REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 160 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

DAVID GITONGA M'AMURU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.P. M. Wechuli, RM dated 23rd September 2019 at the Magistrate's Court at Tigania in Criminal Case No. 273 of 2015)

JUDGMENT

1. The appellant, **DAVID GITONGA M'AMURU**, was charged and convicted of a single count of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charge were that on 13th February 2015 at (particulars withheld] Village, (particulars withheld] Sub-location in Tigania East Sub-County within Meru County, the appellant caused his penis to penetrate the vagina of EK, a child aged 11 years old.

2. Before I deal with the grounds of appeal, it is important to point out that 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**).

3. The evidence that emerged from the trial court was as follows. The complainant, EK (PW 1), testified on oath after a voire dire that she was in Class 3. She recalled that on the material day she had gone to see her friend whose father was the appellant. While she was there the appellant told her to get into the house, he removed her school uniform and dressed her in his wife's clothes. He then removed her inner pants and proceeded to penetrate her. She screamed in pain but no one responded. On the next morning, the area chief came and arrested her and the appellant.

4. The complainant's mother, PW 2, recalled that the night of 12th February 2015, PW 1 had not come home. On the next day she went searching for her at the market and was told that PW 1 was at the appellant's home. She reported the matter to the Assistant Chief. She later learnt that the appellant had been arrested after being found with PW 1. She took PW 1 to the hospital. She stated that PW 1 was born on 30th March 2003.

5. The Assistant Chief, PW 3, told the court that on 13th February 2015, PW 2 came and informed him that PW 1 had been missing. On the following morning, he went to the appellant's home very early and found PW 1 in the house dressed in the appellant's wife's clothes. He arrested the appellant and took the child to his office.

6. PW 4 was the Clinical Officer who produced the P3 medical form prepared by his colleague who examined PW 1 on 14th February 2015. He confirmed that PW 1 was seen on 14th February 2015. Her clothes were blood stained. Her labia majora and minora were inflamed and torn. Although there were no spermatozoa present when the lab analysis of the vaginal swab was done, he concluded that there was penetration. The Investigating Officer, PW 5, gave an account of the investigation.

7. When put on his defence, the appellant gave sworn testimony. He denied the offence and stated that he was away on the material day and when he returned home he was arrested. He told the court that PW 1 was his daughter's friend. He also stated that he was framed because of a land dispute.

8. In his amended grounds of appeal and written submissions, the appellant challenged the appeal on the grounds that the prosecution failed to prove its case beyond reasonable doubt. The respondent supports the conviction on the ground that the prosecution proved all the elements

of the offence.

9. 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."*

10. PW 1's testimony of what took place on the material day was direct and clear. She knew the appellant as the father of her friend, a fact the appellant admitted in his defence. PW 1's testimony leaves no doubt that the appellant caused the act of penetration. The complainants' evidence alone was capable of supporting a conviction as the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. The trial magistrate concluded that the child was telling the truth because she described in detail what happened to her and her testimony was not challenged or impeached in cross-examination and moreover, after observing her particularly the level of trauma exhibited when she was testifying, he concluded that her testimony was consistent and credible.

11. There was also corroborative evidence to support the prosecution's case. PW 3 found PW 1 in the appellant's house dressed in the appellant's wife's clothes. The appellant could not explain why PW 1 was wearing his wife's clothes. Likewise, the medical evidence was consistent with an act of penetration. I would note that the P3 medical report was produced under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which allows another medical practitioner to produce a report on behalf of another doctor. The P3 medical form and the PRC form were therefore properly admitted. All this evidence, displaces the appellant's defence, which in reality, was a mere denial.

12. As regards the age of the child, PW 2 produced the child's immunization card. It confirmed that she was 11 years old. She was therefore a child. Based on the totality of the evidence I find that the prosecution proved each element of the offence of defilement. I therefore affirm the conviction.

13. I now turn to the issue of the sentence. The appellant was charged under **section 8(3)** of the ***Act*** which refers to the defilement of a child between the age of 12 and 14 years. The prosecution proved that the child was aged 11 years old. The proper section is therefore **section 8(2)** of the ***Act*** which provides for a mandatory life term of imprisonment. The mistake on the charge sheet is not fatal and is indeed curable under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** as the appellant was not prejudiced as the sentence is no longer mandatory.

14. The mandatory minimum sentence prescribed under **section 8(2)** of the ***Act*** where the child is 11 years or below is mandatory life imprisonment. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014.** Based on those decisions, I quash the sentence of life imprisonment and substitute the same with a term of 25 years' imprisonment.

15. I affirm the conviction but allow the appeal on the sentence only to the extent that the sentence of life imprisonment is quashed and substituted with a sentence of **twenty-five (25) years' imprisonment** to run from the date of arraignment, that is, 16th February 2015.

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.