REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 129 OF 2016

BETWEEN

DANIEL MWANGANGI MWINZI........APPELLANT

AND

REPUBLIC...RESPONDENT

(Being Appeal from the original conviction and sentence of the Chief Magistrate's Court at Nairobi Cr. Case No. 786 of 2015 delivered by Hon. Oluoch (SPM) on the 5th day of August, 2016).

JUDGMENT

Background

1. The Appellant, **Daniel Mwangangi Mwinzi**, was charged in the main count with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars were that on the 25th day of April, 2015 within Nairobi County, he intentionally and unlawfully committed an act which caused penetration of his male genital organ, penis into the female genital organ, vagina of **LB** a girl aged 7 years. In the alternative, he was charged with committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act** in that he intentionally and unlawfully committed an indecent act with **LB** , a girl aged 7 years by touching her private parts namely vagina.

2. After a full trial, the Appellant was found guilty of the main count and convicted accordingly. He was consequently sentenced to serve life imprisonment. He was aggrieved with the decision and filed the present appeal.

Grounds of Appeal

3. The appeal is based on four Amended Grounds of Appeal raised in the Appellant's written submissions filed on 17th December. 2019, namely:

> **i. THAT the trial magistrate erred in law and fact by failing to find that the elements of the offence (penetration) was not conclusively proved to warrant a conviction.**
>
> **ii. THAT the learned trial magistrate erred in law and fact by failing to find that the Appellant was not issued with statements as required by the law.**
>
> **iii. THAT the whole of the prosecution's evidence was based on suspicion.**
>
> **iv. THAT the prosecution's case fell below the required standard in law of proof beyond reasonable doubt.**

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, the court is required to bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See **Okeno v Republic (1972) EA 32)**.

5. The prosecution's case was that on 25th April, 2015 at about 10.00 pm, **PW1, MN,** the Appellant's neighbour returned home from work and saw the Appellant's house shaking while unlocking the padlock to his house. The houses were single-roomed and made of iron sheets which were squeaking. He peeped inside the house through a gap on the old iron sheet wall and with the help of the electricity light which was on in the house he saw the Appellant having sex with the complainant, **PW5, LB,** who was supposedly his daughter, on the bed. PW5 rushed back to the stage where he operated his *boda boda* (motor cycle) business from and called two other people namely Sammy and Tony and some women from nearby stalls to witness the incident. PW1 hit the door open and they found the Appellant and PW5 on the bed naked.

6. PW2, LK who was also the Appellant's neighbour was sleeping in her house at the time when she heard the commotion. She went to the Appellant's house and found him being beaten by members of the public who were asking him why he had "slept" with a child. She found PW5 on the bed with no clothes and crying. She pulled the Appellant's jacket and covered PW5 then they escorted both the Appellant and PW5 to the police station. The Appellant was placed in the cells whilst PW5 was escorted to Medicins Sans Frontier which was popularly known as Blue House Hospital for examination.

7. The complainant, **PW5, LB** on her part, in an unsworn testimony stated that PW3 used to leave her in the house alone then the Appellant who stayed with them would come at night. She would sleep on the bed with the Appellant who would tell her to remove her clothes when he gets to bed then sleep on top of her and do bad things ("*tabia mbaya*") to her. She had told him to stop but he continued doing that to her several other times. She told PW3 what the Appellant used to do to her and PW3 told her that she would take him to the police. She confirmed that the Appellant was arrested by another man who saw him sleeping on top of her. She also stated that she did not want to go back to stay with the Appellant.

8. PW5 was examined at the facility on 25th April, 2015 at about 2.30 am by **PW7, Selina Nyamu**, a Clinical Officer. PW5 told PW7 that the Appellant who was her step father had sexually assaulted her severally whenever her mother was away. On genital examination, her external genitalia were normal in structure. She had no injuries or abnormal discharge. The hymen was pink, central with an old tear at 6 O'clock position and her anus was normal. PW7 concluded that there were signs of sexual violence since a child of seven years should be having an intact hymen. She signed PW5's medical certificate and filled her Post Rape Care (PRC) report on the same day. She produced both documents in evidence.

9. PW5's mother **PW3, DMM** returned home from work at around 6.00 am the following morning and found the door open with things scattered all over. There were also blood stains on the curtains and on the bed. A neighbor told her to go to John Saga Police Station but did not tell her why. She went there and found the Appellant who had been injured on the head and was bandaged. She was told that PW5 had been taken to Blue House Hospital for treatment. She went there and found PW5 but the hospital refused to release PW5 to her since the Appellant wanted to defile the child. They told her that PW5 would be taken back to the police station so she went back home and later found out that PW5 had been taken to a children's home. She had lived with the Appellant, who was her boyfriend but not the biological father of PW5, for two years and would always leave him with the child when going to her night job at JK Restaurant.

10. PW6, Dr. Joseph Maundu of police surgery examined both the Appellant and PW5 on 29th April, 2015 upon referral from Huruma Police Station. PW5 who was aged 7 years then complained of having been defiled on 25th April, 2015. She had no injuries on her body. Her genitalia were normal with no external injuries. She had an old hymenal tear but no discharge. As for the Appellant, he had injuries on his left ear, lower lip and left shoulder. The injuries were about four days old and a blunt weapon had probably been used. PW6 assessed the degree of injury as harm. However, the Appellant had no injuries on his genital organs. PW6 produced P3 forms for both PW5 and the Appellant in evidence.

11. The investigating officer, **PW4, PC Stacy Wanza** visited the scene and established that there were gaps on the iron sheet wall through which someone could see what was happening in the house but did not take any photographs of the same. She produced PW5's Clinic Card showing that she was born on 13th March, 2009.

12. Upon being placed on his defence, the Appellant elected to give a sworn statement. He stated that on the material night, he was watching news in his house at about 9.00 pm when he heard a knock on the door. Three men and a woman walked in. He recognized two of them being PW1 and PW2 who were his neighbours and had a grudge with him. They attacked him and said they had come on a revenge mission. They told him that they would do something he will never forget in his life. PW5 was playing with other children outside. Other neighbours came due to the commotion and attacked him too. They went to the police station. On 30th April 2015, he was charged with an offence he did not commit.

13. In cross examination, he confirmed that PW5 had been left under his care on the material night but denied defiling her.

Analysis and Determination

14. The appeal was canvassed by way of both written and oral submissions. The Appellant relied on written submissions filed on 17th December, 2019 and appeared in person during the oral hearing of the appeal. Leaned state counsel, Ms. Chege appeared for the Respondent and only tendered oral arguments. Upon carefully considering the parties' respective submissions, I find that the only issues for determination are: whether the Appellant's right to a fair trial was violated; whether the case was proved beyond a reasonable doubt and whether the sentence was proper.

Whether the Appellant's right to a fair trial was violated

15. The Appellant submitted that he was not accorded a fair trial as he was not supplied with witness statements during trial despite asking for the same on numerous occasions. It was his submission that this contravened his right under **Article 50(2)** of the **Constitution** which provides that every accused person has the right to a fair trial, which includes the right: to have adequate time and facilities to prepare a defense and to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

16. According to Ms. Chege however, the allegation of the Appellant not being furnished with witness statements was not reflected in the proceedings.

17. I have perused the trial court's proceedings. The record shows that on 14th May, 2015, the trial court ordered that the Appellant be supplied with witness statements. On 9th June, 2015 when the matter came up for hearing the Appellant informed the court he was not ready to proceed, as he had not been supplied with witness statements. The trial magistrate again ordered that the Appellant be supplied with witness statements at prosecution's costs. When the matter came up for mention on 28th August, 2015, the court yet again ordered that the Appellant be supplied with witness statements. From then on, the Appellant did not raise the issue of witness statements and the record is silent on whether or not he was ever furnished with the same. This obviously implies that the Appellant accepted to proceed with the hearing because he no longer had the complaint of not being supplied with witness statements. I am convinced that he had the statements when he the trial commenced. Furthermore, he ably cross-examined all the prosecution witnesses without any difficulty. I thus find this ground of appeal without merit.

18. I further find solace in the case of **Francis Kanyi Kirunda v Republic [2019] eKLR** **where** the court stated as follows when faced with similar:

> **"The appellant also complained that his fundamental rights under Article 50(2)(j) and (k) were breached. The appellant alleged that he was not supplied with witness statements. Article 50(2)(c) provides that an accused has right to have adequate time and facilities to prepare his defence while (j) provides that an accused has a right to be informed in advance of the evidence that the prosecution will rely upon.**
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> **I have perused the court record. On 27/10/2014 when the appellant appeared before the trial court for plea, the prosecution indicated that there were 5 witnesses to be called of 7 pages and the court directed that the appellant be supplied with witness statements at the court's cost. Thereafter, there was no mention of witness statements. The appellant never complained that the court had not supplied him with witness statements. I believe the appellant was supplied with statements because he would have complained during the hearing. He cannot be heard to complain now when he would have done so in the trial court."**

19. Similarly, in this case, I am persuaded by the Appellant's silence and willingness to proceed with the trial is a testament that he was actually furnished with the witness statements. His rights to a fair trial under Article 50 (2) (j) was therefore not violated.

20. Further, the Appellant argued that he was denied an opportunity to cross examine PW5 and in his view, this was also a violation of his right to a fair trial. This was rebutted by the state counsel who submitted that the Appellant indeed got an opportunity to cross-examine all witnesses.

21. The record shows that upon conducting the *voire dire* examination, the trial court established that PW5 was intelligent but did not seem to understand the solemnity of an oath. As such, the court directed that she gives an unsworn testimony. I note that the Appellant was indeed given a chance to cross examine PW5 on her unsworn evidence thereafter. However, at after answering about two questions in cross examination, the trial court noted that PW5 refused to answer questions and would only nod her head whenever any was asked. In my considered view, this was not a violation of the Appellant's right to a fair trial since PW5 must have been scared when forced to face and answer questions from her alleged tormentor. As such, the Appellant's contention that he was denied an opportunity to cross examine her does not hold. All that was required thereafter is corroboration of PW5's evidence being that she was a child of tender of years. (See **Sahali Omar v Republic [2017] eKLR).** This shall be determined in the next issue.

Whether the prosecution proved the offence of defilement beyond a reasonable doubt.

22. The Appellant submitted that the elements of the offence of defilement were not conclusively proved to warrant his conviction. He contended that the prosecution did not prove that there was penetration of the genital organ of PW5. He argued that there is no evidence that he was found naked as claimed by PW2. Further, he submitted that the alleged broken hymen was not proof of penetration of PW5's genital organ since the same can be caused by many other things. In this respect, he relied on the case **P.K.W v Republic** where the court stated that it has been proven that the hymen can be broken by factors other than sexual intercourse. He therefore took the view that the prosecution failed to prove the case against him beyond a reasonable doubt.

23. In rebuttal, learned state counsel, Ms. Chege reiterated the evidence on record and submitted that the case was accordingly proved to the required standard. She urged that the appeal be dismissed.

24. In a case of defilement, the prosecution is bound to prove three elements namely; whether the Appellant was positively identified, whether the victim was a child and whether there was penetration.

25. As regards the identification of the Appellant, there is no doubt that the same was by way of recognition. He was well known to his neighbours, PW1 and PW2 as well as PW5 whom he admitted was left under his care on the material night. His identification was therefore not in doubt.

26. On proof of the age of PW5, PW3's testimony that PW5 was aged seven years was well corroborated by the Clinic Card tendered in evidence by PW4. The document shows that PW5 was born on 13th March, 2009. This confirms that PW5 was indeed seven years old at the time the alleged offence was committed against her.

27. On the issue of penetration, PW1 testified that he peeped into the Appellant's house out of curiosity when he heard the iron sheets squeaking and saw the Appellant sleeping with PW5 on the bed and both of them were naked. This was corroborated by PW5 who stated that

the Appellant had actually defiled her on several other occasions before whenever PW3 was away and was in fact arrested by another man who saw him sleeping on top of her.

28. Further corroboration on penetration is also evident in the medical evidence produced by both PW6 and PW7. PW7 who examined PW5 at the Medicins Sans Frontier Hospital on the material night stated that on genital examination, PW5’s hymen was found to have an old tear at 6 O’clock position and for that reason, PW7 concluded that there were signs of sexual violence since a child of seven years should be having an intact hymen. In addition, PW6 who examined PW5 on 29th April, 2015 for purposes of filling the P3 form confirmed that she had an old hymenal tear.

29. The Appellant contends that a broken hymen is not conclusive proof of penetration since it has been established that the same can be caused by various other things. However, taking into account the totality of the evidence on record, I have no doubt in my mind that PW5’s broken hymen resulted from her defilement by the Appellant.

30. Further, it was also submitted by the Applicant that the whole case was based on suspicion. He contended that PW1 suspected that since the house was shaking, then the child was being defiled. The claim of suspicion has no basis since there was consistent and corroborated evidence, from PW1 who witnessed the incident and PW5, the victim herein, that he was caught defiling PW5.

31. He also faulted the trial court for failing to consider that there was a grudge between him and PW1 on the one hand and PW2 on the other hand. There was no evidence of an existing grudge between the Appellant and PW1. As for PW2, she denied ever disagreeing with the Appellant concerning PW5 but stated that he would often insult her whenever he was drunk. In contrast, PW2 is not the one who raised the alarm. She only went to the Appellant’s house when she heard a commotion while sleeping. I therefore dismiss this ground for lack of merit.

32. In the premises, I find that the prosecution proved beyond any reasonable doubt that the Appellant defiled PW5. His conviction for the offence was therefore safe and is accordingly upheld.

Whether the sentence was proper.

33. The Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by **Section 8(2)** of the **Sexual Offences Act**. For a long time, the sentences prescribed under **Section 8** of the Act were considered as minimum mandatory sentences thus leaving no room for the exercise of discretion by the sentencing court. (See **Dennis Kinyua Njeru v Republic [2017] eKLR**. However, that approach changed pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Anor v Republic [2017] eKLR** which declared mandatory sentences unconstitutional.

34. Recently, the Court of Appeal in **Evans Wanjala Wanyonyi v Republic [2019] eKLR**, held as follows: -

> **“24. On the enhanced 20 year term of imprisonment meted upon the apspellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another -v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng -v- R (supra) stated:**
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> **“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. ….. Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court**.”

35. Consequently, it means that the sentence prescribed under **Section 8 (2) of the Sexual Offences Act No. 3 of 2006** is a discretionary maximum sentence. Courts therefore have discretion to impose lesser sentences depending on a case by case basis.

36. In the present case, I have considered the circumstances in which the offence was committed and particularly the fact that the Appellant, who was meant to be PW5’s protector and caregiver, took advantage of her and defiled her leaving her so tormented. However, since the Appellant was a first offender, it is my considered view that the life imprisonment imposed by the trial court was excessive and should be set aside.

Conclusion

37. In the premises, the appeal partially succeeds. The Appellant’s conviction is affirmed. The sentence of life imprisonment is hereby set aside and substituted with thirty-five (35) years imprisonment. The sentence shall run from the date of arrest being 25th April, 2015. It is so ordered.

DATED AND DELVERED AT NAIROBI THIS 16TH DECEMBER, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. N/A appearance for the Respondent.