REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 31 OF 2018

JAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court

at Lamu Criminal Case No. 5 of 2018 by Hon. Njeri Thuku (PM) dated 10th July 2018)

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act (SOA) No. 3 of 2006. The particulars of the offence were that on 15th March 2018 in Lamu West Sub-County Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of BAMN a child of 7 years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 15th March in Lamu West Sub-County Lamu County, he intentionally touched the vagina of BAMN a child of 7 years.

3. The prosecution called five witnesses in support of their case. KAO (PW1), the complainant's mother told the court that on the 15th March 2018 she was washing clothes when the Appellant, who is her cousin, came and asked to take her two children so he could buy juice for them but she refused and instead told him to go and buy the juice and bring it to the children. She stated that when she went to hang the clothes, the Appellant took the complainant without her knowledge. When she noticed the child missing she informed her sisters and relatives and they started searching for her. She said that her sister RAA (PW3) called her and told her that she had seen the Appellant defiling the complainant in an abandoned construction. She rushed there and found the complainant. On examining the complainant, she saw blood in her private parts. That the complainant was taken to Mokowe hospital by PW1's sisters where she was treated.

4. PW1 told the court that the complainant was 7 years old having been born on 15th November 2010. She produced the complainant's birth certificate (P.Exh1). She said that she had a good relationship with the Appellant and did not know that he could harm the complainant.

5. BAMN (PW2) the complainant gave an unsworn testimony after the trial magistrate conducted a *voire dire* examination and found that the complainant did not understand the nature of an oath. The trial magistrate consequently appointed PW1 to testify as an intermediary in accordance with section 31 of the SOA. It was the complainant's evidence that the Appellant was her uncle and that he told her he was going to buy juice for her and her sister. That the Appellant chased away the complainant's sister and took the complainant to an incomplete abandoned house. That the Appellant removed her panty, threatened to kill her by stabbing if she shouted, covered her mouth, and "did bad things" to her at her private parts (which she pointed). She further said that Mama Nunu saw them through the window.

6. RAA (PW3) was the complainant's aunt. She told the court that on the 15th March 2018 at around 11am, she received a call from OM, her uncle, who asked her if she had seen the complainant who had gone with the Appellant to buy juice but had not returned. She headed back home where she met with PW1 and other relatives looking for the complainant. They split up in order to broaden their search in different directions. PW3 said that as she was walking she came across an abandoned house where she saw the Appellant through an opening. When the Appellant saw her he escaped through a window space, she tried calling him but he did not stop. That when PW3 went to the window space she saw the complainant lying on her back with her dress lifted up above the waist and without a panty. She was crying. She also had soil and leaves in her hair and that her private parts were swollen and had blood spots around.

7. PW3 also stated that she saw the complainant's ripped panty which was white flowered and the Appellant's red t-shirt at the scene. PW3 called her relatives and when they arrived, the complainant told them that the Appellant had done "bad things" to her and that he threatened

to kill her if she spoke about it. That they took the complainant to Mokowe Police Post and later they were accompanied by a police officer to hospital where she was examined.

8. Ahmed Hassan (PW4) was the doctor at Mokowe Hospital who filled the P3 (P.Exh4). He stated that the complainant's genitalia were red and bruised, and the vaginal canal was unusually red. It was his opinion that there was forced penetration by a penis and not fingers. He produced the treatment notes (P.Exh2) which he initially filled before carrying out further investigations. He also produced the post rape care form (P.Exh3) which he filled and noted that the complainant had sand particles on her back and genitalia.

9. P.C Daniel Kibet Kipchumba (PW5) from Mokowe Police Post was the investigating officer. He stated that the complainant was taken to the station on the 15th March 2018 by her mother PW1. That P.C Dorothy recorded their complaint in the Occurrence Book (O.B) and thereafter together PW1, P.C Dorothy and himself, they escorted the complainant to hospital where she was examined. That they returned to the police post to record the witness statements and found that the Appellant had been arrested. PW5 told the court that they then proceeded to the scene of the crime which, was an abandoned derelict house near a forested area. The complainant showed them where the incident happened and they found a red T-shirt (P.Exh5) which the complainant said belonged to the Appellant. They also found a torn child's panty (P.Exh6) which the complainant identified as belonging to her.

10. The Appellant chose to give a sworn statement in his defence. He stated that on the day of the offence he was in a different area fixing his boat. He stated that he had not been examined medically and that he was framed. In cross-examination he stated that he had never met with the complainant and that he never bought her juice. He told the court that he had fallen out with PW3 after they exchanged insults and that was why he was framed.

11. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to imprisonment for life.

12. Aggrieved by the conviction and sentence, the Appellant lodged his homemade petition of appeal on 18th July 2018. On the 5th November 2019 he filed an amended Petition of Appeal on three grounds which paraphrased are that the learned trial magistrate erred in law and fact by failing to consider that section 8(1)(2) of the Sexual Offences Act was prejudicial and denied the Appellant his rights in violation of section 216 and 329 of the C.P.C; that the prosecution did not prove its case to the required legal standard, and; that there were massive contradictions and variances in the prosecution case.

13. The Appellant filed written submissions on the 5th November 2019 in support of his appeal. In summary, his submissions were to the effect that the mandatory minimum sentence provided for under section 8(2) of the SOA denied the trial magistrate judicial discretion to consider the Appellant's mitigation as provided for in section 329 of the Criminal Procedure Code (C.P.C). He stated that mitigation was an important element of his rights to a fair trial and hearing under Article 50(2) of the Constitution of Kenya. He placed reliance on the case of **Eliud Waweru Wambui vs Rep [2019] eKLR.**

14. Secondly, the Appellant submitted that the prosecution had failed to prove its case beyond reasonable doubt. He stated that PW3 failed to explain to the court why she never raised an alarm and that she was of doubtful integrity. He further argued that PW4 the medical doctor failed to indicate the age of the injuries sustained by the complainant and relied on the case of **Ben Mwangi Maina vs Rep (2006) eKLR.**

15. Finally, the Appellant submitted that there were material contradictions and variances in the prosecution witnesses testimonies on time. It was his submission that PW3 alleged that the complainant was taken at 11am when she was called, while PW1 alleged that the complainant was taken at 12pm. In support of his submission he relied on the Nigerian case of **David Ojeabua vs Federal Republic of Nigeria (2014) LPELR-22 555(CA)**

16. The Respondent opposed the appeal in its entirety and filed its submissions on the 2nd December 2019. During the hearing of the appeal, Mr. Mwangi learned counsel for the Respondent submitted that the life sentence was mandatory. He however acknowledged recent authorities on minimum sentence in the SOA and left the issue of sentence to the court. Secondly, counsel submitted that all the elements of defilement had been proved to the required standard. He submitted that the age of the complainant was proved by the complainant's birth certificate which indicated that she was 7 years old; and that the medical officer had proved penetration. Finally, it was Mr. Mwangi's submission that the difference in time given by PW1 and PW3 was 1 hour which was inconsequential and could not be termed as a serious contradiction.

17. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

18. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination in this appeal is whether the prosecution proved its case beyond reasonable doubt.

19. With respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

20. It is also trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

21. On the age of the complainant, the Sexual Offence Rules of Court 2014 **Rule 4** provides that:-

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

22. In this case, KAO (PW1), the complainant's mother, testified that the complainant was 7 years old and produced the complainant's birth certificate (P.Exh1) which indicated her date of birth to be 15th November 2010. As at the time of the offence she was 7 years old. I find that the age of the victim was satisfactorily conclusively proved. Indeed, she was a class one child.

23. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

24. In this case, the complainant (PW2) gave evidence that the Appellant told her that he was going to buy juice but instead took her to an incomplete abandoned house. That the Appellant threatened to kill her by stabbing if she shouted. He then removed her panty covered her mouth and "did bad things" to her at her private parts which she indicated by pointing. The court understands the phrase "did bad things" to mean penetration.

25. Medical evidence was produced by Ahmed Hassan (PW4) the clinical officer at Mokowe Hospital who examined the complainant. He produced the P3 form (P.Exh 4) which indicated that the complainant had hyper erythematous (reddening) in the vulva and vaginal canal; swollen inner introitus, swollen vaginal walls and that the hymen was intact. It was his opinion that the hyper-erythematous state of the vagina and swelling indicated there was forced penetration by an organ and specifically a penis and not finger.

26. Penetration is defined under section 2 of the SOA as ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

27. The Court of Appeal in **Mark Oiruri Mose v Republic [2013] eKLR** stated that:-

"...So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

28. It is my finding from the above definition and interpretation that the medical evidence corroborated the complainant's evidence and that penetration was proved. I also dismiss the Appellant's contention that PW4 failed to indicate the age of the injuries of the complainant. As a non-issue. The omission does nothing to water down the solid evidence that the complainant was defiled on the material date.

29. On the issue of identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Wamunga –vs- R, [1989] KLR**

30. In this case, PW1 indicated that the Appellant was her cousin while the complainant stated that the Appellant was her uncle. The Appellant also testified in cross—examination that the complainant referred to him as uncle. From the evidence adduced it is clear that the Appellant was a relative of the complainant and was known well to her. She knew that it was her uncle who offered to buy her juice but instead went on to defile her. Furthermore, PW3 saw the Appellant at the scene of the crime. There was no chance of mistaken identity. I find that the Appellant was properly identified.

31. The Appellant submitted that there was a contradiction relating to time where PW1 stated that the Appellant took the complainant at around 12pm while PW3 stated that she received a phone call from her uncle indicating the disappearance of the child at 11am. The contradiction as to whether the complainant went missing at 11am or 12pm is not crucial as its clear that the complainant went missing in the mid-morning hours. It does not affect the main substance of the case.

32. On dealing with contradictions, the Court of Appeal in **Jackson Mwanzia Musembi Vs Republic, (2017) eKLR** cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

"…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. <u>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</u>."(Emphassis mine)

33. In the final analysis having re-evaluated the evidence as above, it is my finding that the case against the appellant was proved beyond reasonable doubt. I uphold the conviction.

34. On the sentence, the Appellant contended that the life imprisonment meted out was unlawful for reason that the mandatory nature of the sentence denied the trial magistrate discretion to consider his mitigation. This is evident from the sentence hearing at the trial court where the learned magistrate relying on paragraph 7:17 of the Sentencing Policy Guidelines, (which provides that a court is bound by the mandatory minimum sentences and must not impose a lower sentence than prescribed), sentenced the Appellant to life imprisonment as prescribed under section 8(2) of the SOA.

35. The mandatory nature of sentences under the SOA has come under scrutiny following the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** where the apex court pronounced itself thus:-

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."**

36. Many recent decisions from the Court of Appeal have adopted the decision of the Supreme court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where it stated thus:-

> **"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, 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."**

37. I have considered the circumstances of the case and the mitigation by the Appellant. In mitigation, the Appellant has failed to show any remorse but he is a first time offender. The Appellant deceptively lured the complainant away from her mother with a promise to buy her juice. He then turned on her, threatened to kill her and proceeded to defile her despite his being the complainant's uncle. Without a sense of humanity, he turned his lust on an innocent, vulnerable and defenceless 7-year-old, robbing her of her innocence and inflicting physical, physiological and psychological trauma and scars on her.

38. I have considered the sentence handed to the Appellant. Even after considering his mitigation I still find that the sentence was appropriate in view of the aggravating circumstances and in particular the age of the child his relationship to her and the trauma inflicted. I hold the view that society would be failing vulnerable children if such offenders were allowed back into the community.

39. In the end, I uphold the judgment of the trial court and confirm both the conviction and sentence. The Appellant shall serve life imprisonment. The Appeal is thus dismissed.

40. The Appellant has a right of appeal to the court of appeal within 14 days. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 30th day of April, 2020.

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R. LAGAT KORIR

JUDGE

This judgement has been delivered to the Appellant via video link to Malindi GK prison (due to COVID – 19 regulations), in the presence of T. Maro (Court Assistant), Ms.Sombo (holding brief for Mr. Mwangi for the Respondent) and the Appellant(virtually present).