REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 97 OF 2018

SIMON KAMOLO MAITHA....APPELLANT

-VERSUS-

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

(Appeal arising from the original conviction in Machakos Chief Magistrate's Court (Hon. C. K. Kisiangani, RM), in Criminal Case SOA No. 1722 of 2014 and judgement delivered on 26.1.2016)

BETWEEN

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

-VERSUS-

SIMON KAMOLO MAITHA......ACCUSED

JUDGEMENT

1. This is an appeal from the judgment and conviction of Hon. C.K. Kisiangani, Resident Magistrate in **Machakos Criminal Case SOA No. 1722 of 2014** delivered on 26.1.2016. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "On the 4th day of October, 2014 at Katheka-kai Location, in Machakos District within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **MM** a child aged 11 years. 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.

2. When the matter came up for trial, the appellant pleaded not guilty hence warranting a trial. In this regard the prosecution presented four witnesses in support of its case. Pw1 was MMM who testified that on 4.10.2014 the victim came and informed her that the appellant had defiled her. The 2nd witness was the victim who after a voir dire examination was conducted, the court was satisfied that she was possessed with sufficient intelligence. She stated that on 4.10.2014 whilst returning home from tending cows she realized that she had forgotten a rope and thus returned to the grazing field to look for it. It was then that the appellant defiled her and she later alerted her mother about the same.

3. The court made a direction that the trial commence de novo and in this regard, Pw1 was MM. After conducting a voir dire on her, the court was satisfied that she had enough intelligence to understand the questions put to her and she gave a sworn testimony. It was her evidence that she was an 11 year old class 5 pupil who on 4.10.2014 had forgotten the rope that was used to tether the cows that were quenching their thirst near a river. It is on the process of her return to search for the lost rope that the appellant got an opportunity to pounce on her and drag her near the river where he removed her underpants and his as well and defiled her. She testified that after he was done he dressed himself and she equally dressed up and went home where she informed her mother about the ordeal. She stated that her mother went to Machakos police station and later to the hospital.

4. Pw2 was MMM who testified that Pw1 was her 10 year old daughter who was born in 2003. She tendered in court the immunization card in respect with the minor. It was her testimony that Pw1 went back to get a rope that she had forgotten in the field whilst grazing cows and on her return she informed her that the appellant had defiled her. She testified that she reported the matter to Machakos Police Station and she was referred to Machakos Level 5 Hospital. She tendered in court the P3 form and the PRC form. It was her testimony that she knew the appellant and that when she confronted him about the incident, he threw her on a chair. When recalled she testified that she had an immunization card in respect of the complainant who was indicated as being born on 3.6.2003. She produced the same without any objection from the appellant.

5. Pw3 was Dr Mutunga, who testified of an examination that was carried out on the victim on 9.10.2014 where it was found that her private parts were painful on touch; her hymen was broken and that the degree of injury was harm. He concluded that the victim had been defiled and he filled the P3 form on 9.10.2014 and stamped the same with the hospital stamp. He testified that the victim was examined by Dr Musembi and the PRC form that was filled on 5.10.2013 by Dr Musembi as well as the treatment notes prepared by Dr Mativo from Machakos Level 5 Hospital were tendered in evidence together with the P3 form without any objection or cross examination by the appellant.

6. Pw4 was Sgt Lorna Kemuma who testified that on 4.10.2014 the victim came to the police station in the company of her mother and informed her that the appellant had defiled her when she had gone to trace a rope that she had forgotten in the field whilst tending cows. She stated that she sought the assistance of Administration police officers and as a result the appellant was arrested and brought to the station on 29.10.2014 whereupon he was charged. The court found that the appellant had a case to answer and he was put on his defence.

7. The appellant opted to give a sworn statement and did not call witnesses. The appellant told the court that he was arrested and it was alleged that he had committed defilement but the charges were false as far as he was concerned. He told the court that he was not aware that he did not know why he was charged. On cross examination he told the court that Pw2 was his enemy who had framed him.

8. The trial court found that the evidence adduced supported the charge; that penetration in terms of Section 2 of the Sexual Offences Act and identification of the appellant was proven. The trial magistrate believed the testimony of Pw1 and placed reliance on the case of **Nyanamba v R (1983) KLR** and Section 124 of the Evidence act. The appellant was convicted of the main charge and after considering mitigations she sentenced the appellant to life imprisonment.

9. It was this decision that prompted the instant appeal. The grounds raised by the appellant and amended challenged the charge sheet for being defective; challenged the failure to summon crucial witnesses and challenged the finding of the court that he was of the view that the same was neither proven nor supported by the evidence on record.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error in relying on a charge sheet that was defective and failed to amend the same in terms of Section 214(1) of the CPC. The appellant challenged the failure to summon crucial witnesses and placed reliance on the case of **Donald Machiwa Achilwa & 2 Others v R (2009) eKLR**. The appellant challenged the evidence on his identification as the perpetrator and reliance was placed on the case of **Kamau v R (1975) EA 139**. His prayer was that the appeal be allowed, the conviction quashed and the sentence set aside.

11. The state submitted that the appellant was aware of the charges he was facing and was able to prepare his defence. It was its argument that in terms of Section 382 of the Criminal Procedure Code, the test to be met is whether there was a miscarriage of justice and that the court ought to have regard as to whether the objection was made at an earlier stage in the proceedings. It was counsel's argument that the ground on defectiveness of the charge sheet lacked merit and ought to be dismissed. Counsel submitted that penile penetration was proven; the account of the victim and the medical evidence proved the same and thus invited the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

13. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

1. **That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;**

2. **That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;**

14. In cases of defilement the following are to be proven:

1. **The age of the child.**

2. **The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and**

3. **That the perpetrator is the Appellant.**

15. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 11 years as per the immunization card indicating that she was born on 5.6.2003. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated via evidence of Pw1 as corroborated by evidence presented via the P3 form, the PRC form and the treatment notes on record that was uncontroverted by the appellant. There is however contention on the issue of identification of the appellant as the perpetrator. Pw1 informed court that on 4.10.2014 she had forgotten the rope that was used to tie the cows that were quenching their thirst near a river. It is on the process of her return in search for the lost rope that the appellant got an opportunity to pounce on her and drag her near the river where he removed her underpants and his as well and defiled her. She testified that after he was done he dressed himself and she equally dressed up and went home where she informed her mother about the ordeal. The appellant seems well known to the family of Pw1 and the evidence of the appellant did not set up any defence and or the same did not succeed in casting doubt on the occurrence of the event and or the participation of the appellant. From the evidence on record, the court is able to say with certainty that the appellant was properly identified as the perpetrator. The complainant in her evidence both in chief and

cross examination was categorical that the appellant defiled her. She denied existence of a grudge against him as she knew him well including one of his children and that what she told the court was the truth and not what she was told to say. This then dislodged the appellant's claim that the victim's mother had framed him.

16. I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court seemed satisfied of the evidence against the appellant that was given by a single witness. The learned trial magistrate rightly relied on Section 124 of the Evidence Act in believing the evidence of the complainant and having considered the surrounding circumstances that the appellant was properly identified by the complainant who knew him, I am satisfied that the prosecution met its standard of proof in their case against the appellant.

17. The evidence on identification of the appellant is also corroborated by circumstantial evidence, and what is required is that the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the appellant's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Shubadin Merali and another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

18. There evidence that the court can infer that the appellant was together with Pw1, this is from the account of Pw1, the speed at which she reported the matter to Pw2. Further the defence evidence in this case is that he was framed and this does not weaken any inference of guilt on the part of the appellant. The day the victim was medically examined was within less than 24 hours of the incident. These pieces of evidence prove beyond reasonable doubt that an act of sexual intercourse took place and the trial court did not err in its findings.

19. The appellant has raised the issue of a defective charge sheet. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

20. I find that the appellant has failed to explain how the charge sheet was defective. Be that as it may, I find that the charge sheet set out the elements of the offence; the evidence on record was in tandem with what was indicated in the charge sheet and as a result the court was able to make a finding that the appellant had a case to answer. The appellant was present during trial, heard all the evidence against him an in my view there was no defect in the charge sheet as to go to the merits of the case. The conviction of the appellant was safe and the appellant's appeal on the ground of a defective charge sheet equally collapses. Suffice to add that if there were any defects the same were curable under section 382 of the Criminal Procedure Code and that the appellant suffered no prejudice whatsoever since he utilized the opportunity accorded as he tackled all the witnesses and tendered his defence. Hence the appeal on conviction lacks merit and is dismissed.

21. As regards sentence it is noted that the appellant was sentenced to life imprisonment in line with section 8(2) of the Sexual Offences Act. However following the decision by the Supreme Court in Francis Karioko & Another V. R (2017) eklr several persons serving minimum sentences imposed by the Sexual Offences Act have petitioned the courts for review of those sentences. The Court of Appeal in the case of **Jared Koita Injiri V. R (2019) eKLR** substituted a sentence of life imprisonment with a sentence of thirty years for an appellant who had been charged with an offence of defilement contrary to section 8(1) and 8(2) of the Sexual Offences Act. The appellant's circumstances are similar to those of the appellant in the cited authority. I find the appellant herein should be allowed to benefit by the interference of minimum sentences following the Supreme Court's decision in the Muruatetu case (Supra). The appellant is noted to have been a first offender. I find in the circumstance that a sentence of thirty (30) years is appropriate.

22. In the result the appellant's appeal on conviction lacks merit and is dismissed. However the appeal on sentence succeeds to the extent that the life imprisonment imposed is hereby set aside and is substituted with a sentence of thirty (30) years from the date of conviction and sentence namely 26.1.2016.

It is so ordered.

Dated and delivered at **Machakos** this **27th** day of **April, 2020.**

D. K. Kemei

Judge