REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 8 OF 2016

AKYM.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from against both the conviction and the sentence of Senior Principal Magistrate Hon. J.N. Nthuku delivered on 13th January, 2016 in Nakuru Criminal Case No. 172 of 2014.)

JUDGMENT

1. The Appellant, AKM, was arraigned before the Nakuru Chief Magistrate's Court charged with a single count of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars contained in the charge sheet were that on the 16th day of July, 2014 at Rhonda in Nakuru, the Appellant unlawfully inserted his genital organ, namely penis, into the genital organ, namely, vagina of LMA, a girl aged six-and-a-half years which caused penetration.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the place, time and victim are the same as that in the main charge.

3. The Appellant pleaded not guilty and the cases proceeded to a full trial. The Prosecution called seven witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer and placed him on his defence. He gave a sworn statement but did not call any witnesses. At the conclusion of the trial, the Learned Trial Magistrate was persuaded that a case had been made out beyond reasonable doubt on the main charge and convicted the Appellant. He also sentenced the Appellant to life imprisonment as by law provided.

4. The Appellant is dissatisfied by both the conviction and sentence and has appealed to this Court. He has listed the following grounds of appeal quoted verbatim from his Petition of Appeal:

> *1) "That the Trial Magistrate erred in law and facts by not considering the contradictions in the Prosecution's evidence i.e. lacking corroboration.*
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> *2) That the Trial Magistrate erred in law and facts by not considering that penetration was not proved/established to be linked with the Appellant as required.*
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> *3) That the Trial Magistrate erred in law and in facts by summary dismissal of my rigid defence which was not dislodged.*
>
> *4) That the Trial Magistrate erred in law and facts by not considering that identification of the Appellant as perpetrator was suspect in this matter."*

5. Before the Trial Court, the following evidence emerged. The Complainant gave an unsworn statement after the Learned Trial Magistrate concluded that she understood the importance of telling the truth but not the meaning of oath. She told the Court that she was six years old and in Standard One at [Particulars withheld]. She said that "on that date" she was sleeping on the couch at night. The lights were off. She said that the Appellant, whom she called "dad" for he was now married to her mother, came on top of her. He removed her blanket; then her panties. He had a soda and a torch. Her mother was in the bedroom. Her mother heard some commotion and lit the lights. The mother screamed upon seeing what was happening. The Appellant then opened the door and ran away. However, the Complainant said, a man by the name Ndung'u caught him and brought back to the house.

6. The Complainant told the Court that this was not the first time the Appellant had done "bad manners" to her; that he had done it previously on her mother's bed when the mother had gone to work. She said that the Appellant had warned her not to tell anyone or he would hit her

very hard.

7. The Complainant's mother, CM, testified as PW3. She told the Court that the Complainant is seven (7) years old but did not have her Birth Certificate. She testified that on 16/07/2014, she was in her house with the Complainant and her husband, the Appellant. The Complainant slept on the couch. The Appellant gave her Kshs. 30/- and asked her (CM) to go buy a soda for him. CM declined since it was late. The Appellant went and bought a soda himself. When he came back he insisted that the lights be switched off as he wanted to drink the soda in the dark. CM obliged, put off the lights and went to sleep on the bed. The bed was on the other side of the curtain. The Complainant was asleep on the couch.

8. CM testified that one hour into her sleep, she got up and found that her husband was not in their bed. She heard a commotion in the sitting room. She called out for the Complainant who responded in a mumbled voice "ni baba!" CM felt her way around the room and grabbed at what she thought was an intruder who was on top of the Complainant. She quickly put on the electricity and saw the Appellant trying to adjust his trousers where were at the knees. The Appellant attempted to switch off the lights but CM overpowered him. The Appellant fled the room but CM screamed attracting the attention of the neighbours – G and Baba M. These two neighbours restrained the Appellant. However, the Caretaker of the plot arrived and started quarreling CM accusing her of causing a disturbance in the plot. In the confusion, the Appellant escaped. The Appellant was arrested the following day.

9. CM testified that she went with the child to the Police Station and then to the PGH Nakuru where the child was examined and treated.

10. At PGH, the Complainant was seen by Dr. Golobe. She filled a P3 Form. However, at the time the trial was conducted, Dr. Golobe had left the station for further studies. Dr. Thomas Matara came to Court to present the P3 Form on her behalf. Dr. Mataara told the Court that the P3 Form indicated that the child seen was LMA; who was six years old. She was seen on 18/07/2014. Dr. Golobe noted that the child had an old broken hymen; had foul smelling discharge and hyperemic vaginal walls. The Complainant had pus cells and red blood cells in her urine. The doctor concluded that there was evidence of defilement. Dr. Matara produced both the P3 Form and the PRC Forms as evidence.

11. PC Lucy Imana testified as PW5. Her testimony was that she was called to the office on 17/07/2014 where a case of defilement had been made. She found that the child was the Complainant in this case. PC Imana took the child to PGH Nakuru for examination and filing of P3 Forms. She then recorded statements.

12. PW6 was Jackson Kamau. He was one of the members of the public who helped in arresting the Appellant. He testified that on 17/07/2014 at around 8:00pm, he was heading home when he heard screams in a nearby plot. He found people who said that the Appellant had defiled a child. The mother to the child showed them documents on the case. Jackson then participated in arresting the Appellant .

13. JM is a brother to the mother to the Complainant. He confirmed that he received a call from CM on 17/07/2014 at around 2:00am. CM told him that her husband had raped LMA. He promised to go in the morning. The following day, J says he went to the place where CM and the Appellant lived and talked to the Appellant before he was arrested.

14. Finally, Dr. John Kimotho Karathi testified as PW4. He testified that he performed age assessment on the Complainant on 24/02/2014. He used the dentition method to estimate the age of the Complainant. He found early mixed dentition with the 1st central incisors and the 1st permanent molars in place. He assessed the age of the Complainant to be 7 years old. He produced the X-Rays and the report as exhibits in the case.

15. Put on his defence, the Appellant said that "on that day", he got home at 8:00pm and found his wife (CM) with another man. He said that she ran out on seeing him and then claimed the man was her cousin. He said that he asked his wife to prepare water for his bath but she refused. He, in turn, refused to take supper and, instead, went to the shop. When he got back, he said that he was called by a seller to get shoes he had ordered. They went to a bar where they stayed until 2:00am. On 17/07/2014, the Appellant says that he was called by his wife only to find two men who said they were Police Officers and they arrested him. He insisted that he did not defile LMA.

16. This being a first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

17. I have now keenly reviewed the trial Court record as summarized above. The Complainant and her mother both gave forthright testimony. The testimony remained unshaken in cross-examination. The Learned Trial Magistrate who heard and saw the witness believed them to be telling the truth. This is one of the rare cases of defilement where there is corroboration: both the Complainant and her mother gave first hand evidence on the defilement. The mother found the Appellant on top of the Complainant; she then put on the light and screamed.

18. The Prosecution was required to establish three elements beyond reasonable doubt:

i. Penetration as defined in the Sexual Offences Act;

ii. That it was the Appellant who caused the penetration; and

iii. Age of the Complainant.

19. The oral testimony by the Complainant and her mother as well as the medical evidence adduced were categorical that there was

penetration. The oral testimony and the medical evidence are mutually reinforcing. The doctor concluded that there was evidence of defilement: hyperemic vaginal walls; pus cells; red blood cells in the urine.

20. The age of the Complainant was established by the oral testimony of the Complainant and her mother as well as the scientific evidence produced by Dr. Karathi. All accounts show that the Complainant was between 6 and 7 years old at the time of the defilement. The P3 Form filled by Dr. Golobe also approximated the age to be six-and-a-half years.

21. Was there sufficient evidence to show that the penetration was caused by the Appellant? In my view there was. As aforesaid, LMA gave straight-forward testimony of what happened. It was corroborated in material sense by her mother, CM. LMA told the Court that the Appellant, whom she used to call "dad", had a torch and a bottle of soda. This was a person well known to her. She also told the Court that he had defiled her previously and warned her not to tell or she would face the consequences. Then, CM heard commotion and grabbed before putting on the lights. When she did so, she was surprised to see that it was her husband who was on top of her daughter. While the Appellant overpowered her and ran off, CM's screams attracted the attention of two neighbours who apprehended the Appellant and brought him to the house. In the circumstances here, there is little room for any reasonable doubts that it was the Appellant who defiled the Complainant.

22. In my view, the Learned Trial Magistrate was correct in dismissing the defence by the Appellant. It was too fantastical and improbable that there was no inherent possibility that it could be true. While the Appellant had no obligation to prove anything, he had the burden of production to put forth a defence which raises reasonable doubts. The story he gave did not. His alibi was not credible. The Appellant did not place enough credible evidence before the Court to trigger the Prosecution duty to displace the alibi defence. Under those circumstances, the Learned Trial Magistrate was correct to dismiss the alibi defence as improbable.

23. The Court of Appeal had this to say about a finding on credibility of a witness by a Trial Court:

> *Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not.*

24. This was in ***Keter v Republic [2007] 1 EA 135***. There is nothing in this case to suggest that it was an abuse of discretion for the Learned Trial Magistrate to disbelieve the Appellant; and, on the other hand, believe the Prosecution witnesses. Indeed, there is enough on the record to affirm that Learned Trial Magistrate's finding of incredulity of the Appellant's narrative: consistency of the Prosecution witnesses' narratives even under scrutiny in cross examination; their points of convergence; evidence of first report naming the Appellant; and lack of motive to lie and/or frame the Appellant.

25. On appeal, the Appellant raised two further complaints. First, he says that he was never given witness statements. However, this does not seem true. On one occasion, the Appellant informed the Court that he was not ready to proceed because his lawyer was not in Court. He never raised the objection that he had never been supplied with witness statements. I simply do not believe him when he says he was not given witness statements. My incredulity is enhanced by the fact that this is a complaint he only raised in his oral arguments – not in the grounds of appeal and not even in his amended grounds of appeal and written submissions.

26. Second, there is a complaint that there are material discrepancies in the evidence by the Prosecution. In particular, the Appellant complains about the dates since the P3 Form talks of 18/07/2014 while the witnesses (PW1; PW2 and PW6) all talked of 17/07/2014. I have carefully looked at the Trial Court record. I believe that this is a minor discrepancy which does not go to the root of the conviction and does not act as an indication that the Prosecution witnesses were not telling the truth.

27. As noted by the Uganda Court of Appeal in ***Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6*** it is not every discrepancy that warrants rejection of evidence – see ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** ***Criminal Appeal NO. 5 OF 2013.*** As the court put it:

> *With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case*.

28. Having looked at the trial Court record in its entirety and in context, I have come to the conclusion that the inconsistencies in question here are not material at all; they can be ignored as they have no bearing on the veracity of the material evidence tending to demonstrate the guilt of the Appellant. The discrepancies can be explained by passage of time and lapse of memory -- factors other than incredulity of the witnesses.

29. All in all, therefore, there is no reasonable doubt that all the elements of the offence of defilement were proved against the Appellant. The conviction was, therefore, proper.

30. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

> *8(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.*

31. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum

sentences prescribed in the Sexual Offences Act:

> *In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*
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> *Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*
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> *The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.*

32. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

33. In the present case, the Appellant mitigated that he has another family and that the four children depend on him as the sole bread winner. He asked for leniency. The Learned Trial Magistrate noted that the victim was a child of tender years and she will likely be scarred for life by this traumatic sexual assault. The Magistrate pointed out that the victim called the Appellant her father.

34. Given these circumstances, and given the fact that there was evidence on record that this was not the first time the Appellant had defiled the Complainant and given the very tender age of the victim and the fact that the Appellant had assumed the role of a father to the victim by marrying the victim's mother, I do not think that life imprisonment is a disproportionate sentence. I therefore, equally dismiss the appeal against sentence.

35. **The upshot of all this is that the Appellant's appeal against both conviction and sentence fails. The Appeal is hereby dismissed in its entirety.**

36. Orders accordingly.

Dated and delivered at Nakuru this 20th day of February, 2020

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JOEL NGUGI

JUDGE