REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 113 OF 2018

TOM SAULO CHANGALWA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal against the conviction and sentence made on 15/6/2016 in Bungoma SO 23 of 2016 by Hon. J. Kingori CM)

J U D G M E N T

1. Tom Saulo Changalwa (the appellant), was a young man aged 22 years when he was arraigned before the Bungoma Chief Magistrate's Court with the offence of defilement contrary to ***section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006***.

2. The particulars of the offence were that, on diverse dates between 15/6/2016 and 25/9/2016 in Bungoma Central Sub-County within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JNN a girl aged seventeen (17) years old.

3. The appellant faced an alternative charge of an indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act, No. 3 of 2006.*** It was alleged that between the period aforesaid at the same place, he intentionally and unlawfully caused his penis to come into contact with the vagina of JNN a girl aged seventeen (17) years old.

4. The trial court found that the main charge had been proved, thus convicted and sentenced the appellant to serve fifteen (15) years imprisonment. Aggrieved by the said decision, the appellant has appealed to this Court setting out six (6) grounds which may be summarized into three (3), *viz;* ***that the trial Court erred in failing to note that the evidence presented was insufficient and contradictory, that the case was not proved to the required standard*** and ***that the trial Court erred in meting out the mandatory sentence without considering the mitigation provided***.

5. The appellant submitted that the prosecution evidence was contradictory. That his defence was not considered as the complainant was his wife whom he thought was an adult and the sexual act was consensual. That due to the peculiar circumstances of the case, the mandatory minimum sentence was unwarranted.

6. It was submitted for the respondent that the submission that the complainant willingly went to live with the appellant was baseless. The complainant did not lead the appellant into believing that she was an adult as the appellant did not take any steps to ascertain her age in terms of ***section 8(5) and (6) of the Sexual Offences Act***. In the premises, the conviction and sentence could not be faulted.

7. As the first appellate court, it behooves this Court to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32.**

8. The prosecution case was that on 15/6/2016, **JNN (Pw1)** left school at 1.00 pm and met the appellant at the stage junction. She boarded his motorbike and he took her to his home. They had lunch with his sister and later went to Matili in the house of the appellant's brother. They lived there together for three months the period which they regularly had sexual intercourse.

9. On 25/09/2016, police raided the home and arrested them. Her parents came to the police station and escorted her to hospital where she was treated and informed that she was four (4) months pregnant.

10. FNS (Pw2), father of the complainant, testified that on 15/06/2016 the complainant did not return home from school. He made effort to trace her back in the school without success. On 24/09/2016, he learnt that the complainant was in the appellant's home whereby he told the

police who raided the home and rescued her and arrested the appellant. She was then taken to hospital.

11. PC Mutai (Pw3) and CPL Jared Awiti (Pw4) of Mukuyuni AP Post told the court how they received information on 24/9/2016 from **Pw2** of the complainant's disappearance and her whereabouts. The following morning, they stormed the appellant's home and found him with the complainant. The complainant informed them that she was married to the appellant.

12. At the Makutano Health Centre, A**ggrey Musungu Khalika (Pw5)** examined the complainant on 25/9/2016. She was 17 years old. She had vaginal discharge with no injury on the labia majora or minora. She had been penetrated and had no hymen. She was pregnant for sixteen (16) weeks.

13. CPL Daniel Chacha (Pw6) investigated the case. On 25/09/2016, he was at the police station when the appellant was brought in by police officers from Mukuyuni Police Post in the company of the complainant and **PW2**. The case was booked and he referred the complainant to the hospital. He then proceeded to charge the accused.

14. In his defence, the appellant stated that the case had been fabricated due to a land dispute with **PW2.**

15. As already stated, the appellant challenged his conviction and sentence on the ground that the prosecution had not proved its case to the required standard and that the sentence was harsh.

16. Section 8 (1) ***of the Sexual Offences Act No. 3 of 2006*** defines the offence of defilement. From the definition, three ingredients must be proved by the prosecution. These are the age of the complainant, penetration and the identity of the perpetrator.

17. The complainant told the court that she was 17 years old. A birth certificate was produced which showed that she was born on 3/11/1999. This Court is satisfied that the age of the complainant was satisfactorily established.

18. On penetration, the complainant told the court how she lived with the appellant for three months. During that period, they regularly had sexual intercourse. **PW5** who examined her found that she had no hymen and she was 16 weeks pregnant.

19. Despite the appellant having denied defiling the complainant, he submitted before this Court that the complainant was his wife and that the sexual act was consensual. In this regard, penetration was satisfactorily proved.

20. On identification, **Pw1** met the appellant in broad day light. They knew each other well. She lived with the appellant for well over three months. There can be no mistaken identity. When **Pw3** and **Pw4** went to the appellant's home, they found him with the complainant. Consequently, this Court is satisfied that the appellant was positively identified as the assailant.

21. In view of the forgoing, the trial court did not err in convicting the appellant for the offence of defilement.

22. On sentence, ***section 8(4) of the Sexual Offences Act No. 3 of 2006*** provides for a minimum sentence of 15 years.

23. When examining the mandatory nature of the death sentence in **Francis Karioko Muratetu & Another v Republic [2017] Eklr,** the Supreme Court held: -

> **"The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution, an absolute right. ... Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the penal code, it becomes clear that the section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically Articles 25(c) 27, 28, 48 and 50(1) and 2(9)."**

24. In **Jared Koita Injiri v Republic [2019] Eklr,** the Court of Appeal 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."***

25. In **Dennis Kibaara v Republic [2019] Eklr,** Limo J. held: -

> **"Before considering which appropriate sentence to impose guided by the above principles, courts must also consider mitigating circumstances and it is now trite going by the decision in Muruatetu consideration of mitigating factors constitutes an element of fair trial enshrined under Articles 25 and 50 of the Constitution. It is therefore clearly apparent that if courts were to continue being bound by prescriptive nature of minimum sentences, mitigation would be rendered superfluous because at the end of the day, it would matter less if a convicted person spends a whole hour giving mitigating circumstances or just 30 seconds to simply pray for leniency. Invariably a court would record the mitigating circumstances and hand in the minimum sentence even if it feels that the prescribed minimum is way too harsh in some given circumstances such as the circumstances obtaining in this case".**

26. In his mitigation, the appellant was a first offender. He stated that he was only 22 years old. He submitted that he thought that the

complainant was a wife material and that is why he went to live with her. The complainant herself told the arresting officers that she was married to the appellant. May be the appellant might have had a defence had he had legal Counsel.

27. In this regard, I would like to associate myself with the sentiments of the Court of Appeal in the case of **Eliud Waweru Wambui v Republic [2019] Eklr,** wherein it delivered itself thus: -

> **"We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in GILLICK vs. WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies.**
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> **...**
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> **Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation."**

28. The appellant submitted that from the behavior of the complainant, he believed she was an adult. Though, he did not show the steps he took to ascertain the age of the complainant as stipulated under ***Section 8(6) the Sexual Offences Act***, he cannot be faulted as the complainant herself told the police she was married to the appellant.

29. Taking everything into consideration, I am persuaded that the appeal lacks merit on conviction but succeeds on sentence.

30. Accordingly, I uphold the conviction. On sentence, I have considered the circumstances under which offence occurred, the age of the victim, her conduct and the appellant's mitigation, and I am satisfied the sentence meted out was excessive.

31. Accordingly, the sentence of fifteen (15) years imprisonment is hereby set aside and substituted with time already served. The appellant is therefore to be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE