REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 84 OF 2018

DAVID KABUCHO NGURE..........APPELLANT

VERSUS

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

(Being an Appeal from the conviction and sentence of the principal Magistrate Hon. J. Omido delivered on 27th of September 2018 in Nakuru Cr. Case No. 253 of 2015.)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that, on diverse dates between March 2015 and September 2015 in Rongai District within Nakuru County, the appellant intentionally and unlawfully committed an act which caused his genital organ namely penis to penetrate into the genitalia organs namely vagina of **DL** a child aged 15 years.

2. The appellant denied the charges and the case proceeded to full trial. The prosecution called 6 witnesses in support of their case while the appellant gave sworn defence with no witness. By the judgment delivered on 27th of September 2018 the lower court found the appellant guilty and convicted him of the offence of defilement. He was sentenced to serve 20 years imprisonment.

3. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal on amended ground set out hereunder:-

> i. That the learned magistrate erred in law by imposing the statutory minimum sentence of 20 years imprisonment but failed to note that since the Supreme Courts' decision in **Francis Karioko Muruatetu Vs Republic (2017)** the courts are no longer bound by statutory mandatory minimum sentences.
>
> ii. That the learned trial magistrate erred in law and fact by failing to believe the appellant's defence that PW1 deceived the Appellant into believing that she was over the age of eighteen years.

4. The state opposed the appeal through oral submissions on 20th of February 2020. The appellant relied on submissions filed with amended grounds of appeal.

APPELLANT'S CASE

5. In respect to his defence, the appellant submitted that he elected to give a sworn statement of defence under **Section 8(5) and (6) of the Sexual Offences Act** and in his defence, he stated that the complainant had told him she was an adult and that he had reasonable believe that she was over 18 years at the time of the alleged offence. He said they had consensual sex intercourse.

PROSECUTION'S CASE

6. The state counsel submitted that on allegation that the appellant was misled by the complainant to believe that she was 18 years, the appellant never asked for documents or records to ascertain age. She submitted that the complainant was 15 years and appellant never told Court in his defence that he had known she was over 18 years.

7. Further that the prosecution proved the age of the complainant by producing the birth certificate, the P3 form and an admission letter of the complainant to the Children's Home which showed she was 10 years by the time she was being admitted into the Children Home.

8. The state counsel further submitted evidence adduced show that the appellant was a shamba boy at the Children Home where the complainant stayed and she informed the Court that the accused threatened her to sack her blood if she resisted; that he threatened to induct her into devil worship.

9. She further submitted that between March to September 2015, the appellant defiled PW1 on several occasions and in November 2015 the complainat fell ill and on being taken to hospital, she was confirmed to be pregnant. That the complainant delivered a child on April 2016; DNA was done after delivery and report produced in court confirmed 99.9%that the appellant was the father of the child confirming the complainat's evidence that the complainant impregnated her.

10. She further submitted in his defence the appellant stated that the complainant was his lover and they had sex severally. She added that the appellant having been an employee at the Children's Home where the child was staying understood that the child was placed there because she was under 18 years and she needed care and he took advantage of a vulnerable child, showed her pornography severally with the aim of having sex with her.

DETERMINATION AND ANALYSIS.

11. This being the first appellate court, I do appreciate my role as has been well settled in the case of **Okemo Vs. R (1977) EALR 32** and further in the by the Court of Appeal in the case of **Mark Oiruri Mose Vs. R (2013) eKLR** where the Court stated as follows:-

> **"the first Appellant Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."**

12. Also in **Pandya -Vs- Republic [1957] EA 336** the court held as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

13. In view of the above, I have perused and considered the proceedings before the trial court, amended grounds of appeal and submissions by the appellant and the state. There is no doubt that the appellant engaged in sexual intercourse with the complainant. The appellant stated that the complaintant was her lover and admitted that they had sex. The complainant also admitted that she had sex with the appellant severally. This was further confimed by conception which led to the child delivering a child whose father was confirmed by DNA analysis to be the appellant. The appellant's defence was that the girl misled him to believe that she was 18 years. I find the the following as issues for determination:-

i. Whether there is sufficient evidence adduced to demonstrate that the appellant was genuinely misled to belive that the complainant was an adult

ii. Whether the appellant sentence was harsh and unreasonable.

(i) Whether there is sufficient evidence adduced to demonstrate that the appellant was genuinely misled to belive that the complainant was an adult

14. Ingredients for the offence of defilement include:-

a. proof of the age of the complainant;

b. proof of penetration;

c. proof that the appellant was the perpetrator of the offence.

15. The two ingredients of penetration and identification of assailant are not in issue; as stated above, they were sufficiently proved. The appellant is challenging prove of complainant's age. It is a defence for an accused to prove if it is demonstrated that he genuinely believed that the child was a minor. Record show that at the time the complainant testified on 6th April 2017, she said she was 17 years. The prosecution produced the complainant's birth certificate which shows she was born on 12th November 2001. The complainant conceived between the month of March and November 2015 and delivered baby XY in April 2016.

16. In the case of **Hadson Ali Mwachongo Vs. Republic [2016] eKLR,** the Mombasa Court held that:

> **"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be**

gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…"

17. PW6, the investigating officer testified that after receiving report of defilement, they took the complainant for age assessment and he also managed to get birth certificate which indicated that the complainant was born on 12th November 2001. Charge sheet indicate that she was defiled between March 2015 and September 2015 which shows she was 14 years 4 months at the time she was defiled. P3 indicated age as 15 years .

18. The appellant's argument is that she was misled to believe that the girl was 18 years old. The Appellant in his defence pleads under **Section 8(5) and (6) of the Sexual Offences Act** which states as follows;

> **"(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.**
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> **(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."**

19. Record show that at the time the complainant was admitted to Isiolo Children's Home on 5th February 2011, the complainant was 10 years which means in 2015 she was about 14 years. She had been there for 4 years . PW5 who runs the home said the appellant played a role of a guardian in the home. He said the appellant had worked in [Particulars withheld] Children's Home in Nakuru when she was taken there. That means he had seen the girl grow from the age of 10 years. The difference between the child age at the time of defilement and age of majority is about 4 years. It is unlikely that the child's appearance would have made one believe she was 18 years and above if that is what misled the appellant. That range in age difference is big; in my view, a reasonable person can tell from appearance a child aged between 14 and 15 years is a minor. On the other hand, the appellant never stated what made him believe the girl was 18 years.

20. From the foregoing I find that the appellant failed to demonstrate that he genuinely believed the complainant was 18 years. Both said they consented to have sex but in view of the fact that the girl was below the age of 18 years she did not have the capacity to consent. The appellant took advantage of her vulnerability and introduced her to pornography before illegally engaging in illegal sex with her. The appellant's defence cannot therefore stand. The trial magistrate did not err in convicting him. Appeal against conviction is hereby dismissed.

(ii) Whether the appellant sentence was harsh and unreasonable.

21. The appellant was charged for Defilement contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006** which provides as follows:-

Section 8. (1) of the Sexual Offences Act No. 3 of 2006 states:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

While **Section 8. (3) of the Sexual Offences Act No. 3 of 2006** states:

> **"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."**

22. The Appellant was convicted for the offence of defilement and sentenced to a jail term of 20 years. The act under which he was charged provides for a minimum sentence of 20 years.

23. I note from the record that upon conviction the Appellant was given an opportunity to mitigate. He prayed for leniency and sought non custodial sentence. He agreed to take care of the child; to provide for the child, take up insurance and educate the child. The court however imposed minimum sentence provided by statute.

24. I however agree with the Supreme Court in the case of **Muruatetu** that discretion should not be taken from a judicial officer by statute as interference with court's discretion is unconstitutional. It renders mitigating factors superfluous. In my view if the appellant was genuine in his mitigation and in view of the fact that the child was 17 years at the time she testified and also had a child from the appellant whom he commited himself to take care of, a sentence lower than the minimum should have been imposed. I am inclined to reduce the sentence to 7 years.

20. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on is sentence allowed

3. Sentenced reduced to 7 years imprisonment.

4. Sentence to run from the time of sentence in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 28th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Appellant in person

Rita for State