REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 144 OF 2017

NICKSON KANDAGOR CHESIRE.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet S.O. Case no. 893 of 2016 delivered on the 24th day of March 2017 by Hon. E.M. Ayuka, RM]

JUDGMENT

1. The appellant was charged with defilement contrary to section "*8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006*." The particulars of the offence were that he had "*on the 27th day of September 2016 in Baringo North Sub-County, within Baringo County unlawfully and intentionally caused his penis to penetrate the anus of JC a boy aged 7 years."* The appellant faced a detective charge of indecent act with a child contrary to section 11 of the Sexual Offences Act.

2. The appellant was convicted of the main charge and sentenced to imprisonment for life under section 8 (2) of the Sexual Offences Act, the Court finding that the Act "*prescribes a mandatory sentence for this kind of offence."*

3. According to the age of the child at 7 years, the applicable section of the Sexual Offences Act is 8 (2) rather than 8 (3) shown in the charge sheet. The defect in the statement of the offence does not cause any prejudice to the accused as the particulars of the offence clearly stated the offence as one of defilement of a boy aged 7 years within the object of a charge under section 134 of the Criminal Procedure Code to give "*such particulars as may be necessary for giving reasonable injunction as to the nature of the offence charged."* The defence in the statement of the charge may, therefore, properly be aired under section 382 of the Criminal Procedure Code.

4. The appellant, being aggrieved with the conviction and sentence of the trial Court, appealed to this Court on the ground set out in the Petition of Appeal as follows:

> *1. That the trial Magistrate erred in both law and facts by convicting me without taking in account the existence of grudge and land conflict between the family of the minor and me.*
>
> *2. That the trial Court erred in both law and facts by convicting me to serve life imprisonment without observing that the age assessment of the complainant was not proved beyond reasonable doubt as required by the law.*
>
> *3. That the trial Magistrate erred in both law and fact by convicting me on contradictory evidence adduced by the prosecution witnesses.*
>
> *4. That the trial Magistrate erred in both law and facts by convicting me without observing the variance between the particulars of the charge and evidence adduced in Court by Prosecution witnesses (charge sheet defective)*
>
> *5. That the trial Magistrate erred in law and fact by me while rejecting my defence without giving any convincing reason for the rejection.*

The appellant further filed written submission urging the said grounds of appeal.

5. In response, the DPP made oral submission during the hearing of the appeal as set out in the record of the proceedings as follows:

> ***"DPP***

Appeal opposed

Appellant convicted of defilement contrary to section 8 (1) and 8 (2) of Sexual Offences Act and sentenced to serve life imprisonment.

I note charge reads 8 (3) instead of 8 (2) Sexual Offences Act. The defective charge sheet does not cause any prejudice to the appellant as it does not affect the evidence before the Court.

The appellant was convicted under section 8 (2) and sentenced under 8 (2) Sexual Offences Act.

Complainant was established as 7 years by age assessment report produced on Court.

Pw3, the complainant's father testified that the complainant was 7 years. The Court on its judgment line 20, also stated that it was satisfied that complainant was 7 years.

The complainant was a boy minor aged 7 years.

He testified that he knew the appellant well and he used to see him at their home as he was their neighbour.

On the material day the appellant had along the way in the morning hour and held the complainant as he was going to school. He took him to the mud house which was nearby where he undressed him and he unzipped his trouser and he removed his penis and inserted into his anus. He thereafter gave the complainant 5/= to buy cake and warn him against telling his grandparents who he was living with.

He further testified that he felt pain in the anus and he notified his grandparents. He testified that it was the 3^{rd} time that the appellant was sodomising him. The incident took place in daylight and the complainant knew the appellant and there was no possibility of mistaken identify

Pw1 stated that on examination the complainant was in pain and there was no spermatozoa but there was blood in the rectum. The anus was swollen and tender. He concluded that there was anal penetration. The appellant in his defence denied over committing the offence and stated that the charges were fabrication due to a land dispute between his family and that of Pw3, the grandfather of the complainant.

The claim of grudge was an afterthought as it was not raised in cross-examination.

It did not destroy the case of the possession. I urge that the appeal be dismissed.

Appellant in reply

I refer to p. 15 line 25 – 8 of Record. The grandfather of the complainant is a brother to my mother. He is my uncle. The wife of my uncle did not testify. They are persons of the same family who testified against me. If it was true the two should have come to testify."

Issues for Determination

6. The issue for determination before the Court is whether the offence of defilement of the complainant child was proved against the appellant.

Issues sub-set to the principal question of the appellant's culpability are the age of the complainant; the evidence of defilement; and validity of the accused's defence. The Court has already ruled on the variance of the statement of the offence and the evidence, and there was no question of identity of the appellant as the witnesses were neighbors of the appellant of whom the later acknowledged as even relatives of the mother.

Determination

Proof of Defilement

7. Pw1, the Clinical Officer who examined the complainant testified that:

"*General body examination was normal. We did examine the anus. The complainant was in pain. We did a rectal swab three days since the last sodomy. There was no spermatozoa, but there was blood in the rectum – showing a possible penetration."*

The witness testified that the complainant had complained of sodomy by a known person and "*named one Kibet whom he said had sodomised him severally and thereafter enticing him with money."*

8. The complainant (Pw2) giving unsworn evidence upon the finding of the trial Court on *voire dire* examination that "*the subject is*

intelligent enough testifying. He shall give unsworn evidence." On the defilement he said

> "***PW2***
>
> *On 27.9.16, I was headed to school when I met the accused who had hid along the way. It was at the morning hours.*
>
> *There's a forest along the path and the accused had hid there. There was a house nearby; mud house.*
>
> *The accused then took me to the house. He held me by the hand and led me there. He then removed his penis and inserted it to my anus.*
>
> *I was in school uniform. I was in a yellow trouser and black shirt. The accused dressed up in a trouser and T. shirt.*
>
> *The accused undressed me. He then unzipped his trousers. He then removed his penis and inserted it into my anus. He then told me not to cry. He gave me some money – a 5/= coin. He told me to go and buy rock cake and told me not to tell my grandmother – that she would beat me up.*
>
> *I used the 5/= to buy a rock cake.*
>
> *I reported the incident to my grandparents. I had pain and discomfort in my anus."*

In both cross-examination by the accused and re-examination by the Prosecution, Pw2, was remarkably consistent as follows:

> "***Cross-examination***
>
> *I was headed to school earlier on the accused had defiled me while on my way from school at the accused's shamba. The school shirt is dark in colour.*
>
> *You held me by the hand and we walked to the scene where you sodomised me. I had not reported the earlier incidences.*
>
> *I have told the Court the truth.*
>
> ***Re-examination***
>
> *I was on my way to school when the accused sodomised me. Earlier on, while I was headed home from school. The accused had defiled me at their shamba. I told the police I had been sodomised by the accused three times."*

9. In terms of section 124 of the Evidence Act, the Court seeks corroboration of the unsworn evidence of the minor, despite its consistent presentation. The injuries observed by the Clinical Officer, Pw1 support the complainant's allegation of having been sodomised. The evidence of the complainant's grandfather (Pw3) who confirmed the complainant's first report to him after returning from school as follows:

> "***PW3***
>
> *On 27.9.16, while I was with my wife – at about 1 pm complainant came back from school. He narrated to us that the accused had sodomised him. That the accused had got him on the house and undressed him and sodomised him. That he then gave him some money with which he bought a cake.*
>
> *He stated that the accident had sodomised him three (3) times.*
>
> *On 28.9.16, I called area chief and village elder. I then reported the matter to police. I then took the child to the Kabartonjo Sub-County Hospital where he was examined and given drugs. The complainant was issued with a P 3 form which was filled up on 29.9.16."*

10. Against the appellant's unsworn statement alleging a land dispute between him and the complainant's grandfather "*Pw3*", I find the charge of defilement of the child proved because although the issue of land dispute was brought out in cross-examination of Pw3, the same did not explain the evidence of Pw2 which was confirmed by the medical evidence of Pw1. I do not find inconsistently in the evidence of Pw3; as urged by the appellant as a neighbor and later as a brother to the appellant's mother. He explained in re-examination that the appellant's mother was not blood sister but sister according to clan descriptions, and it is understandable that he could therefore refer to the appellant as a neighbor. Moreover, a nephew could also be a neighbor.

Alibi defence

11. The appellant raised an alibi defence while alleging a land dispute as the reason for the frame up charge "*to cover up the land dispute*". There is no need to cover up a land dispute; it should be filed in appropriate Court or tribunal. Without placing any burden on the accused to prove his innocence, the Court observes that no evidence of existence of the dispute' which was denied by Pw3 was available to support a reasonable doubt to the otherwise consistent evidence of Pw2 corroborated by Pw1 and Pw3.

12. I find the charge for defilement proved beyond reasonable doubt.

Age of the Complainant

13. The trial Court accepted the child presented before it as a child and consequently conducted a *voire dire* in which it found him "*intelligent enough to testify [and] give unsworn evidence."* As regards the exact age of the child Pw2, the complainant said that he was 6 years. His grandfather Pw3 said that "*the complainant is aged 7 years. He was born on 2009 July*." Pw2 testified on the same day as Pw3 on 16/11/16. The offence is alleged to have been committed on 27/9/2016. Pw4, a Clinical Officer testified that the age assessment was done by a Medical Officer, Dr. Chemator at Baringo County Referral Hospital who was away on official duties. He presented the age assessment report backed up by an x-ray of the left waist and said:

> "*Age assessment was conducted on the complainant. An x-ray of the left waist was done. I have the film before the Court. She was aged under 18 years old. He was born in 2009. Had a total of 20 permanent teeth. He was approximately 7 years old. I will produce the age assessment report PEx. 2*."

As required by ***Okeno v. R*** (1972) EA 32, this first appellate Court gives deference to the Court which observed the complainant (Pw2) and said in the Judgment "*The Court also observed the complainant and I am satisfied that he is 7 years old*." On the basis of the trial Court's observation of the child and the evidence of Pw3 as supported by the age assessment report, I find the age of the complainant proved as 7 years old. That the child itself said he was 6 years is immaterial.

Sentence of Life Imprisonment

14. Section 8 (2) of the Sexual Offences Act provides that where the victim of defilement is aged 11 years and below, the sentence shall be life imprisonment as follows:

> ***8 Defilement***
>
> ***(2)*** *A person who commits an offence of defilement with a child aged eleven years or less* ***shall upon conviction be sentenced to imprisonment for life****.*

15. The appellant urges that Supreme Court decision in ***Francis Karioko Muruatetu v. R*** Petition No. 15 of 2017 and seeks a finding that the sentence of imprisonment for life is unconstitutional. The Petition before the Supreme Court dealt with the question of the death sentence as a mandatory sentence in cases of murder under section 204 of the Penal Code. The life imprisonment is also a mandatory sentence for a certain category of offence under the Sexual Offences Act.

16. Section 8 (2) of the Sexual Offences Act provides that "*a person who commits an offence of defilement with a child aged eleven years or less* ***shall upon conviction be sentenced to imprisonment for life."***

This sentence is in the same mode of mandatory direction of the sentence for murder under section 204 of the Penal Code which provides that:

> ***204. Punishment of murder***
>
> *Any person convicted of murder* ***shall be sentenced to death****.*

The textual provision in section 8 (2) that the offender "*shall upon conviction be sentenced to*" is in similar juridical and linguistic mood as the expression in section 204 Penal Code, "*shall be sentenced to" **and it is the same expression in both provisions if the** "upon conviction*" is removed in section 8 (2) of the Sexual Offences Act, because it cannot be lawful to sentence a person who has not been convicted.

17. In considering the death sentence prescribed for the offence of murder, the Supreme Court at paragraph 48 and 69 of the Supreme Court in ***Francis Karioko Muruateti & Anor. v Republic*** (2017) eKLR held as follows:

> "***48.*** *Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death such law can only be regarded as harsh, unjust and unfair.* ***The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a Court listens to mitigating circumstances but has, nonetheless****, to impose a set sentence, the sentence imposed fails to conform to the tenents of fair trial that accrue to accused persons under Article 25 of the Constitution an absolute right-*
>
> "***69.*** *Consequently,* ***we find that section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death-penalty, which is still applicable as a discreting maximum punishment."***

18. By like reason, this Court, as urged by the appellant, finds that the sentence of imprisonment for life is unconstitutional to the extent that it provides for a **mandatory** sentence but it is valid only as a maximum sentence for the offence for which it is prescribed. The life sentence as a **mandatory** sentence is indefensible in view of the ***Muruatetu*** decision, which as a decision of the Supreme Court binds all Courts in terms of Article 163 (7) of the Constitution.

19. I think that different consideration would apply for minimum sentences, and the Court does not make any decision on the provision for minimum penalties in the other sub-sections of section 8 of the Sexual Offences Act.

Orders

20. The sentence of life imprisonment is, therefore, set aside but the appeal from conviction is dismissed. As a first appellate Court and noting the mitigation of the appellant before the trial Court, I think that a sentence of imprisonment for twenty (20) years meets the justice of the case in terms of retribution, deterrence of potential offenders, and the reform of the offender.

21. The sentence shall run from the **24/3/2017**, the date of the conviction and sentence in the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent