IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 2 OF 2020

CORAM: D.S. MAJANJA J.

BETWEEN

BONIFACE GITONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. P. M. Wechuli, SRM dated 23rd December 2019 at the

Magistrate's Court at Tigania in Sexual Offence Case No. 47 of 2016)

JUDGMENT

1. The appellant, **BONIFACE GITONGA**, was charged and convicted on two counts of the offence of defilement contrary to **section 8(1)** as read with **section (4)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charge were that between 2nd and 6th January 2016 at Amwari and Kakoromone within Meru County, intentionally caused his penis to penetrate the vagina of JK, a girl aged 16 years.

2. The appellant was sentenced to 15 years' imprisonment He now appeals against conviction and sentence. As this is a first appeal, it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

3. The complainant, PW 1, testified that she was 17 years old. She testified that she knew the appellant and had been in relationship with him between 2013 and 2016 and during that period she was having sexual intercourse with him. She left home on 1st January 2016 to go and see her grandmother but she went to see the appellant instead. After she had disappeared, her father, PW 2 and mother, PW 3 started looking for her. PW 2 found her at a home in Kiriko where the appellant was present. PW 2 reported the incident to the police and took PW 1 to the hospital for examination and treatment.

4. PW 4, the Clinical Officer, who examined PW 1 on 6th January 2016 observed that her labia minora and majora were intact but the hymen was broken. He noted that the red blood cells and pus cells present but no spermatozoa from which he concluded that there was penetration. He prodiced the P3 medical form and treatment notes. The investigating officer, PW 4, gave an account of the investigation. He confirmed that the appellant and PW 1 were arrested by PW 2 who brought them to the police station.

5. When put on his defence, the appellant denied the charges in his sworn testimony. He stated that he did not have a relationship with PW 1. He claimed that he was just arrested and brought to court.

6. In order to prove the offence of defilement under **section 8(1)** of the ***Act***, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

7. The evidence in this case show that the appellant and PW 1 were in a relationship for a period of time. PW 1's testimony that she was away from home is corroborated by that of PW 1 and PW 2. Moreover, PW 2 found the appellant and PW 1 together in the same house. The medical evidence is consistent with an act of penetration having taken place. The appellant defence, was in effect, a mere denial. There is no reason why PW 1 and her parents would pick on a random person to accuse of defilement.

8. The age of a child is a question of fact. In this case, in this case, the medical assessment revealed that she was 16 years old. For purposes of the offence she was child and thus unable to consent to sexual intercourse. The totality of the evidence is that the prosecution proved its

case beyond reasonable doubt.

9. I now turn to the issue of the sentence. At the time of conviction, the mandatory minimum sentence under **section 8(4)** of the ***Act*** for causing an act of penetration of a child aged 16 years was 15 years' imprisonment. However, following the decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic*** **SC Petition No. 16 of 2015 [2017] eKLR, the Court of Appeal** in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR held that mandatory minimum sentences were not tenable under the Constitution and the court has discretion to impose an appropriate sentence based on circumstances of the case.**

10. I have considered the evidence and the respective ages of PW 1 who was aged 16 years old and the appellant 22 years and the fact that they had a prior relationship. In order to protect children from sexual predation and exploitation and the law provides for heavy penalties. In this instances and circumstances, I find the term of 15 years' imprisonment harsh and excessive.

11. I allow the appeal on sentence and substitute the sentence of 15 years' imprisonment with **5 years imprisonment**.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.