REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 64 OF 2019

EDWARD MWIKAMBA GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon M. Opanga- SRM dated 4th July, 2019 in Kangundo SO Case No. 42 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

EDWARD MWIKAMBA GITONGA .....ACCUSED

JUDGEMENT

1. The appellant, **Edward Mwikamba Gitonga**, was charged in the **Kangundo SO Case No. 42 of 2018** with the offence of defilement of a child contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on diverse days between April, 2016 and 24th August, 2018 in Kangundo Sub-county within Machakos County, he intentionally caused his penis to penetrate the vagina of VMK, a child aged 10 years.

2. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that on the same day at the same place the appellant intentionally caused his penis to come into contact with the vagina of VMK, a child aged 10 years. He pleaded not guilty to the offence.

3. In support of its case the prosecution called 4 witnesses. After *voir dire* examination, the court found that the complainant had sufficient intelligence and could therefore give evidence on oath. According to the complainant who testified as PW1, on diverse dates between April 2016 and 24th August 2018, the appellant herein who was her mother's worker used to tell her to accompany him. On a particular date which the complainant could not recall, when the complainant's mother was not at home, the appellant told her to go with him into the house where he took off her clothes and put the thing that the appellant used to urinate with into her thing for urinating. According to the complainant, she the appellant lifted the skirt she was wearing, took off his trousers and slept on her on a sofa set. It was her evidence that the appellant used to give her *mandazi* and since that was not the first time such an incident was occurring, she did not bleed. She stated that the appellant used to do the same every time the mother was not around and when her younger brothers who were around were playing. She stated that the appellant did the same to her in 2016 and in 2017 he did it twice.

4. The complainant testified that one day in 2018, her mother travelled to Misiani and left her with the appellant. The complainant was washing dishes outside while the appellant was preparing lunch. After lunch, she went to sleep in her bedroom when the appellant went and peeped through the door. The complainant then went to hide in the bathroom but the appellant went looking for her, pulled her to the bed, took off her pant and dress and put his thing inside her. She however did not disclose the incident to her mother since the appellant threatened to beat her up. The complainant stated that one day when the appellant was seated with one Anthony, the appellant said that she was bad and the complainant threatened to disclose to her mother what the appellant was doing to her at which point the appellant dared her to do so. The complainant then disclosed the same to her mother who instructed her sisters, **N** and **A**, to take her to the Hospital while her mother went to report to Kawethei Police. At the Hospital the complainant was examined and treated after which she recoded her statement

with the police. Later the appellant was arrested when he reported for work.

5. It was the complainant's evidence that the appellant used to work for then till evening then return to his home. It was her evidence that she was taken to the Hospital in 2018 and that she never disclosed the earlier incidents.

6. PW2, **VK**, the complainant's mother testified that the appellant was her neighbour at home and that he used to stay with her at home where he used to perform casual jobs and take food for a period of 10 years. She recalled on 24th August, 2018 when the appellant was with Anthony, the complainant's younger cousin and the appellant teased. According to her that day she had gone with some youths to Misiani and left the complainant with the appellant and the said Anthony. It was upon her coming back that the appellant told Anthony that the complainant is a bad child and the complainant retorted that she was going to disclose the appellant's actions. According to PW2, the appellant was drunk at that time and she was not aware of what the two were talking about. The appellant got annoyed and banged the chair and dared the complainant to do so. The complainant then told PW2 that she would disclose the same after the appellant had gone. At this time PW2 thought they were talking about stealing by the appellant.

7. According to her, on Monday she revisited the issue with the complainant who informed her that on the day she went with the youths the appellant defiled her. PW2 then told the complainant's elder sisters to take her to the Hospital while she proceeded to report the matter at the police station. According to PW2, the said sisters informed her that upon examination the complainant's vagina was found to be wide indicating having been defiled severally. The complainant then disclosed to her that the appellant had defiled her severally since 2016. Upon the arrest of the appellant both the complainant and the appellant were examined and P3 form filled in. It was her evidence that at the time of her testimony the complainant was 10 years old and she exhibited her birth certificate showing that she was born on 3rd November, 2008, She also identified the treatments notes and the P3 form. According to PW2, before the complainant was taken to the Hospital, she examined her and noticed that her vagina was wide unlike that of a child of her age.

8. In cross-examination she denied that she was indebted to the appellant and denied having bribed the police and the doctor.

9. PW3, **Dominic Mbindyo**, a clinical officer at Kangundo Level 4 Hospital testified that the complainant was seen at Kakuyuni Health Centre on 27th August, 2018 in the company of her elder sister with a history of defilement by a person known to her. Upon examination it was found that her labia majora was intact and there were no lacerations or blood stains on her clothes though there was indication of penetration. Upon further investigations urinalysis revealed moderate yeast cells. According to the witness the presence of pus cells and leukocytes showed that there was penile UTI. The witness proceeded to produce the P3 form and treatment notes.

10. PW4, **Sgt Jona Wangira**, was the investigations office in the case. According to her she received a report on 27th August, 2018 at 5.19pm from the complainant and her mother that the complainant had been defiled. She then commenced investigations leading to the arrest of the appellant after which the appellant was charged.

11. Upon being placed on his defence, the appellant testified that he was a businessman selling samosas. He denied the charges levelled against him and testified that on the material day, he met PW2 at 4pm when he was going to the house and she was going to the market. He requested for a pump to spray his coffee and PW2 directed him to go home and pick the same. On 24th he woke up and proceeded to PW2's home, 2 km away and found the owner of the home seated outside and upon requesting for the pump, he called **Mary Kimeu** who brought the pump and the appellant proceeded to the coffee farm where he reached at 1pm. After lunch he was sent to go and fetch water using donkeys and he made two trips and returned between 3-4pm. Upon his return he found the Mzee alone who told him to take him to Kawethei where they started drinking. It was his evidence that when he asked for the money which he had lent to the Mzee's wife, a disagreement arose and they had a physical after which he returned home. It was his evidence that the said Mzee beat up his wife accusing her of being the appellant's lover. The following three days, Saturday, Sunday and Monday, he did not go to work but on Tuesday when he reported to work he was arrested and charged with the offence. It was his evidence that PW2 threatened to ensure he was locked up for life.

12. In cross-examination he admitted that he used to stay at the complainant's home between 2017 and 2018 taking care of the farm. However, on 23rd he went to borrow a pump when he met PW2 who told him to go and ask the complainant's father since she was not going to be around and he did so on 24th when he found the father. He however admitted that there were no differences between him and PW2. According to him PW2 fabricated the charges due to the fight between the appellant and the complainant's father though he never reported PW2's threats.

13. In her judgement, the learned trial magistrate found that based on the finding of urinary tract infection and the evidence of PW2 and PW3 that the appellant in his drunken stupor had banged the table and dared the complaint to disclose the actions of the appellant as well as the report from the examination of the complainant's genitalia, penetration was proved. It was her finding that the age of the complainant was proved to have been 10 years old at the time of the offence and the appellant was well known to the complainant. It was her finding that the appellant's defence that the charges were fabricated was not proved. The court found the appellant guilty, convicted him and sentenced him to life imprisonment.

Determination

14. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

15. In this case the prosecution's case was that from 2016 to 2018 the appellant used to defile the complainant whenever the complainant was left with the appellant. It was the complainant's evidence that the act of defilement took place severally and that the appellant threatened her not to disclose the same. It was not until some time in 2018 when the appellant in a moment of unguarded utterances caused by his drunken condition provoked the complainant into disclosing the actions of the appelant. As a result the complaiannt was taken forn examination which revealed the presence of urinary tract infection and the fact that the complainant had been defiled before.

16. The appellant's defence was that the charges against him were instigated by the disagreement between himself and the complainant's father.

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

> ***8. (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 -***
>
> ***(a) 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***
>
> ***(b) 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.***

18. 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 the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. 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."**

19. It was contended that there was no evidence tendered to prove the age of the complainant. In this case the evidence on record both oral and evidentiary placed the age of the complainant between 9 and 12 years at the time of the commission of the offence. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence."**

20. Closer home in the case of **Kaingu Elias Kasomo vs. 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."**

21. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said: -

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

22. However, in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it 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..."**

23. 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 vs. Republic** - Criminal Appeal No. 89 of 2016.

24. In this case there is evidence both oral and documentary that the complainant was aged 10 years at the time of the last offence. Accordingly, I see no error in that finding.

25. Regarding penetration, that the complainant had been penetrated is not in doubt. The presence of the infection as well as the widening of her genitalia was a clear indication that she had been involved in sexual activities even prior to the date of the incident in question. The complainant's oral evidence of penetration was corroborated by the medical evidence which revealed that the complainant had urinary tract infection and indication of recent penetration.

26. That the appellant was well known to the complaiannt was not in doubt.

27. The appellant raised the issue of the existence of a grudge between him and the complainant's father. However, it was not the father who complained against the appellant. In fact, the offence only came to light after the appellant in his moment of unguarded drunken stupor provoked the complainant by teasing her that she was a bad child. It was this that seemed to have annoyed the complainant to tell her mother, PW2, about the appellant's conduct. It may well be that had the appellant not taken one too many the incident may not have been discovered. Accordingly, the appellant's allegation that the charges were instigated by PW2, who was not even aware of the on goings between the appellant and the complainant had no substance.

28. Having considered the evidence presented before the trial court it is my view and finding that the appellant was properly convicted on the offence of defilement. The evidence presented was sound and his defence did not shake the prosecution evidence which was watertight. In the presence I find no reason to disturb the findings on conviction.

29. As regards the sentence, it is clear that the life sentence imposed upon the appellant was prima facie mandatory sentence. I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. 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."**

30. However, the appellant's action was heinous. In this case, the appellant took advantage of the tender age of the complainant who was left in his care for his own selfish gratification. As in **Tito Kariuki Ngugi vs. Republic [2008] eKLR**:

> **"The Appellant…caused her trauma which she will have to live with for the rest of her life."**

31. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. 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."** See also **Omari vs. Ali [1987] KLR 616.**

32. In **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his**

powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

33. In the same vein I set aside the life sentence imposed upon the appellant herein and substitute therefore a sentence of 15 years' imprisonment to run from 29th August, 2018.

34. Judgement accordingly.

35. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Appellant having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 30th day of April, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Njeru for the State

Appellant in attendance through skype

CA Geoffrey