REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 103 OF 2015

SAMUEL NJENGA WANYOIKE....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of life imprisonment from a judgment dated 24th April 2014 by Hon. H.M. Nyaga (CM) in Cmcr No. 136 of 2014)

JUDGMENT

1. The Appellant Samuel Njgenga Wanyoike was charged and convicted for the offence of Defilement of a three (3) year old girl child, LM on the 8th May 2014 at [Particulars Withheld] area in Molo, within Nakuru County contrary to **Section 8(1) of the Sexual Offences Act No. 3 of 2006**

He was sentenced to serve life imprisonment as provided under **Section 8(2) of the Act**.

2. This Appeal is against the conviction and sentence. In his Amended Grounds of Appeal filed on the 7th March 2018, four(4) grounds are raised, that the

> ***(1) Doctors evidence was uncorroborated.***
>
> ***(2) That the minor victim did not testify by herself or by intermediary and therefore without her evidence the trial is a nullity***
>
> ***(3) Conviction was based on insufficient, uncorroborated and contradictory evidence***
>
> ***(4) That the defence evidence was not considered thus occasioned miscarriage of justice***.

3. The appellant filed written submissions which he fully relied on. The prosecution on its part tendered oral submissions.

4. As demanded of an appellate court, I have re-examined the evidence tendered before the trial court – **Okeno –vs- Republic (1972)EA 32.**

The minor victim is said to have been about three years at the date of the commission of the offence. She did not testify due to what the trial magistrate termed as due to her tender age.

5. A *voire dire* examination was conducted. The record shows that the minor kept looking at the accused and only saying *"Sammy tabia mbaya, Sammy tabia mbaya."*

The trial court noted and recorded her sediments and concluded that she could not testify.

Section 125(1) of the Evidence Act states

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age disease (whether of body of mind) or any similar cause."***

6. **Section 2 of the Childrens Act**

Defines a child of tender years to mean a child under the age of ten years.

Thus I am persuaded that the trial court was right and acted within the law when she made a finding that the minor victim could not testify due to her tender. The sediments were stated by the Court of Appeal in **Samuel Warui Karimi –vs- R (2016) e KLR at Nyeri.**

7. The child victim did not testify as aforestated. However **her mother (PW1)** and the **Clinical Officer (PW4)** who examined her testified.

The appellant's submission is that as the victim did not testify the trial court erred in convicting him on uncorroborated evidence.

8. The court in **Kennedy Chimwani Mulokoto –vs- Republic** in **Eldoret Criminal Appeal No. 51 of 2011, Ochieng J** rendered that

> ***"When the mother of the little girl gave her evidence she was deemed to be giving evidence on behalf of the little girl---- Therefore, for all intents and purposes, she did so as a legally recognized intermediary --- such evidence was admissible."***

9. In this present appeal, the mother of the child did not testify as a legally appointed intermediary in terms of **Article 50(7) of the Constitution**, but out of her own observations of the child, and the circumstances within her knowledge and therefore her own independent evidence. It is instructive that the child's mother (PW1) was the complainant on behalf of the three year old child.

10. **Section 33 of the Sexual Offices Act** allows the trial court to rely on either evidence of the surrounding circumstances or under **Section 31(4)**, evidence of an intermediary or both.

There was therefore evidence before the court by the mother of the minor and medical evidence upon which the trial court founded a conviction.

I find no prejudice or miscarriage of justice in the failure of the child to testify in the circumstances - **M.M. –vs- Republic (2014) e KLR**.

To that extent, ground No. 2 of the appeal is found to have no merit.

11. The **Clinical Officer (PW4)** examined the child one day after the alleged defilement.

Her findings were that

- **The girl had blood stains in the middle part near the groin region and around the genital area.**
- **There was tenderness. No tears were noted. The hymen was torn. No discharge was noted. The child had bathed. Laboratory tests were done. No spermatozoa were seen. I found that the child was defiled.**

On cross examination, the clinical officer stated that there was evidence of penetration.

12. In defilement cases, medical evidence is paramount. The appellant submission is that as he was not examined by the doctor, he could not be linked to the commission of the offence.

Section 36(1) of the **Sexual Offences Act** empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence,

This provision is however not couched in mandatory terms. DNA testing too is not the only evidence of which commission of a Sexual offence may be proved. Thus such examination is not mandatory as proof may be by other ways. The above was held in **Robert Mutigiri Mumbi –vs- R, Cr. Appl. No. 52 2014 (Malindi)** by the Court of Appeal, and cited in **Martin Okello Alogo –vs- R (2018) e KLR.**

13. Further **Proviso to Section 124 Evidence Act** provides that the court can link an accused person in a sexual offence on the evidence of the victim alone, without corroboration, if it believes the victim's evidence to be truthful and records the reasons for that belief.

In any event, PW1 mother of the minor victim while cleaning the child saw blood at the child's vaginal area and testified that she was complaining of pain, upon which she decided to take the child for medical examination.

14. It was **PW1's** evidence that the accused had taken the child to his house, as he always did, on the material day. **PW1** further upon asking the child what the problem was, the child would only say "*Sammy tabia mbaya, aliniweka dudu."*

15. It is now accepted that the term "*tabia mbaya"* used by young children refers to sexual intercourse or conduct. It should therefore be understood as such, as a small child cannot be able to otherwise describe the act. The **Court of Appeal** discussing the meaning and purport of the phrase "*Tabia mbaya*" by minor children in the case **Muganya Chilegi Saha –vs- Republic (2019) e KLR** held that such phrase meaning bad manners in connotes English.

Sexual conduct or intercourse that a minor of tender years has no other language to explain to the act.

See also **JE –vs- Republic (2017) e KLR** where again the phrase "*tabia mbaya*" –(bad manners) was construed to mean sexual intercourse or conduct.

There is no doubt that the accused was placed at the centre and scene of the offence by **PW1**.

16. It was the accused who was with the child at the material times. When called upon to answer to the charge, the accused in his sworn statement of defence admitted that the child used to go to his house, and that he heard the child say *"Sammy, tabia mbaya,"* while crying but did not expound as to why the child would cry and mention his names and such utterances if he was not the one the child was referring to and responsible for the *"tabia mbaya."*

17. The appellant's defence of a grudge with the child's mother over some porridge cannot be credible as not having been proved. Like the trial magistrate I find no merit in the appellant's defence.

The upshot is that the clinical findings coupled with the evidence of **PW1** and the child's victim conduct and utterances all point to very strong evidence against the appellant that was corroborated by each other.

18. It is therefore my finding that there was sufficient evidence upon which the appellant was convicted. I also find no material contradictions or inconsistencies that would be sufficient to invalidate an otherwise lawful and valid judgment. I am further guided by numerous decisions that in any trial where several witnesses testify, there is bound to be inconsistencies in their evidence.

However what is important is for the court to sieve through such evidence and to make a finding if such inconsistencies are grave enough to invalidate a lawful judgment – **Ahmad Abolfathi Mohammed & Another –vs- R (2018) e KLR**.

19. In its totality, I find and conclude that the appellant was properly and lawfully convicted on the evidence on record for the offence of defilement of the three year old child.

I uphold the conviction.

20. **Section 8(2) of the Sexual Offences Act** provides for the sentence upon conviction under **Section 8(1).** It is a mandatory and minimum sentence of life imprisonment.

21. Essentially sentence is at the trial court's discretion and upon proven circumstances of each individual case.

However, in the current justice dispensation under the 2010 Constitution and Judicial thinking, minimum and mandatory life sentences do not serve the purpose and objectives of sentencing as stated in the judiciary sentencing policy as they erode and curtail the court's judicial discretion and independence. There is a live and aggressive debate to re-think and abolish all minimum sentences and especially life sentences. Various courts have pronounced themselves in that respect, and the debate continues.

22. In particular the Supreme Court in the celebrated **Muruatetu Petition No. 15 and 16 of (2015)(consolidated) (2017) e KLR Francis Karioko Muruatetu and Another –vs- Republic** opened the way for Judicial re-thinking when it outlawed Death sentence under **Section 204 of** the **Penal Code.** It declared it unconstitutional, but did not invalidate the death sentence as contemplated under **Article 26(3) of the Constitution.** See also **Carolyn Anna Majabu –vs- Republic (2014), Cr. Appl No. 65/2014 Kabibi Kaluma Katsui –vs- Republic, Mombasa Cr. Appl No. 9/2014, Antony Mbithi Kasyula –vs- Republic Cr. Appeal No. 134 of 2012**.

23. The purpose and objectives of Sentencing as stated in the Judiciary Sentencing Policy should be commensurate and proportionate to the crime committed and the manner it is committed. It should also meet the ends of justice, and the principles of proportionality, deterrence and rehabilitation **– Nakuru HCCRA No. 136 2015 – NOO –vs- Republic (2019) e KLR –**where the judge reduced life sentence to 30 years imprisonment. See also **J. E –vs- Republic (2017) e KLR** the court reduced - sentence under Sexual Offender Act to 30 years imprisonment.

24. The Court of Appeal in **Jared Koita Injiri –vs- Republic (2019) e KLR** in similar circumstances reduced a life imprisonment sentence to 30 years imprisonment in 2019. The court applied the reasoning in the **Mutuateru case (Supra**) that the trial court sentenced the appellant to life imprisonment on the basis of the mandatory sentence stipulated under **Section 8(1) of the Sexual Offences Act** and stated

> ***"…. If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court."***

25. Upon the above reasoning and the current thinking on life imprisonment and minimum sentences and/or unreasonably long periods of imprisonment these sentences are neither proportional nor appropriate to the crimes committed in various decisions, among them **NOO –vs- Republic (2019) e KLR**, where a life sentence was also reduced to 30 years imprisonment, **RKS- -vs- Republic (2018) e KLR** when the offender and the victim were found to be minors, and offender sentenced to 20 years in prison, was reduced to time served in custody, **Jared Koita Injiri** (Supra) where life sentence was reduced to 30 years imprisonment. **Gidraph Mwangi Mugo –vs- R (2019) e KLR** where a life sentence was reduced to 10 years. The list continues but the above shall suffice.

26. The general thread running across the decisions coming out from various judicial officers is that each case should be looked at in its peculiar circumstances and character.

27. The offence committed by the appellant was heinous and no doubt caused severe trauma to the young child. A deterrent sentence would be appropriate in the circumstances.

28. Having taken into account all relevant factors and that the appellant expressed remorsefulness in his mitigation, I shall set aside the life imprisonment sentence and substitute it with a sentence of **30 years** from the date of sentence by the trial court.

It is so ordered.

Dated, delivered and signed at Nakuru this 27th Day of June 2019.

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J.N. MULWA

JUDGE