REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 35 OF 2016

HILLARY NGETICH KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence from Adult Criminal

Case Number 151 of 2013 by the A. Towett (Resident Magistrate) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. The appellant Hillary Ngetich Kirui was charged with **defilement Contrary to Section 8(1) (2) of the Sexual Offences Act.**

2. It was alleged that on 2nd August 2013 in Njoro Direct within Rift Valley Province Nakuru County, he unlawfully and intentionally committed an act by inserting your male genital organ (penis) (sic) into the vagina of MC, a child aged six (6) years of age which caused penetration.

3. In the alternative he was charged with indecent act with a **child contrary to section 11 of the Sexual Offences Act,** where he was accused of *"touching her private part namely vagina."*

4. The appellant pleaded not guilty on 6th August 2013. On 29th February 2016 he was found guilty, convicted and sentenced to life imprisonment for the offence of defilement.

5. Aggrieved the appellant filed this appeal on the following amended grounds:-

> *1. THAT the trial court erred in law and fact in failing to superintend a fair trial as provided for in the Constitution.*
>
> *2. THAT the learned trial magistrate erred in law in not appreciating that the medical evidence was benign and hence unable to prove the element of penetration.*
>
> *3. THAT the learned trial magistrate erred in law and fact in not proving the age of the complainant beyond reasonable doubt standard between 95% to 99% certainty.*
>
> *4. THAT the learned trial magistrate erred in law and fact in not finding that the conviction and sentence were premised on ambivalence since life sentence was unmetered and hence undefined how long it was long.*
>
> *5. THAT the learned trial magistrate erred in law and fact in descending into the arena so that the judgment became warped in the dust of conflict thus smacking of open bias and failure to analyse and appreciate my defence.*

6. He also filed written submissions to which the state through Ms. Nyakira made oral submissions. Mr. Cheche for the appellant relied wholly on the submissions filed by the appellant.

7. Five (5) witnesses testified for the prosecution. PW4 VS the mother to MC testified that she was born at home on 10th November 2008 according to the clinic card she had. VC was a hotelier at Mauche. On 2nd August 2013 she came home and found her children asleep. On the morning of 3rd August 2013 when the child woke up she could not walk. In her evidence in chief she testified: ,

"*She told me that she met Hillary who defiled her while in the maize plantation. I then examined her private parts and then went to Mauche Police Station where the officer examined her. The police officer then advised me to take her to hospital. It was a Saturday… P3 was not filled on 5th August 2013 P3 was filled… when we went back to Mauche and I called police officer who came and arrested him. The complainant was present and she identified him…"*

8. The police officer was **PW5 No. 96218 PC Miriam Suleiman**; this was her testimony.

"*I am called Miriam Suleiman for Likia Police Station. I am No. 96218 PC, I am attached to Mauche Police Post and investigating officer in this case.On 3/8/2013 I was at the station when MC and her mother came and reported that Mercy had been defiled. He took the subject to hospital at Njoro Health Centre and p3 form filled. I interrogated the witness and the complainant and I recorded the statement and later arrested the accused person and took him to hospital at Njoro Health Centre where he was examined. The medical documents were produced by the doctor. I also obtained the clinical card and I also took the child to hospital for age assessment. The clinic card indicates the child was born on 10/11/2008. As the investigating officer I would wish to produce the clinic cards exhibit (P exhibit 2) the person whom we arrested is here (positively identified) I arrested him with PC Jacob. I did not know the accused person before. I later recorded my statement."*

9. The clinical officer was **PW3 – David Cherono** from Njoro Health Centre. He testified that the complainant first visited the family on 3rd August 2013 with history of defilement by a person known to her. When he examined her *"the incident had taken place after three days and the injury had been inflicted by male genitalia… the offence was defilement and the complainant was aged 10 years old in her private parts she had injuries… labia minora with freshly perforated hymen. She had pus cells discharge and moderate epithelial cells, evidence of defilement."* He filled P3 on 5th August 2013 and produced the treatment card.

10. The appellant was also examined at the facility, that urinalysis showed pus cells confirming he had an infectious disease.

11. After conducting voire dire the trial court established that though the child said she was six (6) years old she, ***"is knowledgeable and understands that she is supposed to say the truth, she understands the nature of oath, she will give sworn testimony."***

12. On oath the complainant told the court that she was six (6) years old and in top class at [Particulars withheld] school. That on 2 nd August 2013 at 2.00 p.m. while from school alone.

"*Hillary came from the road. He was alone. He then came from behind me and took me to the shamba and he did bad manners to me. the shamba had peas… he removed my clothes I had a … red uniform… full dress… biker. When he removed my clothes I was seated… Hillary then removed his clothes… He removed his duda and inserted it into mine… when he did that I cried a lot but he continued to do bad manners to me. When he was done I dressed up and left and he also left. I was the first one to leave. I walked back home. I then checked my private parts when I reached home I had some discharge. I had some discharge when I reached home I found my mother there and I told her what had happened. I told her Hillary had done bad manners to me. My mother took me to the hospital in the morning…. I knew him before he did bad manners to me. I knew his home… I had seen Hillary many times."*

13. On cross examination the complainant said the shamba had maize and a lot of trees. She said she did not bleed but she saw fluid or discharge on her private parts. She said she did not know the accused's home. She said that it was her mother who told her his name was Hillary. On re-examination she said the shamba did not have peas but maize and trees. She said she had seen Hillary before that day but she did not know his name.

14. The complainant was also taken for age assessment as per the testimony of Dr. Omuret Joyce Otieno PW3 who testified that she was between 5 – 6 years old.

15. It is on this evidence that the trial court found that the prosecution had established a prima facie case against the accused to warrant his being put on the defence.

16. The appellant denied the charge. He gave sworn statement of defence. He testified that he did mandazi business at Mauche which he would cook from 10.00 a.m. to evening. However, on 2nd August his brother Caleb had been involved in an accident and he spent the whole day dealing with that issue, taking him to hospital, back home. On 5th a police officer told him that his brother had been arrested and was at the police station. He boarded the same motor bike with the police officer and they went to the police station where he learnt he was under arrest on allegations of defilement. He was then taken to Njoro Hospital and tested for HIV. He denied committing the offence. He said he only knew the complainant's mother but did not know the child. He said on 2nd August 2013 he was in Mauche Center, which is where he lived.

Appellant's submissions

17. The gist of the appellant's submissions is that the prosecution failed to discharge its duty to prove the case beyond a reasonable doubt.

18. On the first ground the appellant argued that his right to fair trial was violated because the court did not ensure that the prosecution complied with **Article 50(2) (g) of the Constitution**. That, true he had counsel to whom the state had supplied witness statements. However, when the trial court decided to proceed in the absence of the appellant's counsel, the court did not ensure that the appellant had all the witness statements and was ready to proceed. The trial court simply chose to proceed. He pointed to the record where it states:

"***Court: Matter placed aside to 9.40 a.m. it is now 10.15 a.m. and the advocate to accused is not present. This matter involves a***

minor and the doctor has been waiting since 9.00 a.m. matter to proceed for hearing."

19. The appellant argues that this was open bias by the trial court. While alive to the fact that cases involving minors ought to be expedited, the appellant submitted the witness waiting was a not minor. That the court could have called his counsel or at least sought his views on the matter proceeding without her. The result was that the trial was unfair and he was prejudiced.

20. Further on the issue of unfair trial the appellant argued that the trial court violated the provisions of **Section 198 (1) Criminal Procedure Code and Articles 49(1) (a) (i) (ii) (iii)** in that the trial court never established the language the appellant understood, which language is 'Pokot', that the record simply shows that the proceedings were in English. He cited; **David Nyongesa Okwatenge vs Republic [2010] eKLR and Bishar Abdi vs Republic [2010] eKLR, Adan v Republic [1973] EA 445.**

21. Regarding the medical evidence he cited the Doctor's testimony that *"On 3/8/2013 the complainant by name MC came to our facility with history of having been defiled by a person known to her."* He submitted that the clinical notes from that hospital were dated 4/8/2013 and 5/8/2013 respectively but did not contain the reference number on the P3. To him therefor, the P3 was *'' premised on a lacuna or gap''.* He asked the question *"If the complainant visited hospital on 3rd August 2013 then how comes the treatment notes show a different date?"* and submitted that it simply meant that the P3 drew its reference *''from a figment of imagination or simply put, from a lacuna''.*

22. On the injuries described in the P3 and the probable type of weapon he submitted that these were glaringly missing from the P3 as well as, probable age of injuries and the immediate clinical results which are missing. He urged the court to find that the explanation for this was that no injuries were observed. Citing, Section 33 of the Sexual Offences he submitted that the surrounding circumstances and impact of a sexual offence were not captured by the clinical officer and that his evidence are captured exhibited *"a wild-goose chase of his own''.* He urged the court to find that the evidence on penetration was not beyond reasonable doubt as it was *'between 95% to 99% certainty.'*

23. On age of the complainant, he submitted that it is now settled that age must be proved. He found it strange that in 2013 when the offence was alleged to have been committed complainant was six (6) years, but the clinical officer who examined her said she was ten (10) years. When the mother testified in 2014 the complainant was still six (6) Years. Hence the age assessment report ought to be dismissed.

24. Relying on **Burunyi & Another vs Uganda1969 EA 123 & Peter Opiyo Opapa vs Republic CR. 265/1985 (UR) KSM w**here the case of **Muriu & Others vs Republic (1955) 22 EACA 417** he submitted that the court descended into the arena of conflict.

> *"It has been observed that a Judge must not descend into an arena so that his judgment (sic) becomes warped up by the dust of conflict conversely, a Judge cannot sit in splendid isolation above the conflict and not intervene when he detects a lacuna of ambiguity in the evidence."*

25. Finally, he submitted that the trial magistrate did not write the judgment.

26. Regarding the sentence, the appellant relying on **Francis Muruatetu** submitted the life sentence cannot mean the entire lifetime of a prisoner. He submitted;

> *"First, it would be going against the grain on the very intention of reforming with justice used by the Prisons Authorities and also International Conventions. In the Apex Court's decision in **Petition No. 15 of 2015 of Francis Karioko Muruatetu** and **Wilson Thirimbi Mwangi** delivered on 14/12/2017, there was a unanimous agreement by the Judges that life sentence cannot mean the entire life of the prisoner. This court being a Constitutional Court has unfettered original jurisdiction to set the record straight over how long life sentence should be in a known metered form in this appeal. Your Lordship, it would not be the first time for a court of concurrent jurisdiction to pronounce itself over the matter. I therefore urge this Honourable Court to be counted among the most progressive and enter the annals of history as one among equals for having pronounced itself that there must be a limit to how long life imprisonment should be." (emphasis added)*

27. The prosecution through Ms. Nyakira submitted on the original Grounds of Appeal on the ground that the appellants amended Grounds of Appeal raised nothing substantially new.

28. In those grounds the appellant had pointed out that the complainant was coached. She submitted that there was no evidence the complainant was coached. That the P3 and Post Rape Care proved that the complainant was defiled and the evidence did not exonerate the appellant. That the prosecution had presented credible evidence which was also consistent and well corroborated. That no hearsay evidence was presented to trial court. That the appellant was placed at the scene of the offence.

29. I have carefully considered the evidence and submissions. What emerges is that the appellant is challenging the totality of the case for the prosecution. If we start with the evidence of the investigating officer, she does not say why the appellant was charged with this offence or that she even recommended a charge. She simply states what she did up to point of arresting the appellant. Nowhere in her testimony does she say that she investigated the case and formed the opinion that the offence of defilement was committed.

30. On age the of the complainant, the prosecution presented an array of evidence. The charge sheet says that complainant was six (6) years old on 2nd August 2013. The clinic card showed she was born in 2008. The P3 showed she was six (6) years old. on 5th August 2013, the age assessment allegedly done on 10th April 2014 said she was between 5 and 4 years, but the four (4) is crossed out and changed to six (6) without any the signature of the person changing it. In his oral testimony the clinical officer said the complainant was ten (10) years old. Anyone would wonder whether the prosecution witnesses were talking about the same person. Whom did the clinical officer examine? On whom was the age assessment conducted? This *vis -a -vis* the complainant who testified before the trial court? There is a difference between a 4-year-old, a 6-year-old and a 10-year-old. One person presenting not just the appearance, but the age on examination by professional creates great doubt as to the integrity of that evidence making it incredible.

31. Was there penetration? The prosecution relies on evidence of complainant and the medical evidence. On 5th August 2013 the clinical officer indicated that the hymen was freshly perforated laceration on labia minora and majora and foul smelling discharge. In the same P3 he indicated that the injuries were three days old, so how would he describe a freshly perforated hymen? Would three days fall into 'freshly'? He did not also explain how he drew the conclusion that the injuries are caused by male genital organ. Penetration is a key component of defilement. It must be demonstrated that it was by the genital organ of the accused person. How did the clinical officer arrive at the conclusion that what he says he saw was caused by male genitalia.? It was just written there in the P3. Without any explanation. With due respect that is not enough.

32. The complainant testified after the appellant inserted his duda into hers, she felt a lot of pain but did not bleed, but only saw a discharge. There is a tingling doubt as to whether it is credible that there would be forceful penetration of a six (6) year old by an adult male genitalia, and there be no tears, no bleeding? Again this was not explained when the medical evidence was given. This is not explained by the doctor at all.

33. The most curious thing is the contradiction between her testimony and that of her mother.

> ***1) That on 2nd August when she came home after the defilement she found her mother at home and told her that she had been defiled by Hillary.***
>
> ***2) That her mother took her to hospital the following day in the morning***

If the complainant is to be believed that the offence occurred about 2:00pm, she went home, found her mother and reported to her why would her mother wait until the following day to take her to hospital?

> 3) Her mother's testimony that on 2nd August 2014 she arrived home when the children were already asleep and only learnt of the defilement on the morning of 3rd August 2013 when the PW1 woke up and was unable to walk.

The complainant already told the court she reported to her mother the same afternoon. So who is to be believed?

> 4) That PW1 told her mother that the defiler was Hillary yet the complainant said it is her mother who told her the name of the person who defiled her was named Hillary.

34. The above raises the question as to whether the appellant identified? Clearly, there is nothing from the complainant's testimony that she identified the appellant, the mother says she called the police to arrest the appellant and she is the one who says that complainant identified him. PW5 the investigating officer only said she arrested the appellant while in the company of PC Jacob. She does not say how the appellant was identified for arrest.

35. While the complainant said she had seen the appellant before, there is nothing on record to show that she identified him for arrest. Other than that her mother told her his name, how the mother was able to arrive at the name is not on record.

36. The complainant clearly said she did not know the name of her attacker but was told the name by her mother. What are the odds that he may not have been the one, noting that she said the person who defiled her came from behind? It was during the day and it would have been expected she would give a bit more detail if indeed she knew the appellant before. For example, where she had seen him before the alleged many times. It was just a statement, that she had seen him before. Where, when, was not established. The evidence on the identity of the perpetrator is unreliable.

37. In addition to the contradictions pointed to hereinabove in her evidence in chief the complainant said the incident happened in a shamba where there were peas. She later charged and said there were no pleas but maize and trees. The investigating officer did not visit the scene so we have no reliable evidence on what the scene was, and whether it is a place where such an offence could happen, that at 2.00 p.m. there would no other person on that road, that the complainant was alone. Secondly there is no evidence as which other adult was in the home that night if we are to believe the complainant's mother. This is evidence that would be unsafe

38. The above contradictions and inconsistencies are not idle. They go to the core of the charges facing the appellant before the trial court. They raise issues that **Section 33 of the Sexual Offences Act** speaks to;

> · Whether the offence happened as alleged
>
> · Whether the accused person committed the offence.

It is my view that the that the case for the prosecution as presented does not adequately settle those two issues.

> *1*. The appellant invoked this court's constitutional jurisdiction to declare imprisonment to life unconstitutional. He cited the **Francis Karioko Muruatetu & another v Republic [2017] eKLR.** I hold the view that persons who commit crimes and transgressions against the society, given the chance, and the appropriate rehabilitation can pay for their wrongs and transform to better persons and reintegrate back to society. That the criminal justice system should at all times give them that window of hope. An indeterminate sentence takes away that hope, and in my view has no place in a Constitutional democracy such us ours where the Constitution declares at Articles — 19(2) *The purpose of recognising and protecting human rights and fundamental freedoms is to **preserve the dignity of individuals** and communities and to promote social justice and **the realisation of the potential of all human beings***. And at 20 (4) *In interpreting the Bill of Rights, a court, tribunal or other authority shall promote— (a) **the values that underlie an open***

and democratic society based on human dignity, equality, equity and freedom; *and (b) the spirit, purport and objects of the Bill of Rights*. Why would the society just choose to lock up a man or woman for the remainder of his human life for an offence in our Prisons whose Motto is "***Kurekebisha na Haki*** "or ***Rehabilitation and Justice***. It is like we are so certain that this person can never reform, can never be rehabilitated. Except for the offence committed by the offender who sentence is defined, there are no other parameters set out to determine that really this person, irregardless of whatever we do with him, must be locked up for the remainder of his life until death do us part, without the opportunity to come back to society upon reform? There is something terribly twisted about that. And the Appellant has a point.

39. However, I cannot purport to determine any issue in that regard because the Supreme Court pronounced itself firmly, on the issue while citing with approval, the High Court case of ***Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui),*** and for the sake of the appellant I quote from the case.

40. First the court asked itself ***a) "Whether the indeterminate life sentence should be declared unconstitutional"*** The Court then stated

[73] Counsel for the 1st Petitioner raised two issues with regard to the 'indeterminate' or 'indefinite' life sentence, as follows: whether the indeterminate nature of a life sentence is unconstitutional and whether this Court should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment. We will address the two questions separately. [74] The 1st petitioner submitted that the indeterminate life sentence is contrary to Articles 28 (right to dignity) and 29 (d) and (f) of the Constitution (protection from physical or psychological torture and protection from cruel, inhuman and degrading treatment or punishment) and it also does not provide the prisoner with an avenue for review of the sentence. The 2nd petitioner has argued that the indeterminate life sentence which is devoid of judicial input is contrary to Article 50 of the Constitution, which provides for the right to a fair trial. The respondent, the DPP, did not provide substantive submissions on this question. [75] On the other hand, counsel for the amici curiae urged the Court not to determine 'the constitutionality of any aspect of life imprisonment', as it has not as yet been canvassed in the High Court or the Court of Appeal. He also argued that because of the complexity of the issue, the Court should avoid pre-judging any future challenge. In the event that the Court chose to determine this issue, he argued that a lack of provision in legislation for remission or parole for persons serving life imprisonment is contrary to amongst other sections, Article 27 of the Constitution (discrimination). [76] We have perused and analyzed the Petition and the written submissions and it is clear that the petitioners have not sufficiently argued and illustrated the particulars of why the indeterminate life sentence should be declared unconstitutional. Indeed, counsel for the 1st petitioner upon being asked by the Court to elaborate on this issue was not able to provide adequate submissions. ***A critical issue such as this, where legislation is to be examined is deserving of the reasoned and well-thought arguments of the petitioners, the Director of Public Prosecution and other interested parties or amicus curiae and input of the High Court and the Court of Appeal. This will allow this Court to benefit from the reasoning of these superior Courts and the parties will not be disadvantaged by this Court's holding which will in effect make this Court a court of first and last instance. It is therefore our view that the submissions made did not canvass the issue to our satisfaction. Consequently, we will not make a determination on it***

41. Then on ***whether the it could can fix a definite number of years to constitute life sentence*** the Court went on to state:

[89] …we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the Constitution, which reads: "51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned. (3) Parliament shall enact legislation that— (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments." [90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of ***Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui),*** *where the Court held at paragraph 72 and 76 that—* ***"As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature. 76. …. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."*** *[94] We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence.* ***Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature****.*

41. Hence, it is clear that the view of the Supreme Court on the number of years constituting life imprisonment is a matter for the legislature.

42. As to the constitutionality of the sentence of life imprisonment, it is only its mandatory nature that was declared unconstitutional in respect of the offences that carry it as a mandatory sentence; but as to constitutionality of the sentence of life imprisonment *per se* the appellant is at liberty to file the appropriate petition as suggested by the Supreme Court in *Muruatetu.* The appellant's submissions are inadequate to enable this court to make a pronouncement on the matter.

43. In the upshot, I find that the appeal is merited, the conviction is quashed, the sentence set aside and the appellant be set at liberty unless otherwise legally held.

Dated and Signed and Delivered at Nakuru this 3rd day of August ,2020.

Mumbua T. Matheka,

Judge

<u>In the presence of: VIA ZOOM</u>

Martin Court Assistant

For state: Ms Wambui

Appellant: Present

Mumbua T. Matheka,

Judge.