REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 48 OF 2018

BENARD MWANGI NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable R. Amwayi - Resident Magistrate,

delivered on 15th *May, 2018 in Molo Chief Magistrate's Court Criminal Case No. 1586 of 2015)*

JUDGMENT

1. The Appellant herein is Bernard Mwangi. He was arraigned before the Molo Chief Magistrate's Court charged with a single count of defilement. The charge sheet stated that his offence was "contrary to section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006."

2. The particulars enumerated in the charge sheet were that on the 15th day of June, 2015, in [Particulars Withheld] Village, Molo District within Nakuru County, the Appellant intentionally caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of MW, a girl aged 8 years old.

3. An alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act was also levied against the Appellant. The specifics as to victim, time and place of the offence are the same as those in the main charge.

4. The Appellant denied the charges and a trial followed. During the trial, the Prosecution called six witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer. The Appellant elected to give an unsworn statement and did not call any witness. The Learned Trial Magistrate returned a verdict of guilty and sentenced the Appellant to life imprisonment as per the statutory minimum in section 8(2) of the Sexual Offences Act.

5. The Appellant is dissatisfied with both the conviction and sentence and has appealed to this Court as a matter of right. Through his advocates, Kerubo Maobe & Associates, the Appellant's original Petition of Appeal raised three grounds of appeal. I will reproduce them verbatim warts and all:

> 1. The Learned Trial Magistrate failed to enter a conviction and sentence against the weight of evidence and therefore misdirected herself on the legal requirements to establish a case against the Appellant beyond any reasonable doubt.
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> 2. The Learned Trial Magistrate erred in law and in fact in not considering the Appellant's defence and mitigation.
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> 3. The Learned Trial Magistrate erred in law and in fact in failing to indicate which language the proceedings were conducted.

6. Subsequently, the Appellant's counsel filed Supplementary Grounds of Appeal. Again, reproduced verbatim, the grounds are that:

> 1. The Learned Trial Magistrate failed to record the evidence of the witnesses as was tendered by witnesses and subsequently entered a conviction and sentence against evidence that was mis-recorded.
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> 2. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's cross-examination in her judgment.
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> 3. The Learned Trial Magistrate erred in law and fact in misrecording the Appellant's defence in her judgment and subsequently

entered a conviction and sentence against evidence that was mis-recorded.

4. The Learned Trial Magistrate erred in law and in fact in entering a finding on the demeanour of the Complainant when she was not the Presiding Magistrate at the time of hearing.

5. The Learned Trial Magistrate erred in law and fact in sentencing the Appellant to life imprisonment which was excessive.

7. In the Court below, the following evidence emerged.

8. The Complainant testified as PW1. She testified after the Learned Trial Magistrate conducted *voir dire* and concluded that she understood the meaning of oath. She told the Court that she was eight (8) years old; and that on 15/06/2015, she had not gone to school because she was unwell. At around 5:00pm on that day, she said, she was at home playing with a baby whose mother was C. It would seem that C is a relative. The said C, then, told the Complainant to go and untie the sheep at the Appellant's homestead. The Appellant is a cousin to the Complainant and is a neighbour.

9. The Complainant testified that when she got to the Appellant's place, the Appellant asked her to do "*tabia mbaya*" with her. She said she declined but the Appellant dragged her forcefully into a maize *shamba* next to the house. While there, the Complainant said that the Appellant pressed her head to the ground, removed her panties, unzipped his trousers, removed his penis ("*kitu yake ya kukojoa"*) and started defiling the Complainant in her "*kitu ya kukojoa*" (vagina). The Complainant testified that she felt pain as the Appellant penetrated her and that she screamed. She said that the Complainant raped her for about two minutes and then left her. He promised, she said, to give her Kshs. 50/- if she did not tell anyone.

10. The Complainant said that she immediately left the maize *shamba* and went to her grandmother's home. There she met her aunt, PN, whom she told what had happened. The aunt, then called the Chief and the matter was reported to Molo Police Station. Thereafter, the Complainant said, she was taken to the Police and the hospital for examination.

11. The Complainant's brother – MN – and her mother – LW – testified as PW2 and PW3 respectively. MN testified that he was at home when his sister came at around 6:00pm on 15/06/2015 and reported to him and their aunt, that she had been defiled by the Appellant. He said that he immediately called their mother and then rushed to where their mother was to inform her. LW, the mother, corroborated this part of the narrative and said that she got a call from MN about the incident. She then took a *boda boda* to go home where she found that the Chief and the Village elder had already arrived. She found the Complainant crying. She escorted the Complainant to the Police and the hospital for examination.

12. The village elder who was at the scene was David Ongaji Likidio. He testified as PW4. He testified that he was finalizing a meeting on that day – 15/06/2015 – when he got a call about a defilement. He also saw a large crowd on the road. He went to the home of the Complainant and interrogated her. He found the Complainant crying. The Complainant told him that she had been defiled by the Appellant. Mr. Likidio said that he called the Chief and the Administration Police who apprehended the Appellant and took him to Molo Police Station.

13. At Molo Police Station, the incident was recorded by a PC Christine on 15/05/2015 at around 7:00pm. PC Christine was the initial Investigating Office before PC Thomas Nyamori took over the case. It was PC Nyamori who testified as PW6. He confirmed that according to the Police records the Appellant was presented to the Police Station by Administration Police Officers from Matumaini Area. They were also accompanied by the Complainant and her mother. PC Nyamori testified that the Police issued a P3 Form and referred the Complainant and her mother to Molo Sub-County Hospital. Upon completion of his investigations, PC Nyamori was persuaded that the Appellant had committed the offence and recommended that he be charged with defilement.

14. When the Complainant went to Molo Sub-County hospital, she was examined by Dr. Kuria. It was Dr. Kuria who filled out the P3 Form after the examination. However, by the time the trial was being conducted, Dr. Kuria was no longer at the hospital. It fell on a Dr. Magdaline to go to Court to produce the P3 Form on her behalf. Dr. Magdaline's second name is, unfortunately, not indicated in the Trial Court Record. In any event, she testified that she knew Dr. Kuria's handwriting having worked with her.

She produced the P3 Form without objection from the Appellant's lawyer. She noted that the P3 Form indicates that the Complainant's complaint was that she had been defiled by someone well known to her. Upon examination, the doctor found a freshly broken hymen and moderate lacerations on the posterior vaginal wall. Though the doctor found no evidence of spermatozoa and other tests were negative, his conclusions were categorical that there was evidence of forceful vaginal penetration.

15. Put on his defence, the Appellant said that on the material day, he went to cut Napier grass and then went home. He said that he found the Complainant at their home together with his sister's daughter. He claimed that he had had a disagreement with the Complainant's mother a week before when she had asked him to transport her to town at 10:00pm. He said that he took her to town but when she delayed in her mission, he decided to return home forcing her to take another *boda boda* home. The Appellant said that the Complainant's mother was unhappy with this and demanded that the Appellant refunds part of the fare she had paid. When the Appellant refused to refund, the Appellant said that the Complainant's mother warned him of dire consequences. He believed that the defilement case was, therefore, the "dire consequences" the Complainant's mother had threatened.

16. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic*** **[1972] EA 32**).

17. On appeal, the Appellant's counsel has raised four

"procedural" or technical complaints against conviction which I should deal with at the outset.

18. First, counsel argues that there was a mistrial because the trial was conducted in English and Kiswahili – yet, counsel argues, the Appellant understands neither since he did not go to school. Counsel makes this argument by deduction; not factually.

She says that since it is "conceded" that the Appellant never went to school, then it must be conceded that he does not understand English or Kiswahili.

19. The requirement that trial be conducted in a language that an Accused Person understands is a constitutional imperative enshrined in Article 50 of the Constitution. However, the violation or adherence to that right is a factual matter not one of deductive conjecture. Here, according to the Court record, the Appellant informed the Learned Trial Magistrate at the time he was arraigned that he understood Kiswahili. Plea was, therefore, taken in Kiswahili and the rest of the trial was translated into Kiswahili. What is more is that when put on his defence, the Appellant gave a substantially long statement in Kiswahili. There is really no basis for the latter-day contention that the Appellant did not understand the language in which the trial was conducted.

20. Second, Counsel for the Appellant makes the unusual argument for the first time in her submissions that the Learned Trial Magistrate "failed to record the evidence of witnesses as was tendered by witnesses and subsequently entered a conviction and sentence against evidence which was mis-recorded." This is a serious allegation – one which cannot be made casually in submissions while expecting it to stick. A party on appeal who seriously contends that there was mis-recordation of what transpired at trial is required to make an appropriate application for the Court to receive additional evidence and then swear an affidavit indicating the evidence which the party contends was not recorded or was wrongly recorded. A bald accusation made at the submissions stage cannot carry the weight of such a serious charge.

21. Third, Counsel for the Appellant argues that it was an error for the Learned Trial Magistrate to convict on uncorroborated evidence of a minor. The Counsel cited section 124 of the Evidence Act. The response to that complaint is, of course, in that self-same section of the Evidence Act: The proviso to that section states:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

22. In this case, the Trial Court conducted a *voir dire* examination and the Learned Trial Magistrate was satisfied that although the complainant could not be sworn, she understood the need to tell the truth. In its analysis, the Learned Trial Magistrate is clear that she was convinced that the Complainant was truthful. By law, therefore, there was no requirement for corroboration.

23. Fourth, the Appellant complains that the Learned Trial Magistrate was wrong to make a finding on the demeanor of the Complainant and basing her judgment on the assessment when she was not the presiding magistrate at the time of the hearing.

24. It is true that the Learned Trial Magistrate who delivered the judgment purported to analyse the demeanor of the victim yet she was not the one who had heard that witness. The Learned Trial Magistrate stated this:

> The Complainant in her testimony (sic) narrated clearly what happened to her on that fateful day. Her testimony was well corroborated, consistent and coherent. To me she did not look like a witness who had been coached to frame or implicate the Accused Person. She remained calm even during cross examination and to me (sic) was a truthful witness.

25. It is true that the Learned Trial Magistrate was wrong to make comments on the demeanor of the Complainant while the Complainant testified before a different magistrate. However, this, on its own, is not a reversible error. This Court is called to perform a *de novo* review of all the evidence – which I do below. In doing so, the Learned Magistrate's remarks about the demeanor of the witness will be ignored.

26. Turning to the substantive matters, this Court must be satisfied, on its own evaluation of the evidence, that the offence charged was proved beyond reasonable doubt.

27. The offence of defilement has three elemental ingredients which must be proved by the Prosecution beyond reasonable doubt:

a. The age of the Complainant;

b. Proof of penetration; and

c. Identification: proof that the Appellant caused the penetration.

28. On the age of the Complainant, a Birth Certificate was produced. It proved that the Complainant was below twelve years old. She was born on 01/11/2007 and was, therefore, 8 years old at the time of the offence. The P3 Form also stated her age as 8. Further, the the oral testimonies of the Complainant and her mother also identified her date of birth as 01/11/2007. There can be little doubt on this aspect of the case.

29. The P3 Form coupled with the oral testimony of the Complainant are also un-impeachable evidence of penetration. The Complainant gave straightforward and compelling testimony about what happened. Her testimony was consistent even in the little details – and it remained so through cross-examination. The P3 Form produced as evidence corroborated that there was penetration as did the testimonies of

PW2 and PW3 about what the Complainant told them immediately after the sexual assault.

30. This latter evidence also goes to the element of identification. The Complainant remained consistent about not only what happened to her but who did it to her. Immediately after the incident, the Complainant went home and told her brother and her aunt what had happened. She described what had happened and named her assailant. Her assailant, the Appellant, is a relative. The assault happened at about 6:00 pm when there was still day light. There is no possibility of error. The Complainant told the village elder the same. She also persisted in the same story to the Investigating Officer and the doctor who examined her.

31. The Learned Trial Magistrate considered the Appellant's defence and dismissed it as implausible and incredible. She believed the Prosecution witnesses' narrative instead. I find no reason to interfere with this finding of facts on the basis of the evidence recorded.

32. On the basis of this consistent testimony, the Learned Trial Magistrate was entitled to come to the conclusion that it was the Appellant who, indeed, sexually assaulted the Complainant.

33. Based on this analysis, it is my finding that all the ingredients of the offence of defilement were proved beyond reasonable doubt and the conviction was safe.

34. Turning to sentence, the Learned Trial Magistrate imposed a sentence of life imprisonment in line with section 8(2) of the Sexual Offences Act which provides that as the minimum sentence.

35. In the recent past, our case law has departed from the position that the minimum sentences provided for in the Sexual Offences Act are categorical and immutable prescriptions from which a sentencing Court cannot depart regardless of the circumstances of the individual case before them. This was perhaps most clearly held in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

> In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko *Muruatetu & Another v. Republic*, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.
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> Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.
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> The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

36. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

37. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court that he was remorseful and that he was a family man and the sole bread winner for the family. He pleaded for leniency.

38. I have also noted that the offence is, without question, a serious one. Defiling an eight-year old is the height of barbarism. When committed by a relative who the child trusted, it is doubly so. The trauma occasioned on this young victim will likely haunt her for the rest of her life.

39. However, it is also true that the Appellant was a first offender; and he expressed remorse for his evil deed. It is also true that he asked for leniency. It is, lastly, also true that the Appellant was not gratuitously violent or depraved in the commission of the crime.

40. All factors considered, I am of the view that a life imprisonment sentence in the circumstances of this case is excessive. I would, instead, revise it downwards to imprisonment for a period of twenty-five (25) years.

41. The upshot is that the appeal against conviction is dismissed. I allow the appeal as regards sentence alone. The sentence of life imprisonment is hereby set aside. In its place, I substitute therefor a sentence of twenty-five (25) years imprisonment. The prison term shall run from 17/06/2015 – the date the Appellant was first arraigned in Court – since he remained in custody since that day.

42. Orders accordingly.

Dated and delivered at Nakuru this 26th day of November, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.