REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 42 OF 2013

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. J. M. NANGEA IN CRIMINAL CASE NO.2379 OF 2011

PETER MUTAI SEFU......APPELLANT

VERSES

REPUBLIC.................RESPONDENT

BETWEEN

REPUBLIC................PROSECUTOR

VERSES

PETER MUTAI SEFU.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) and 8(2) of the Sexual Offences Act No. 3 of 2016.** The particulars of the offence were that **on the 5th day of October, 2011 at [particulars withheld] village within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of DCK a child aged 10 years old.**

2. The Appellant was convicted and sentence to life imprisonment hence this appeal. The summary of the facts and evidence as presented during trial is as hereunder.

3. PW1 the Complainant said that she was 10 years old and a class 5 pupil at [particulars withheld] primary school. She said that on the material day she had been sent by her mother to the posho mill. On her way back in a path passing through a maize field she met the Appellant who pulled her inside the said maize field and defiled her. She said that she attempted to scream but he blocked her mouth.

4. After she defiled her he let her go and she went home crying and she met her mother who was looking for her. She informed her of what had happened. Her mother then reported to the village elder. She was thereafter taken to the hospital where she was examined and treated.

5. Pw2 DC the mother to the Complainant testified that she had sent her to the posho mill at around 5 pm but she delayed coming. When she arrived she told her of what had happened and when she examined her private parts she saw sperms. She reported the matter to the village elder and they traced him that night to no avail.

6. The following morning, they found him in the neighbour's house and was taken to the police station. She took the Complainant to the hospital where she was treated. A P3 form was also issued by the police and it was filled at the hospital.

7. PW3 LINUS LIGARE from Kitale District Hospital filled and produced the P3 form. He said that he examined the minor and found "***her labia majora inflamed, her hymen was torn and was of recent infliction."***

8. PW4 DAVID MURAMBI testified that he was a village elder at Kitalale where the Complainant came from. Her mother reported the incident to him and he traced the Appellant who was as well his neighbour. Together with his vigilant group they arrested him at the Complainant home.

9. PW5 DR KIPROP JONATHAN a dentist from Kitale district hospital produced the dental age assessment of the Complainant whom he

found after examination that she was aged around 10 years old.

10. PW6 PC MARTIN MUNENE from Kitale police station carried out the investigations and preferred charges against the Appellant. He said that it was the complainant who named the Appellant. He issued the P3 Form which was later filled at the hospital.

11.When placed on his defence, the Appellant gave unsworn defence and stated that he had gone to visit his aunt when he was arrested by two people two days later. He said that he was charged with strange charges.

ANALYSIS AND DETERMINATION

12. The parties have filed written submissions which the court has perused. The grounds raised by the appellant in the petition are general assault on the entire evidence by the Respondent which according to him was full of contradictions and incapable of sustaining a conviction.

13. The learned state counsel has submitted in support of the conviction and the sentence. He said that all the three ingredients of the offence of defilement were proved.

14. The duty of this court at this juncture was well articulated in the case of **OKENO V. REP. (1973) E.A.32**. The court stated as follows;

> **"*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 [1957] EA 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] EA 570). It is not the function 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 [1958] EA 424.**

15. The three necessary ingredients which must be proved in the offence herein include the age of the minor, the identity of the perpetrator and penetration.

16. The age of the minor was well proved by the production of the dental report by the doctor. She was found to be around 10 years and despite the absence of any other documentary evidence, this court is satisfied that this ground was proved.

17. On the question of penetration, the minor graphically explained how she was pinned down as she laid on her back and her pant removed and defiled. She said that she felt pain.PW3, the Clinical Officer found that she indeed had been defiled as her hymen was torn and was fresh looking.

18. Was the Appellant the perpetrator? The incident took place at around 7.00 pm. The minor explained that she knew the Appellant. There was nothing to suggest that they were not familiar to each other. They were neighbours and the appellant did not deny the fact.

19. She reported the incident to her mother and clearly explained to her who had defiled her. I do not see any confusion by the minor. There was nothing to suggest that there could have been a case of mistaken identity. Neither was there any suggestion that it was too dark for the minor to have recognised the assailant.

20. In case of any doubt the provisions of Section 124 of the Evidence Act can be inferred in this case. The same states that;

> "**Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

21. I find the minor truthful as the incident was fresh in her mind when she met her mother. The appellants defence was not convincing at all and it was not of much probative value.

22. This appeal is not meritorious. The evidence tendered against the appellant was overwhelming and the finding by the trial court was sound both in law and facts. The appeal is dismissed.

23. In terms of the sentence and taking cue from the recent decision in the now famous case of **Muruatetu**, there is need to interfere with the life sentence lawfully handed over to the appellant.

24. The court of appeal has also stated as hereunder in the case of **JARED KOITA INJIRI VERSES REP. (2019) eKLR**

> **"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."

25. In the circumstances the life sentence meted against him is hereby set aside and the Appellant is sentence twenty (20) years Imprisonment from 10th October, 2011.

26. Orders accordingly.

Dated signed and delivered via Zoom at Kitale on this 30th day of April 2020.

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H. K. CHEMITEI

JUDGE

30/4/2020