REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 38 OF 2017

DAVID FUNDI MUTHURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Siakago Resident Magistrate delivered on 12/09/2017 whereas the appellant was convicted of the offence of **Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006** and sentenced to serve life imprisonment. He was acquitted of the alternative charge of c**ommitting indecent act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of the charge were that on the 8th and 9th day of November 2014 at [particulars withheld] township, Nyangwa sub-location, Kianjiru location in Mbeere sub-county within Embu County, the appellant intentionally caused his male genitalia organ to penetrate female organ of DM a child aged six (6) years.

3. The case proceeded to full trial after appellant pleaded not guilty to the offences. The prosecution had called 5 witnesses including the complainant a minor, who gave unsworn statement due to her tender age. She stated that her mother left the appellant at home to take case of the minor and her brother also of tender years. The appellant took the complainant to the bed and defiled her. He was later arrested and charged with the offence.

4. The appellant denied committing the offence but admitted that he was left to take care of the complainant and her brother by their mother on the material day.

5. He was found guilty of the main charge of defilement and convicted accordingly.

6. The trial magistrate after hearing the prosecution and defence case found the appellant guilty of the offence of defilement of a child aged 6 years and sentenced him to serve life imprisonment. This was after considering the mitigation put forward by the appellant on 12/09/2017.

7. Dissatisfied by the said conviction and sentence the appellant lodged this appeal on 21/09/2017 within the 14 days prescribed by the law which was based on the following: -

> ***(a) The trial magistrate erred in law and fact when he failed to consider that the prosecution evidence was insufficient to hold conviction.***

(b) The trial magistrate erred in law and fact when he failed to consider that the prosecution failed to avail crucial witnesses such as the investigation officer, arresting officer and medical doctor contrary to Section 214 of the Criminal Procedure Code.

(c) The trial magistrate erred in law when he failed to allow the appellant to cross examine the complainant as well as other witnesses.

(d) The trial magistrate erred in law when he rejected the appellant's defence for weak reasons.

8. The parties filed submissions to dispose of the appeal.

B. Appellant's Submissions

9. It is submitted that the prosecution evidence was inconsistent in proving the allegations against the appellant as no medical report was exhibited which in itself proves that there was no penetration. Reliance was plaed on the case of **John Barasa v Republic [2006] eKLR** where it was held that where evidence is insufficient or uncorroborated the court should never rely on the same.

10. It was further submitted that crucial witnesses in this case were not summoned to give evidence thus going against section 150 of the Criminal Procedure Code as well as the decision in the cases of **Bukenya v Uganda EACA [1972]** and that of **Peter Mutira Mitambo v Republic [2016] eKLR** where the court in both instances held that the prosecution should avail all witnesses even if their evidence are fatal to the prosecution case.

11. The appellant further states that the charge sheet reflects that the offence occurred on the 8th and 9th November 2014 whereas the OB report shows that the case was reported on the 28/11/2014 when the appellant was arrested and as such this points to the appellant being framed.

12. The appellant further submitted that the trial magistrate rejected his defense on weak reasons contrary to section 169 (1) of the Criminal Procedure Code and further that despite an order by the trial magistrate to recall witnesses so that they could be cross examined, the prosecution failed to do so in violation of section 150 of the Criminal Procedure Code as well as the fair trial envisioned in article 50 of the constitution.

C. Respondent's Submissions

13. The respondent opposed the appeal but conceded to the prayer in respect to the *ratio decidendi* set in the case of **Dismus Wafula Kikwake v Republic [2018] eKLR.** It is submitted that the weight of the prosecution testimonies was not dislodged by the unsworn testimony adduced by the appellant in his defence.

14. It is submitted that the ingredients of the offence that the appellant was charged with was proved and further that section 124 gives the trial court power to allow a conviction based on the evidence of a single witness if it is satisfied that the witness is telling the truth.

15. It is submitted that the appellant had not demonstrated that substantial injustice was occasioned to him by the failure to appoint him an advocate.

D. Analysis of the Law

16. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno v Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that: -

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own

decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."

17. The prosecution evidence started with that of PW1 the minor who gave an unsworn testimony that she knew the accused and that on the material date her mother had gone to Embu and left her and her brother with the appellant. She further testified that the appellant took her and laid her in his bed and removed her clothes and slept on top of her putting his penis in her vagina prompting the minor to cry as it was painful. The appellant then slapped the minor but she did not stop crying. It was PW1's testimony that one Kavenge came in the morning and took her to hospital since her mother was still away from home.

18. PW2, PW1's brother testified that appellant took PW1 to his bed after which PW1 started crying. PW3, the mother of PW1 did not witness the incident. It was PW4 Nicasio Mugo Njeru who testified that he received a call from one Wawira informing him that there was a sick child who couldn't be treated since they needed a letter from the police. It was PW4's further testimony that he took the child to the police station where he was issued with a P3 form. PW5 testified that he received a call on the 28/11/2014 from one Corporal Mvutu asking him to arrest the appellant which he did.

19. On being placed on his defence, the appellant gave unsworn evidence in which he denied being in custody of the children but said that their mother just left them behind. He denied committing the offence.

20. The trial court convicted the appellant upon satisfying itself that the prosecution had proved their case against the appellant beyond reasonable doubt.

21. Having carefully considered the appellant's grounds of appeal, it is my considered view that the issue for determination are: -

a) Whether the prosecution proved its case beyond reasonable doubt before the trial court.

b) Whether the failure to provide the appellant with an advocate during his trial was a violation of the appellant' right to a fair trial.

22. The appellant further claimed that he was convicted on a defective charge sheet as the day the offence occurred was between the 8th and 9th November 2014. The date the report was made on the occurrence book was 28/11/2014 according to the prosecution. The appellant claimed that the discrepancy was evident that the charges against him were made up.

23. I do note that as alleged by the appellant that the OB number noted in the charge sheet is 28/11/2014. This disparity in the date on the charge sheet and the OB number was explained by the complainant's failure to report the incidence immediately and that this cannot be a reason to deem the charge sheet as defective. Further as was submitted by the respondent, a charge sheet can only be defective if it does not stat the essential ingredients of the offence. See the case of **Sigilani v Republic [2004] eKLR.**

24. The charge sheet spells out all the ingredients of the offence of defilement contrary to Section 8(1) of the Act. Accordingly, I find no defect in the charge.

25. Section 8 of the *Sexual Offences Act* provides as follows: -

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall

upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

26. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether there was penetration and whether it was by the appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

*"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

27. In the case **of Kaingu Elias Kasomo v Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. However, in the case of **Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** was observed as follows: -

"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

29. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities' age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other

information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich v Republic - Criminal Appeal No. 89 of 2016**.

30. In this case it is noteworthy that no evidence was not tendered by the parent of PW1 who testified as PW3. However, PW2 in his testimony stated that she was ten (10) years old and that PW1 was his younger sister. This evidence was not controverted and it guided the trial magistrate in the age factor. It is clear that PW1, the victim herein, was below 10 years old. The appellant despite having opportunity to cross examine PW2 did not rebut this fact, further the charge sheet stated that PW1 was six (6) years old. As such I find that the age of the complainant was established.

31. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi v Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali v Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"***

32. In this case upon examination, PW1 testified that the appellant took her to his bed removed her clothing, lied on top of her and caused his penis to penetrate her vagina which was painful causing her to cry. This was corroborated by the evidence of PW2 who testified that the appellant removed PW1 from their bed to his and he later heard PW1 cry. PW4 testified that he procured P3 forms for PW1 to be treated.

33. The appellant alleges that the trial magistrate when he failed to consider that crucial witnesses were not called. **Section 124 of the Evidence Act** (a proviso thereof) is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (*See George Kioyi v R Cr. App. No. 270/2012 (Nyeri) and Jcob Odhiambo Omumbo v R. Cr. App No. 80 of 200 (Kisumu).*

34. In the instant case, the trial court convicted the appellant not on the sole evidence of PW1 the victim. PW2's evidence was corroborated by that PW3 and PW4. The trial Magistrate believed the testimony of PW1 and discounted the allegations by the appellant that he was being framed.

35. Moreover, an alibi defence which is raised at the stage of defence hearing or during submissions on appeal without indicating where the appellant was during the period it is alleged he defiled the complainant is no defence at all. The Court of Appeal has stated over and over again that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise.

36. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the trial, it must still be addressed. See (**Ganzi & 2 Others v R [2005] 1 KLR 52**. However, in the present case, and as already observed above, the appellant's belated alibi was weighed against the evidence adduced by the prosecution which was accepted by the trial court. I am in agreement with the trial court's finding that the alibi defence was effectively displaced.

37. Under **Article 50 (2) g** provides that: -

> ***"Every accused person has the right to a fair trial, which includes the right;***
>
> ***(g) to choose, and be represented by an advocate, and be informed of the right promptly.***
>
> ***(m) to have the assistance of an interpreter … if the accused person cannot understand the language used at the trial."***

38. The evidence by the prosecution witnesses as a whole displaced the allegation by the appellant that he was being framed for the offence.

39. I have perused the proceedings and note that the appellant cross-examined some witnesses and where he did not, there is no evidence that the court refused him to do so. PW1 was a minor of tender years who gave unsworn evidence. I find that the appellant has not demonstrated that he was denied the right of fair hearing.

40. The allegations by the appellant that the evidence was insufficient, unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and/or that it lacked probative value are baseless and not supported by the evidence on record.

41. It is my considered view that the prosecution proved all the ingredients of the offence of defilement. The defence of the appellant was fully considered by the trial court and found not plausible.

42. Regarding the sentence meted out on the appellant of life imprisonment as provided under **Section 8(1) as read with Section 8(4) of the Sexual Offences Act.** The said provision states:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

43. It is clear that the said provision provides for *prima facie* mandatory minimum sentence against the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

44. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the *Kenya Judiciary Sentencing Policy Guidelines* where it is appreciated that:

> *"Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."*

45. I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri v Republic [2019] eKLR** where it held that: -

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by*** *section 8 (1)* ***of the*** *Sexual Offences Act****, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in*** *Francis Karioko Muruatetu & Another vs Republic* *(supra)****, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

46. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin v Mohamed [1973] EA 370**:

> ***"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to***

the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

47. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals.

48. This does not mean that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentence.

49. In the case **R v Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ** stated:

"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."

50. In a New Zealand decision namely **R v AEM (200)** it was decided that:

"… One of the main purposes of punishment…is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."

51. In **R vs. Harrison (1997) 93 Crim R 314** it was stated: -

"Except in well- defined circumstances such as youth or mental incapacity of the offender… Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."

52. The Supreme Court in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015,** set out the following guidelines with respect to sentencing: -

"[71]…the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

53. In this case, the appellant took advantage of a minor who was left in his custody by the mother. He was a parent by all means since he admitted that he was married to the mother of the complainant. The mother of the complainant PW3 referred to the appellant in her testimony as "my husband". In my view, the appellant bore a greater responsibility to the complainant as opposed to another offender. The whole experience must have been very traumatising for the complainant. In my view, the appellant does not deserve a lesser sentence than what is provided in the law.

54. Having considered the circumstances under which the offence was committed as well as the appellant's defence, I find no reason to interfere with the sentence meted against the appellant.

55. In the premises, I find no merit in this appeal and I dismiss it accordingly.

56. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Appellant present