REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NUMBER 85 OF 2019

HAC..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(**Being an appeal against the conviction and sentence in Criminal Case No. 46 of 2019 at Kisii Law Courts before Hon. Mac'Andere (R.M) delivered on the 11th October 2019**)

JUDGMENT

1. The appellant **HAC** was convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**. The particulars were that on the night of 23rd and 24th March 2019 in Marani sub- County within Kisii County, he intentionally caused his penis to penetrate the vagina of DNA a child aged 8 years. He also faced an alternative charge of, Indecent act contrary to section11 (1) of the Sexual Offences Act No. 3 of 2016. The particulars of this charge are that, on the night of 23 rd and 24th day of March 2019 in Marani Sub County within Kisii County the appellant intentionally and unlawfully did commit an indecent act by rubbing his penis against the vagina of DNA a child aged 8 years.

2. The appellant now appeals against the conviction and sentence on the grounds set out in his petition of appeal and his submissions. He contends that the offence was not proved beyond reasonable doubt and there was no medical evidence linking him to the offence. The appellant also argues that the prosecution's case was riddled with inconsistencies and this supports his claim that the charges he faced were fabricated. He also argues that the prosecution did not avail certain key witnesses to prove its case. The respondent counters that all the elements of the offence were proved beyond reasonable doubt but supports the appeal on sentence.

3. As this is a first appeal, I am required to evaluate all the evidence on record and come to an independent conclusion as to whether to uphold the conviction, always bearing in mind that I neither heard nor saw the witnesses testify. In order to do so, it is important to set out the facts as they emerged before the trial court and they were as follows. (see Okeno vs Republic [1972] E.A)

4. The complainant DNA (PW1) gave an unsworn testimony after *voir dire* examination. She testified that on the night of 23rd and 24th March 2019 the accused did "stupid things" to her. She testified that on those two nights she was with her siblings as her father, the appellant had chased away her mother PW2. She told the court that the appellant had turned her into his wife. He touched her private parts with his penis and inserted it into her vagina. The complainant testified that she had felt pain but did not scream. The following morning, she took a bath and went to church. When her mother asked her she told her what had happened and she was taken to hospital. The complainant stated that it was not the first time such a thing had happened.

5. During cross examination, PW1 reiterated that the appellant had been doing bad things to her since her grandmother had died. She insisted that she had told the court the truth and had not been asked to fix him by her mother.

6. EK (PW2) testified that on the material night she had a quarrel with the appellant who was her husband. She ran off to avoid being beaten up by the appellant and spent the night at her aunt's place. She told the court that she had left her children TM aged 4 years, EO aged 10 years and the complainant at home. The following day was Sunday. She decided to go and prepare her children for church. On the way, she found that the children had prepared themselves and were already headed to church. When she asked them how their night had been, the complainant told her that the appellant had gone to where she slept and did bad things to her. PW 2 testified that she had taken PW1 to Kegogi Hospital and reported the incident at Rioma police station. During cross examination PW2 stated that the complainant had never told her of any other such incident before.

7. The investigating officer, CPL Peris Maganga (PW3) from Rioma police station, testified that on 26th March 2019, PW1 went to the station accompanied by her mother. She alleged that her father, the appellant, had defiled her on the night of 23rd and 24th March 2019. PW3 accompanied the minor to Marani Sub-County hospital where she was examined, treated and discharged. The P3 form was also filled at the hospital. PW3 also told the court that she had observed that the complainant was sickly and could not walk well. She also testified that the complainant's mother had told her that the child was 8 years old.

8. Samuel Machuki (PW4) a clinical officer at Marani hospital, gave evidence on behalf of his colleague, Joseph Nyangau who had been transferred. He testified that the complainant presented herself to the hospital on 26th March 2019 with a history of being defiled by a person well known to her. On examination, it was observed that the minor had lacerations on her private parts. It was also noted that she had a foul smelling discharge. Her hymen was torn and a urine test showed no signs of infection. Based on the analysis, a conclusion was reached that it was likely that the child had been defiled. PW4 proceeded to produce the P3 form and treatment notes as exhibits.

9. When placed on his defence, the appellant testified that he was at work on 23rd March 2019 when a certain person and a police officer arrested him. At the station, he denied the charges facing him.

10. The trial court analyzed the evidence placed before it and found that the prosecution had proved all the essential ingredients of defilement beyond reasonable doubt. The court convicted the appellant and sentenced him to life imprisonment in accordance with **Section 8(2)** of the **Sexual Offences Act**.

11. Being aggrieved by that decision, the appellant lodged the instant appeal. The issues raised in the appeal can be summarized as follows;

a. Whether the medical evidence was sufficient to sustain the appellant's conviction;

b. Whether the trial court erred by convicting the appellant on contradictory statements;

c. Whether the prosecution proved its case beyond reasonable doubt.

ANALYSIS AND DETERMINATION

12. The appellant's argument on the first issue is that the medical evidence was not sufficient to sustain a conviction because the complainant was examined three (3) days after the incident. The prosecution's case was that the appellant and his wife PW2 had a disagreement on the night of 23rd and 24th March 2019 which caused PW2 to flee the house and leave her children TM, EO. and the complainant at home. The following morning, the complainant met PW2 on her way to church and told her about the assault. The medical evidence produced by PW4 shows that the complainant was examined on 26th March 2019, several days later. No explanation was given for the delay. The question this court is tasked with determining is whether the unexplained delay in the medical examination of the complainant weakens the prosecution's case.

13. PW3 told the court that on the day she escorted the minor to Marani Sub County Hospital for examination, she appeared sickly and could not walk well. At the hospital, the complainant was examined by PW4's colleague who had been transferred at the time of the hearing. PW4 produced the P3 form and treatment notes in accordance with **section 77** of the **Evidence Act**. The medical examination revealed that complainant's private parts had lacerations. It also showed that her hymen was torn and she had a foul smelling discharge. The conclusion reached was that the complainant had been defiled. At section B of the P3 form, the medical officer estimated that the injuries were 4 days old. This was fairly close to the complainant's claim that she had been defiled 3 days earlier.

14. The complainant testified that after the appellant had chased PW2 that night, he touched private parts and inserted his penis into her vagina and she felt pain. The complainant gave an unsworn statement, the appellant was given an opportunity to cross examine her. Her evidence remained steadfast during cross examination. It is now established that the oral evidence of a victim of defilement is sufficient to prove the offence. (See ***Kassim Ali Vs Republic , Mombasa [2006] Eklr appyton Mutuku Ngui vs Republic [2014] eKLR and Aml vs Republic [2012] eKLR***)

15. In this case, the complainant's claim that she had been defiled by the appellant was also corroborated by the evidence of PW2 who testified that she had fled and left her children including the complainant at home with the appellant on the material night. PW2's testimony provided circumstantial evidence on the whereabouts of the appellant on the night in question. The fact that the appellant did not deny that he was PW2's husband or that he had been left with the children including the complainant on the night in question, leads me to the conclusion he is not innocent.

16. There appeared to have been bad blood between the appellant and PW2 but the independent medical evidence of PW4 and the observation by PW3 that the complainant was walking with difficulties reinforced the evidence of PW2 and the complainant.

17. When placed on his defence, the appellant testified that he had been arrested at his place of work on 23rd March 2019 and charged with the offence. There is no proof that the appellant was arrested on 23rd March 2019 for the offence at hand or any other offence. The appellant's defence did not dislodge the prosecution's case which was cogent, consistent and remained unshaken during cross examination. His contention that he was framed for the offence is therefore untenable.

18. The appellant's argument that the prosecution did not call the other children in the house to testify, is answered by **section 143** of the **Evidence Act** which provides that, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."* In the case of ***Keter vs. Republic [2007] 1EA135*** the court held that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish a charge beyond any reasonable doubt. These sentiments were echoed in the case of ***Sahali Omar vs. Republic [2017] eKLR*** where the Court of Appeal held that the prosecution reserves the right to decide which witness to call. If the prosecution witnesses are sufficient to prove the charge, the situation hardly calls for the drawing of an adverse inference with regard to the 'missing' witnesses. Similarly, I find that the prosecution witnesses sufficiently proved the charge facing the appellant.

19. The appellant also contends that the conviction was unsafe due to an inconsistency in the prosecution's case. He argued that the complainant had testified that it was not her first time to be defiled by her father yet her mother, PW2 stated that she was not aware that the

minor had been defiled by the appellant prior to the incident in question. During cross examination PW1 divulged to the court that the night in question was not the first time the appellant had defiled her. She testified that since the death of her grandmother the appellant had been calling her and doing bad things to her. When this issue was put to PW2 by the appellant, she stated that the complainant had never told her of any other incident. That said, it is clear that the testimony of PW2 does not contradict that of the complainant in any way. Further, the P3 form also shows that the minor complained of previous assaults by the appellant as the same is noted down as part of her medical history. I therefore reject his argument that the prosecution presented inconsistent evidence and uphold the trial court's finding that the prosecution proved its case beyond reasonable doubt.

20. I will now address the issue of the sentence meted upon the appellant. The trial court sentenced the appellant to life imprisonment based on the mandatory sentence imposed in **Section8 (2)** of the **Sexual Offences Act**. Minimum mandatory sentences imposed under the Sexual Offences Act have been the subject of several decisions of the Court of Appeal including ***Evans Wanjala Wanyonyi v Republic [2019] eKLR Christopher Ochieng v R Kisumu Criminal Appeal No. 202 of 2011 [2018] eKLR*** and in ***Jared Koita Injiri v Kisumu Criminal Appeal No. 93 of 2014 [2019]eKLR***. In those cases, the Court declared minimum mandatory sentences under the Sexual Offences Act unconstitutional.

21. In ***Christopher Ochieng v R (supra)*** and ***Jared Koita Injiri v Republic (supra)*** the Court of Appeal set aside sentences of life imprisonment and substituted them with a sentence of 30 years' imprisonment. In ***Jared Koita Injiri v Republic (supra)***the Court of held;

> *"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.*
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> *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.*

22. The act committed by the appellant to the minor who was aged 8 years was an abominable crime. His act is further aggravated by the fact that the minor regarded him a father. Unfortunately, such acts against children are rampant and must be condemned in the strongest terms possible. Taking into consideration the foregoing authorities, the appellant's mitigation before the trial court that he was an orphan and the fact that he was a first offender, I set aside the sentence of imprisonment for life imposed on the appellant and substitute it with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

Dated, **signed** and **delivered** at Kisii on this **29th** day of **July** 2020.

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Prosecution Counsel Office of DPP

Ms. Rael Court Assistant