REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 30 OF 2019[SO]

CORAM: HON R.E.ABURILI J

PETER OKOTA NYEERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence by Hon M. Obiero, Principal Magistrate delivered on 8/6/2018 and sentence on 14/6/2028 in Bondo PM's Court Sexual Offence Case No. 35 of 2017)

JUDGMENT

1. The appellant herein **PETER OKOTA NYEERO** was initially 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. He also faced the alternative charge of committing an indecent act with the same child contrary to section 11(1) of the Sexual Offences Act. The said initial charge sheet was amended and substituted with the charge of defilement of a child with mental disability contrary to section 7 of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 1st day of July, 2017 at about 11.00 a.m. at Ndori sub-location in Gem Sub-county within Siaya County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.A. [full name withheld] a child aged 11 years. The appellant was further charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 1st day of July, 2017 at Ndori sub-location in Gem sub-county, intentionally and indecently touched the vagina of .E.A. with his penis a child aged 11 years.

2. The appellant denied the charge and the prosecution called four (4) witnesses who testified in support of their case. Placed on his defence, the appellant exercised his right to remain silent and opted not to adduce any evidence. He simply stated that the allegations were not true and left it to the court to decide.

3. In the impugned judgment delivered on 8th June 2018 Hon. M. Obiero, Principal Magistrate found the appellant guilty of the offence of defiling a child contrary to section 8(3) of the Sexual Offences Act and sentenced the appellant to serve twenty years imprisonment on 14/6/2018.

4. Aggrieved by the conviction and sentence imposed on him, the appellant filed this appeal on 18th March 2019 with leave of court and later on 14/5/2020 the appellant filed his amended grounds of appeal together with written submissions asserting:

1. *That the trial court failed to consider that the charge sheet preferred was defective.*
2. *That the trial court failed to specify whether the sentence imposed was in respect of the main charge or alternative charge.*
3. *That the trial court failed to observe that there was violation of Section 33 of the Sexual Offences Act.*
4. *That the trial court failed to observe that the alleged age of the complainant was not established as required by law.*
5. *The appellant urged this court to allow his appeal in its entirety.*

SUBMISSIONS

5. The appeal was canvassed by way of written submissions filed by the Appellant on 14.5.2020 during the Covid 19 situation. The Respondent did not file any submissions.

6. On the ground that the charge sheet was defective, the appellant submitted that the charge sheet was defective because during the judgment, the Magistrate corrected the charge yet the appellant did not plead to the new charge. It was submitted that the magistrate stated that, "He should have been charged under Section 8(3) of the Sexual Offences Act (see pg. 20 of the judgment). It was the appellant's submission that the trial court was in error to amend the charge whereas the same was the duty of the prosecution. He referred to the case of **Yongo -v-Republic [1983] KLR.**

7. On the ground that there was breach of section 169 of the Criminal Procedure code, the appellant submitted that the trial court failed to specify whether the sentence imposed was in respect of the main charge or the alternative charge.

8. On the ground that there was violation of section 33 of the Sexual Offences Act, the appellant submitted that the medical examination report did not reveal the status of the hymen; whether it was intact or broken. It was his submission that the failure of the medical examination to reveal the condition of the hymen is an indicator that the evidence of penetration was not proved beyond reasonable doubt. He maintained that the medical examination did not prove section 26 of the Sexual Offences Act. He reiterated the findings by the medical officer who found upon examination that:

a) The hymen was absent

b) No blood stain

c) No blood cell

d) No vaginal discharge

9. On the proof of age of the complainant, the appellant submitted that the prosecution failed to prove the alleged age of the victim by way of production of birth certificate. The appellant further submitted that the trial court did not observe the vitalness of the age of the victim in establishing the offence of defilement hence failing to order for an age assessment. He asserted that the clinic card which was produced should not have been relied upon to establish the age since it is a document that is easily accessible and non-official.

10. Further, that the prosecution further failed to produce the treatment notes which were relied upon. Reliance was placed on the case of **WAGNER -V-R N.R.P CR A NO. 404 OF 2009.(sic).**

11. On alleged violation of section 329 of the Criminal Procedure Code, the appellant submitted that the sentence imposed was unconstitutional due to its mandatory nature and in violation of the appellant's right to mitigation under Section 329 Criminal Procedure Code. He submitted that Section 8(3) of the Sexual Offences Act provides for a mandatory minimum sentence of 20 years. Reliance was placed on the Supreme Court decision in **FRANCIS KARIOKO MURUATETU & ANOTHER V-R (2017) e KLR** where the Court held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to relevant aspects of character and record of each accused person. Further reliance was placed on **CHRISTOPHER OCHIENG V-R (2008) e KLR CRA No. 202 of 2011,** where the Court of Appeal held that minimum mandatory sentences are unconstitutional. The appellant therefore submitted that the discretion of the trial court to mete out a sentence that is commensurate with the circumstances of his case was curtailed by the mandatory minimum sentence.

Analysis and Determination

12. This being a first appeal, iam alive to the principles espoused in **Okeno v Republic Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"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 1975) E.A. 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] E.A. 570. It is not the junction 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 1978) E.A. 424."***

13. Revisiting the evidence adduced before the trial court by the prosecution, as the appellant exercised his right not to adduce any evidence in defence, **PW1 JARED OBIERO OPONDO** the Clinical Officer based at Siaya Hospital testified that he examined the complainant on the 3rd day of July, 2017. He stated that the complainant as mentally challenged as she could not express herself at the time of examination. He stated that on examination on of her genitalia, he found that there were numerous spermatozoa cells and pus cells. There was also HVS and Urinary tract infection. He filled the P3 Form wherein he concluded that the minor was defiled. He produced the P3 form as an exhibit.

14. In cross examination by the appellant, the witness stated that he had not examined the appellant.

15. **PW2 STEPHEN OTIENO** a herdsboy recalled that on the 1st day of July, 2017 at 11.00 a.m., he as herding cows and that he drove them through a road that passes through a bush, he saw Okoth, the appellant herein and E. the complainant having sex on the ground. That E, the Complainant was lying down while the appellant was lying on top of her. PW2 told the appellant that he was going to inform the complainant's mother. He then went and told the Complainant's mother of what he had seen take place between the complainant and the appellant and he accompanied her and the complainant to Akala Police Station where they reported the incident and recorded statements the same day. He identified the appellant in court saying he knew him very well as they live in the same village.

16. In cross examination by the appellant, PW2 stated that he saw the appellant very well and that the appellant is his grandfather. he reiterated that the incident took place at 11 am but that he did not have a phone so he did not photograph the appellant.

17. **PW3 MJO** testified as an intermediary for the complainant after leave of court was granted to the prosecution to call her as such, following a medical report that the complainant was a mental invalid and incapable of testifying. PW3 stated that she was the mother to the complainant and that on the 1st day of July 2017, at about 5.00 pm, she was from Akala Market when she was informed by one Atoti that he found Peter Okota defiling her daughter, the complainant. She stated that when she went and checked the complainant who was at her brother in-low's home, she confirmed that she had been defiled.

18. Together with Atoti and the complainant, they proceeded to report the matter to Akala Police Station and she took the complainant to Akala Health Centre where she was treated. She later took her to Siaya County Hospital where the complainant was treated, examined and a P3 form was filled. She stated that the complainant was aged 11 years at the time of the incident. she identified the Child Health Card for the complainant She further stated that the complainant is mentally disabled and that she was born with the condition. She stated that they live in the same village with the appellant.

19. In cross examination she reiterated her testimony in chief and added that after the incident the appellant went to her home seeking to discuss the matter and that he also attempted to commit suicide after the incident and was arrested in August by the police.

20. **PW4 JOHN TURUNYA** testified that he investigated the case. That upon receiving a report on 1st day of July, 2017 from the parents of the complainant who reported that one Stephen Otieno PW2 had informed them that he found the appellant defiling the complainant, the following day, he escorted the complainant to Akala Health Centre where she was treated and examined. It was his further testimony that on the 3rd day of July, 2017, he escorted the complainant to Siaya Hospital where she was treated and examined. Further, that on the 4th day of July, 2017, he went to look for the appellant but he was told that the accused person had taken poison and had been taken to hospital. He stated that he went back on the 21st day of August, 2017 and found the appellant and arrested him.

21. He stated that during the investigations he took the complainant to a psychiatrist and she was examined and confirmed to be mentally unstable. He produced the complainant's mental assessment report dated 13/2/2018 as exhibit 3. He also produced the Child Health Card in respect of the complainant as exhibit 2 showing that she was born on 20/6/2005.

22. At the close of the prosecution's case, the appellant opted to remain silent and call no witness.

DETERMINATION

23. I have considered the evidence adduced by the prosecution witnesses, the grounds of appeal as amended and the submissions by the appellant in support of his appeal.

24. In my humble view, the issues for determination flow from the grounds of appeal as amended and as argued by the appellant in his written submissions.

25. ***On whether the charge sheet was defective,*** the appellant submitted that the trial court amended the charge sheet and convicted him of the offence that he was not charged with and without allowing him to plead to the new charge that he was convicted of.

26. I have perused the charge sheet initially filed in court and it reads defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The alternative charge is committing an indecent ac with a child aged 11 years old.

27. However, on 27th November 2017, the prosecution sought to amend the charge sheet and with leave of court, the charges were amended and substituted the initial charge sheet, after the prosecution informed the court that the complainant was mentally retarded. The appellant on being asked whether he had any objection stated that he had no objection to the amendment sought and the charges were amended and a fresh plea was taken both on the amended charges and on the alternative charge. The substantive charge in the amended charge is defiling a child with mental disability contrary to section 7 of the Sexual Offences Act while the alternative charge remained that of committing an indecent act with a child aged 11 years. The amended charge sheet is dated 27/11/2017 and duly signed by the OCS Akala Police Station.

28. The trial magistrate in his judgment convicting the appellant was clear that he had found that the prosecution had proved beyond reasonable doubt that the appellant had defiled a child with mental disability as charged and convicted him accordingly.

29. For the above reasons, I find that the appellant's ground of appeal lacks merit. I find no defect in the charges and more so, the charges were amended and read out to the appellant who pleaded not guilty. In addition, albeit the appellant claims that the trial magistrate did not indicate whether he was sentencing on the main or alternative charge, the judgment is trite that the conviction was in respect of the main charge of defiling a child with mental disability and not that of committing an indecent act with a child. the sentence could only have been on the charge convicted and not any other charge. The two grounds 1 and 2 of appeal therefore fail and are hereby dismissed.

30. On alleged breach of section 169 of the Criminal Procedure Code, the appellant submitted that the medical examination did not indicate the condition of the hymen whether it was intact or broken. I have perused the evidence of PW1, the Clinical Officer who examined the complainant and the P3 form produced as P Exhibit 1. It shows the condition of the complainant's hymen to have been perforated. Accordingly, penetration was proved to have taken place beyond reasonable doubt.

31. The appellant also claimed that sections 26 and 33 of the Sexual Offences Act was not proved. The sections cited refer to the offence of deliberately transmitting HIV and other life threatening sexually transmitted disease and evidence surrounding circumstances and impact of sexual offence respectively. In my humble view, these sections were quoted by the appellant out of context as they are not supported by any

relevant issue or matter and therefore not supported. The ground of appeal based on these sections is accordingly found to be devoid of merit and is hereby dismissed.

32. The appellant also claimed that the age of the victim was not proved beyond reasonable doubt as there was no birth certificate produced. He claimed that there was no age assessment report to establish the age of the complainant and that the Child Clinic Card is unreliable and non-official and easily accessible. He further alleged that the prosecution failed to produce the treatment notes relied upon.

33. In the case of **KAINGU ELIAS KASONO –VS- REPUBLIC Criminal Appeal No. 54 of 2010** the Court of Appeal sitting in Malindi held as follows:

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"***

34. In the above case, the Court of Appeal found age to be a critical component in a defilement case and as such a material fact requiring proof beyond reasonable doubt. However, the same Court of Appeal in **RICHARD WAHOME CHEGE –VS- REPUBLIC Criminal Appeal No 61 of 2014**, sitting in Nyeri held a totally divergent view. In that case, the Court considered the question of proof of age of the victim and held thus:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."***

35. In Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"*** **[Emphasis added]**

36. What flows from the above decisions is that the Court of Appeal is clear that documentary evidence such as an age assessment report, birth certificate, baptismal card etc are not the only ways to prove the age of a victim in a defilement case. The court held that the testimony of the child regarding her age supported by the mother who bore her would be sufficient. Both these authorities emanate from the Court of Appeal and applying the doctrine of *stare decisis, the decisions* bind this court. I have no reason to depart from the said decisions which are sound in law.

37. The testimony of the complainant's mother was that the complainant was born on 20/6/2005 and a Child Clinic Card was produced to that effect, as an exhibit. The P3 form showed that the complainant was aged 11 years. As at 1/7/2017 the complainant was therefore aged 12 years and 10 days. No doubt the child clinic card is an authentic public document showing date of birth of the complainant and the institution or place where the said child was born. I therefore find that the prosecution proved the age of the complainant beyond reasonable doubt to be 12 years old and that there was no contrary evidence.

38. On the allegation that treatment notes were not produced, it is my humble view that the treatment notes could not have added any weight to the evidence already adduced establishing penetration of the complainant, as the P3 form was produced by its maker the Clinical Officer who examined the child and established the degree and extend of her injuries sustained through defilement.

39. On the allegation that section 329 of the Criminal Procedure Code was violated in that the appellant was handed a mandatory minimum sentence of 20 years imprisonment for defiling a mentally challenged child, the appellant relied on the Francis Muruatetu case. I have examined the sentencing remarks by the trial magistrate. He considered the mitigation that the appellant prayed for leniency, was sick and an old man on medication.

40. This court observes that the sentence was in respect of section 8(3) of the SOA where the child is found to be aged 12 years and above. However, the amended charge was in respect of section 7 of the Sexual Offences Act which provides:

> ***"7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."***

41. The Child was aged 12 years old and with a mental disability hence the sentencing section in section 7, not 8(3) of the Sexual Offences Act. For the above reason, I find that albeit the minimum sentence is not less than ten years, the sentence imposed which was 20 years was in my humble view excessive and based on section 8(3) of the Sexual Offences Act and not section 7 of the same Act. Accordingly, the appeal against sentence merited***. I set aside the 20 years imprisonment and substitute it with a prison term of Ten (10) years imprisonment to be calculated from the date of arrest and or confinement of the appellant if he was not on bond***.

42. On the whole, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated above.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 29th Day of July 2020 via Microsoft Teams. The Appellant present virtually stationed at Kisumu Maximum G.K Prison.

R. E. ABURILI

JUDGE