REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 8 OF 2019

JOSEPH AKALA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo Resident Magistrate in Kehancha Magistrate's Court Criminal Case No. 11 of 2017 delivered on 5/2/2019)

JUDGMENT

1. The Appellant herein, *Joseph Akala,* was charged with the offence of *Defilement* contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of *committing an indecent act with a child*. The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 20th day of July 2017 at [particulars withheld], intentionally caused his penis to penetrate the vagina of SJ a girl aged 10 years*'.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Seven witnesses testified in support of the prosecution's case. **PW1** was the arresting officer. She was **No. 2008113132 APC Dorothy Achieng Okello** then attached to Kuria West Sub-County within Migori County. The victim one **SJ** testified as **PW2. PW3** was the mother of the victim. Two Clinical Officers attached to Kehancha Sub-County Hospital testified as **PW4** and **PW6** respectively. The Assistant Chief of Igena Sub-location testified as **PW5**. The investigating officer was one **No. 81041 PC Patrick Kimondiu** who was attached to Kehancha Police Station. He testified as **PW7**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW2) whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence. He did not call any witness. Thereafter the court rendered its judgment on 05/02/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 12/02/2019 where the Appellant challenged the judgment and sentence on two main grounds that the offence was not proved and that there were unsettled contradictions in the evidence.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant appeared in person. He filed Supplementary Grounds of Appeal and submissions before the hearing of the appeal. In his submissions the Appellant reiterated that the offence was not proved as required in law. He also submitted that the trial court erred in failing to find that he was a minor at the trial. He also raised the issue of contradictions on the evidence. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and prayed that the appeal on conviction be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this 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.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) <u>On the age of the complainant:</u>

12. The age of the complainant was not contested in this appeal. The prosecution relied on a Certificate of Birth No. 3210490 which indicated that the complainant was born on 27/11/2006. Therefore, the complainant's age was around 10 years at the time the offence was allegedly committed.

13. The complainant was hence a minor of tender age within the meaning of the law.

(b) <u>On the issue of penetration:</u>

14. **Section 2** of the **Sexual Offences Act** defines '**penetration**' as:

> ***the partial or complete insertion of the genital organs of a person into the genital organ of another person.***

15. This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** when the Court of Appeal stated thus:

> ***…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. <u>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</u>….***

(emphasis added).

16. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** held as such on the aspect of penetration:

> ***In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.***

17. Penetration was hotly contested. The Appellant contended that there was no evidence of penetration. The evidence of penetration was adduced by the complainant, PW3, PW4 and PW6. The complainant narrated how she met the assailant as she went to the river to look for her sister who had the keys to their home. The complainant had returned home from school only to find their house locked. As she walked to the river the route passed through a maize plantation. The maize was taller than her. She was confronted by the assailant. The assailant asked the complainant her name. She was also asked how many they were at their home. She was then suddenly held by the mouth and taken inside the maize plantation.

18. The complainant then described what followed as follows: -

> **…He pulled up my dress and did 'tabia mbaya'. He did 'tabia mbaya' on the back. He also removed my inner clothes. He removed his trousers and he did 'tabia mbaya'…. I cried and shouted. When he did 'tabia mbaya' he had stood me up. I screamed…...**

19. In the case of **<u>Muganga Chilejo Salha v Republic [2017] eKLR</u>** the Court of Appeal while acknowledging the use of euphemisms by children when describing acts of sexual intercourse stated: -

> ***Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated/accepted the use of euphemisms like, "alinifanyia tabia mbaya",*** **(IE v Republic, Kapenguria High Court Criminal Case No. 11 of 2016)** ***"he pricked me with a thorn from the front part of this (sic) body."*** **(Samuel Mwangi Kinyati v Republic, Nanyuki HC Criminal Appeal No. 48 of 2015),** ***"he used his thing for peeing",*** **(David Otieno Alex v Republic, Homa Bay HC Criminal Appeal No. 44 of 2015),** ***"he inserted his "dudu" into my "mapaja"*** **(Joses Kaburu v Republic, Meru HC Criminal Case No. 196 of 2016),** ***"he used his munyunyu"*** **(Thomas Alugha Ndegwa, Nairobi HC Criminal Appeal No. 116 of 2011)** ***as apt description of acts defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me" which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony.*** **See AM v Republic Voi HC Criminal Appeal No. 35 of 2014, EMM v Republic Mombasa HC Criminal Case No. 110 of 2015, among others.** ***Trial courts should record as nearly as possible what the child says happened to him or her.***

20. There was PW3 as well. PW3 was the mother of the complainant. She was called by PW7 to go to Kehancha Police Station. She obliged. On reaching there she found the complainant at the station and learnt that she had engaged in sexual activities. PW3 stated thus: -

> **…. The child had worn school clothes……She had also worn a panty. The panty was red in colour (MFI 5) it has faeces and blood……**
>
> **…. The child said she as having pain on the abdomen and on the back side……...**
>
> **…. I saw the panty with faeces and blood. I am speaking of what I have seen with my own eyes. That is what I saw from the child. I was not told of the same…….**
>
> **…. I did not wash her. I just changed her clothes…. I left the inner clothes. She could not walk with soiled clothes…... she did not take a bath. The child had not taken a bath…...**

21. When the complainant was taken to hospital she was examined and treated by PW4 and PW6.

22. PW4 was the first clinical officer to see and attend to the complainant at the hospital. She examined and treated her. She asked the complainant to remove her panty. PW4 noted some blood stains on the panty. She also examined the complainant's private parts. She found the external genitalia normal. The hymen was partly torn with a fresh wound on it. She ordered for a laboratory tests on urinalysis, a high vaginal swab and a HIV to be done.

23. The results of the urine showed the presence of pus cells and red blood cells in plenty. That confirmed an injury to the vagina. PW4 prescribed some drugs for the complainant. She also filled in the Post Rape Care Form and the P3 Form.

24. PW6 was at the hospital when the complainant and the suspected assailant were taken thereto. He examined both of them. He confirmed the injuries as stated by PW4 on the complainant. He also examined the suspected assailant and found nothing in his genitals. PW6 treated the suspect for the injuries he had sustained on the mouth, neck, lips, thorax, abdomen and upper limbs.

25. From the examination and analysis both PW4 and PW6 concluded that the complainant had been partially penetrated in her vagina by a penis.

26. Going by the narration by the complainant, the evidence of PW3, PW4 and PW6 coupled with the contents of the treatment notes, the Post Rape Care Form and the P3 Form, I find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) <u>On whether the Appellant was the perpetrator:</u>

27. The Appellant vehemently denied being the assailant. He raised an *alibi* defence. He stated that he was at Isebania town in the morning and later took a motor cycle to his home. When he reached his home he differed with the rider on the fare and the rider called other riders. He was attacked and brutalized by the riders and was rescued by a village elder who called the police.

28. The burden of proof in a criminal case rests throughout with the prosecution. Even in cases where an accused person raises an *alibi* defence still he/she cannot be expected to prove that defence. The Court of Appeal in **<u>Kiarie vs. Republic [1984] KLR</u>** held that '***an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable'.***

29. In this case the *alibi* defence was raised for the first time at the defence case. Even in such a scenario the trial court must consider the defence alongside the prosecution evidence. (See the Court of Appeal in ***<u>Ganzi & 2 Others vs. Republic</u> [2005] 1 KLR 52).***

30. The complainant testified that when the assailant had intercourse with her she felt pain and screamed. People gathered in the bush and the assailant was arrested at the scene. Members of public began beating him.

31. PW5 was immediately called and informed of the arrest of the assailant by the village elder. He was also informed that members of public were assaulting the assailant. He directed that the assailant be taken to where PW5 was. The assailant was taken to where PW5 was. The complainant was taken alongside the assailant. PW5 called the police to rescue the assailant. PW1 and her colleagues managed to rescue the assailant and escorted him to the police station.

32. The witnesses testified before the trial court which observed their demeanors. The court considered the totality of the evidence alongside the defence and was satisfied that the Appellant had been placed as the assailant. I have as well reviewed the evidence on record. There is nothing meaningful on record challenging the demeanor of the witnesses and that is why the trial court believed the witnesses. As an appellate Court I am called upon to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my 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 I must give allowance for that.

33. I am alive to the fact that the complainant did not know the appellant prior to the incident. However, the appellant was caught at the scene with the complainant. That perfectly cured any doubt.

34. Having reconsidered the prosecution's evidence and the defence, I am satisfied beyond any peradventure that it is the Appellant who beastly and sexually assaulted the complainant.

35. Before I deal with the aspect of the sentence there are two other issues which the appellant raised. The first one was the issue of the unreconciled contradictions and the other one was his age.

36. On contradictions, the Court of Appeal had occasion to address the issue in **Phillip Nzaka Watu vs. R** (2016) eKLR, where it expressed itself thus:

> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.*** (emphasis supplied)

37. The contradictions alluded to in this case were on the evidence of the complainant, PW2, PW4 and PW6. The appellant submitted that the evidence on whether the complainant had changed clothes, taken bath and which part she was penetrated varied with each of the said four witnesses. I have carefully reviewed the evidence of the said four witnesses and I find that indeed the alleged contradictions were properly reconciled and settled. There is no doubt at all on what happened to the complainant, what PW3 did and the interventions by PW4 and PW6. It is all clear and settled. The witnesses as well as the trial court reconciled all differing aspects of the evidence. I therefore do not agree with the appellant that the alleged contradictions were unsettled. To the contrary, they were.

38. I will deal with the issue of the age of the appellant in sentencing.

39. Having analyzed and reviewed the evidence and the defence, I am satisfied that the prosecution proved its case as required in law. The appellant was rightly found guilty and convicted. The appeal on conviction fails.

40. The appellant also challenged the sentence. The Appellant was sentenced under **Section 8(2)** of the **Sexual Offences Act** to life imprisonment. The sentencing court relied on the mandatory sentence under **Section 8(2)** of the **Sexual Offences Act** in its sentence.

41. The Supreme Court of Kenya in **Francis Muruatetu & Another -vs- Republic 2017 eKLR** and the Court of Appeal in **Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR)** dealt with the mandatory nature of sentences. The effect of the said decisions, among many others, is that a sentencing court ought to exercise its discretion in sentencing. The mandatory nature of sentences was hence declared unconstitutional.

42. In this case, the trial court relied on the provision of **Section 8(2)** of the **Sexual Offences Act** in imposing the sentence. To that extent the court erred. The appeal against the sentence must therefore succeed. The life sentence is hereby set-aside.

43. On the age of the appellant, I must state that the age of an accused person has bearing both on the trial and sentencing. If an offender is a minor, there are special considerations which must be taken into account during the trial. If the minor offender is eventually found in contravention of the law, the law also guides on sentencing.

44. The appellant vehemently submitted that he was 18 years old at sentencing. The P3 Form and the treatment notes of the appellant which were produced as exhibits confirmed that the appellant was 18 years old in 2017. The appellant was hence 19 years old at sentencing. Accordingly, the appellant was not a minor at the commission of the offence. He was 18 years old.

45. Be that as it may, the manner in which Courts may deal with minors who committed offences but who had turned to adults at sentencing was recently re-discussed by the Court of Appeal in **Kisumu Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang vs. Republic (2019) eKLR**. My Lordships had the following to say: -

> ***Section 191(1) of the Children Act sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judical discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the Children Act. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. This Court while faced with a similar case in Richard Mwaura Njuguna & another v Republic [2019]eKLR observed thus:***
>
> *It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue is the High Court case of Daniel Langat Kiprotich vs State [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:*
>
> *This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to a borstal institution for no more than three years, the options are*

limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or here errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where teh offence committed was a particularly vicious or serius one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

Earlier on this Court in the case of J M K v Republic [2015]eKLR had observed

....A critical issue in this appeal relates to the appropriate senetnce for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In of Nyeri Criminal Appeal No. 118 2011 (JKK -v- R, (2013)eKLR, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic -v- S. A. O., (A MINOR) [2004]eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot -v- R).

The Court went further and held that:

The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the Presidnt. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The Children Act prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow teh appeal to the extent that we substitute the order directing teh appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhsphs the probation department to take the apepllant through the rgours of coming into terms with his mistake and poor judgment which have consequences such a loss of liberty.

We are in total agrement with the above sentiments and observations. Accordingly we find that committing the apepllant to a borstal institution as prescribed under Section 6(1) of the Borstal Institutions Act is not foreseable in view of the appellant's current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the apepllant's culpability.

46. Therefore, in appropriates cases an offender who is a minor at the commission of an offence, but who had turned into adulthood at sentencing may still be sentenced to a term of imprisonment.

47. Returning to the matter at hand, a consideration of the circumstances under which the offence was committed, the nature of the offence, the appellant's mitigations on record, the ages of the complainant and the appellant, the effect of the offence on the complainant and many other principles of sentencing as provided for in the *Judiciary's Sentencing Guidelines*, I hereby find that the appellant, who is a very young adult, instead needs to undergo rehabilitation.

48. To that end, I order that a Pre-Sentence Report be availed on 08/06/2020 for further orders on sentencing.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 22nd day of May 2020.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Joseph Akala, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant