



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 134 OF 2018**

**BETWEEN**

**PETER NYAKUNDI AMUOMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. S.K. Onjoro, SRM delivered on 21<sup>st</sup> December 2018 at the Magistrates Court in Kisii in Criminal Case No. 2142 of 2013)*

**JUDGMENT**

1. The appellant, **PETER NYAKUNDI AMUOMA** was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8 (2)** of the **Sexual Offences Act** (“the Act”). The particulars of the offence were that on 10<sup>th</sup> November 2013, at [particulars withheld] Sub-location in Marani District within Kisii County, he intentionally and unlawfully had an act of penetration to the genital organ of PB a girl aged 8 years using his penis.
2. The appellant appeals against both conviction and sentence on the grounds set out in his petition of appeal dated 31<sup>st</sup> December 2018 and expounded in his written submissions. He contends that the prosecution did not prove the case against him beyond reasonable doubt. He faults the trial court for relying on inconsistent evidence and on medical evidence obtained 72 hours after the alleged offence and protests the court’s failure to consider his defence. He also argues that the life sentence imposed on him was unconstitutional as it violates **Article 24** of the Constitution and urges this court to quash his conviction and set aside his sentence. Counsel for the state opposed the appeal. He submitted that the appellant had been clearly identified and the elements of the offence proved.
3. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion all the time bearing in mind that it did not see or hear the witnesses testify as to form its own opinion on their demeanour. (see **Okeno v Republic [1972] EA 32**).
4. PW 2 testified that her daughter, PW 1, was born on 20<sup>th</sup> October 2005 and was 9 years old at the time of the trial. She recalled that at around 8.00am on 14<sup>th</sup> November 2013 she noticed PW 1’s private parts were wet when she woke her up. She asked her why there was a fluid coming out of her private parts but PW 1 cried and declined to answer. She took PW 1 to Marani Health Centre on the same day and learnt from the doctor that the child had been defiled. The doctor asked PW 1 who had defiled her but she kept mum.
5. On 6<sup>th</sup> December 2013, PW 1’s sister, PW 4 bought her dress and asked her to tell her the perpetrator in exchange for the dress. PW 4 told PW 2 that PW 1 had informed her that the appellant was the one who had defiled her. PW 2 knew the appellant as she often saw him in the village and knew he sold firewood. She asked PW 1 why she had taken time to tell her and PW 1 said that the appellant had threatened her with a knife. She reported the matter on 8<sup>th</sup> December 2013 and the appellant was arrested on the following day.
6. The complainant, PW 1, gave her unsworn testimony after a *voir dire* examination. She recounted how she was sent to the shop by her mother on 10<sup>th</sup> November, 2013 to buy sugar. She met the appellant who grabbed her, covered her mouth and took her to a maize plantation. She narrated what happened to her as follows:

*I knew Nyakundi. I knew him. I had met him before the incident. I would see him on the road. At the maize plantation he removed my underwear. He also removed his. The maize plantation was near the road. He removed his thing from here (points at the crotch). He put his thing in mine. He put it here (points at her crotch). He did bad things to me. After he was done he put back his underwear. He also dressed. He pointed a knife at me and told me he would kill me if I reported the matter to my mother. Nyakundi close my mouth all this time. Nyakundi was on top of me when doing bad things to me.*

7. PW 1 went home but did not tell her mother what had happened. She told her sister, PW 4, about the incident when she asked her. The matter was reported at Rioma police station and PW 2 took her to hospital. PW 1 also told the court that she had met the appellant before the incident and knew he sold firewood. She also testified that she knew his name as she had heard people in the neighbourhood refer to him as Nyakundi.

8. The clinical officer, PW 3, testified that on 9<sup>th</sup> December, 2013 PW 1 went to Marani Sub-County hospital accompanied by her parents with a complaint that she had been defiled on 10<sup>th</sup> November 2013. From his examination, he concluded that PW 1 had been defiled after observing a whitish discharge coming from her vagina and a laceration on the upper part of the vagina and the labia majora

9. PW 4 testified that in November 2013, her mother, PW 2, called her and informed her that her sister, PW 1, had been defiled. When she came from Nairobi on 6<sup>th</sup> December 2013, she called PW 1 and her to disclose who had sexually assaulted her otherwise she would not give her the clothes and shoes she had bought for her. It is at this point that PW 1 narrated to her ordeal. PW4 testified that she recorded her statement a day after PW 1 informed her what had happened.

10. The investigating officer, PW 5, testified that PW 1 and PW2 had made a complaint of the incident at Rioma Police station on 8<sup>th</sup> December 2013. PW 5 recorded the witness statements and accompanied PW 1 to hospital.

11. The appellant denied the offence in his unsworn statement. He testified that on 8<sup>th</sup> December 2013, he met administration police officers as he was ferrying firewood on his donkey. They demanded Kshs. 1,000/- from him but he did not have the money and asked them to allow him to sell the firewood and bring the money later. He met the same officers on a different date. He did not have the money so they arrested him and took him to Rioma police station for lying to them. He testified that PW 2 had complained for long that he was the one who caused her husband to be a drunkard by buying trees from him. He further testified that he was HIV positive and could not stop selling firewood as he needed money to purchase his medication.

12. Under **section 8(1)** of the Act, the prosecution must prove that an accused did an act of penetration with a child. “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.”

13. I will first deal with the issue of age of the child. The appellant’s argument that PW 1’s age was not proved is untenable as the evidence by a parent’s evidence on the age of the child has been held to be adequate proof of age (see **Alfayo Gombe Okello v Republic CA KSM Criminal Appeal 203 of 2009 [2010] eKLR**) Hence, even in the absence of the evidence of the doctor who had assessed her age, PW 2’s evidence that PW 1 was born on 20<sup>th</sup> October 2005 and therefore 8 years old at the material time was sufficient proof of age as it is a question of fact. In any case, it was not in doubt that PW 1 was a child as she was aged below the age of 18 years.

14. As for the element of penetration, PW 1 gave a vivid description of how she was sexually assaulted. Despite being stood down for failing to answer questions put to her, she resumed her testimony which was not shaken on cross-examination. Her evidence was corroborated by that of PW 2 who noticed a discharge coming out of PW 1’s genitalia. The evidence of penetration was still evidence even after a month when PW 3 examined her and observed laceration on her vagina which were indicative of penetration.

15. In his testimony, PW 3 stated that the offence had been committed 2 days before the medical examination on 9<sup>th</sup> December 2013. PW 2’s evidence on when the offence occurred was not clear. It became evident on cross-examination that she could not recall with clarity whether the offence occurred on 10<sup>th</sup> November 2013 or 12<sup>th</sup> November, 2013.

16. The Court of Appeal in **Erick Onyango Ondeng’ v Republic NBA CA CRA No. 5 of 2013 [2014] eKLR** observed that:

*With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.*

17. Whether the inconsistencies were inconsequential to the prosecution’s case requires an analysis of the third element of the offence which is the identity of the perpetrator. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal stated that;

*[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.*

18. For her part, PW 1 testified that the appellant was the person who had accosted on the material evening. She stated that she often saw the appellant in the neighbourhood and knew he sold firewood. This was a case of recognition as opposed to the identification of a stranger which is deemed more reliable. However, the court is still required to warn itself that mistakes in recognition of close relatives and friends are sometimes made and is required to weigh the quality of the evidence. (See **Anjononi v Republic [1980] KLR 54, Paul Etole & Another v Republic NRB CA Criminal Appeal No. 24 of 2000 [2001]eKLR**).

19. Although the PW 1 did not report the incident immediately, she explained that she had been threatened by the assailant hence the efforts by her mother and sister to assist her name the perpetrator. The prosecution’s case is that PW 1 disclosed the identity of the appellant to PW 4 on 6<sup>th</sup> December, 2013, a long time after the offence had been committed and only after she had been given a list of names to pick from. She was also only able to identify the appellant after being enticed with a dress and shoes by PW 4. When cross-examined, PW 1 was firm that although several names were put to her, she was able to pick him as she knew him as he used to sell firewood and she knew him as Nyakundi as he was referred to by that name.

20. Under the *proviso* to **section 154** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the trial court may convict an accused in sexual offences on the basis of the uncorroborated testimony of a child if, for reasons to be recorded, the court is satisfied that the victim is telling the truth. In this case the trial magistrate who wrote the judgment did not have the benefit of observing PW 1 as to form an opinion on her truthfulness based on her demeanour. However, there was corroborative evidence of both the fact of penetration and the identity of the appellant. The appellant was known to PW 2 and he admitted in his own defence that he used to sell firewood. Nothing was suggested to PW 2 and PW 4 that they would have framed a random person for the felonious act. I therefore affirm the conviction.

21. As regards the life sentence imposed on him, the appellant has contended that it is harsh and excessive in the circumstances. Under **section 8(2)** of the *Act*, where an accused is convicted of defiling a child aged 11 years old and below, a mandatory sentence of life imprisonment is imposed. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the *Act*; *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. It adopted what the Supreme Court held in *Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017]eKLR* that the mandatory death sentence prescribed for the offence of murder by **section 204** of the *Penal Code* was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and 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. In *Christopher Ochieng v Republic (Supra)*, the Court of Appeal held that:

*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.*

22. As I am bound by those decisions, I find that the life imprisonment meted upon the appellant was excessive and cannot stand given the circumstances of the case. I therefore substitute the term of life imprisonment with an imprisonment for a term of 30 years. Since the appellant was in pre-trial custody, the sentence shall run with effect from the date of arraignment, that is, **16<sup>th</sup> December 2013**.

23. Save for the sentence, the conviction is affirmed and the appeal thereon dismissed.

**DATED and DELIVERED at KISII on this 28<sup>th</sup> day of JUNE 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.