REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 60 OF 2017

GEORGE KURIA MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence from the judgment of Hon.B.M.Ochoi Principal Magistrate, Mukuruweini delivered on 13th September, 2017 in Criminal Case No. 04 of 2017)

JUDGMENT

FACTS

1. The Appellant **George Kuria Mwaura** was charged with the offence of defilement contrary to **Section 8 (1)(2)** of the **Sexual Offences Act;** the particulars of the charge are that on diverse dates between 4th January, 2017 and 30th January, 2017 at [Particulars withheld] Village in Mukuruweini Sub-County, the appellant intentionally caused his member to penetrate the genital organ of **TMM** a child aged nine (9) years.

2. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that on the same date and at the same place hereinabove mentioned the Appellant intentionally touched the private parts of **TMM.**

3. The prosecution called a total of six (6) witnesses in furtherance of its case; the Appellant was convicted on the main count and was sentenced to life imprisonment;

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal together with his Amended Grounds of Appeal which are as summarized hereunder:-

(i) Section 8(1)(2) does not exist in the Sexual Offences Act; the Charge Sheet was defective as the words **"as read with"** were omitted;

(ii) The trial magistrate relied on the evidence of **PW2**, **PW3**, **PW5** and **PW6** which was riddled with contradictions and inconsistencies;

(iii) The trial court rejected the appellant's defence which was not displaced by the prosecution evidence;

5. At the hearing hereof the Appellant was unrepresented and relied on his written submissions; whereas the State was represented by Prosecuting Counsel Ms Gicheha who made oral submissions; hereunder are the parties rival submissions;

APPELLANT'S SUBMISSIONS

6. The complainant referred to her assailant as **"Mzee wa Kamari alias Githuri gia Kamari"**; that the particulars of the Charge Sheet do not contain these names; which means that the complainant **PW1** was referring to someone else other than the appellant; no amendment was made to the Charge Sheet; the other defect was that Section 8(1)(2) with the omission of the words **"as read with"** is a non-existent section in the Sexual Offences Act; that the omission caused him prejudice as he was charged and convicted with an offence that was not known in law;

7. His contention was that for the issue of penetration to be proved it must on the terms as set out in Section 2 of the Act; which provides for partial or complete insertion of the genital organs of a person into another's; the words used by the minor in her evidence are **" …he put his thing inside me…"**; the question that then arises is what caused the hymen to be broken because for an act of penetration to amount to defilement it must be by a genital organ; and this was never mentioned by the minor; therefore the prosecution failed in its burden of proving

the offence of defilement;

8. That the evidence advanced by **PW2, PW3** and **PW5** was contradictory; the minor stated that it was on the 4/01/2017 when she was defiled; the teacher **PW2** stated that it was on 10/01/2017 when she noticed that the minor was walking in an awkward manner and then passed this information to **PW5** the father of the minor; that it was interesting to note that **PW5** even after being summoned by the teacher went silent upon receiving information and never made any report to the police; his evidence only relates to the complaint of 30/01/2017; as for **PW3** the grandmother of the minor she narrated how on the date the offence was committed she had sent the minor and her siblings to the town centre to look for food;

9. The Appellants contention was that there were contradictions and inconsistencies in the dates; the dates on the charge sheet relate to diverse dates between 4/01/2017 and 30/01/2017; the Investigating Officer stated that the report was made on the 19/01/2017 yet another police officer indicated that a report had been made on the 30/01/2017; he further contended that the complainant was taken for examination even before the offence had been committed; this raised a doubt as to whether the offence was ever committed;

10. The last ground of appeal was that he had opted to give a sworn statement of defence and raised the issue of the treatment he had been undergoing due to prostate; a problem that he had even before he is said to have committed the alleged defence; that with such a condition it could not have been possible for him to manage to defile the minor; that the trial court failed to consider his defence and also failed to weigh it against the evidence adduced by the prosecution as it was duty bound to do in law;

11. The Appellant urged this court to re-analyze the whole of the evidence adduced and to arrive at its own independent conclusion; and prayed that the appeal be allowed in its totality.

RESPONDENTS SUBMISSIONS

12. In response Prosecuting Counsel for the State submitted that the fact that the Section reads as 8(1)(2) does not invalidate the Charge; that the omission is curable by Section 358 of the Criminal Procedure Code;

13. The evidence of **PW2, PW3, PW5**, and **PW6** was consistent; Martha Njoki (**PW2**) was the complainant's teacher; she noticed that **PW1** was walking in an awkward manner and enquired from her; **PW1** narrated how the appellant lured her into his house, placed her on his bed, removed her clothes and then defiled her; MW (**PW3**) was the complainant's grandmother and she resided with **PW1**; her testimony was that she had sent the complainant with a cousin to get food; the cousin came back alone and stated that she had left the complainant behind because she was walking slowly; they went back to look for her but couldn't find her; upon returning home they found her asleep; upon being interrogated the complainant narrated what had transpired; the matter was then reported to the police; FM **(PW5**) the father to the complainant said that he had been summoned by the teacher and told about the information received from the complainant on what had happened; his evidence was that indeed on that day the complainant failed to return home and she had told him that the appellant had taken her to his house and had defiled her;

14. **PW6** Corporal Jackline Mbula was the Investigating Officer she stated that on the 19/01/2017 she had been instructed to investigate a defilement case; she accompanied the complainant to Mukuruwieni Sub-County Hospital and after examination the report established that the minor had been defiled; before she had completed investigations on the first case of defilement another report was received on the 30/01/2017 this time lodged by the complainant's father of defilement of the same minor by the same assailant; the appellant was arrested and charged with defilement;

15. The Appellant had defiled the minor on two occasions that is on 4/01/2017 and 30/01/2017; on both occasions the Appellant lured the complainant to his house and instructed her to remove her clothes and her evidence was that he lay on top of her and put his **'thing'** inside of her and she screamed because of the pain; he threatened her with death if she told anyone; when her father enquired who had done this she told him that **'Mzee wa Kamari'** was the one who had done it and she identified him by name in court;

16. The doctor who examined the minor was Doctor Gichohi (**PW4**) confirmed that the minor was aged 9 years; upon examination he confirmed a broken hymen and had a reddish vulva and an infection; no spermatozoa was noted; the minor was treated and given medication; the duly completed P3Form and PRC Form was tendered into court;

17. Counsel submitted that from the evidence submitted by the prosecution witnesses there was no contradiction noted; **PW1's** evidence was very clear in her narration of what the Appellant had done to her and she had identified the Appellant by recognition; all the other witnesses confirmed in their evidence what she had told them; the doctor (**PW4**) corroborated that penetration took place; the doctor had estimated the age of the minor as nine (9) years; utilizing all this evidence the trial court arrived at its decision and convicted the Appellant;

18. The defence the Appellant raised at trial was that he was arrested for no good reason and that it was due to the existence of a grudge; but counsel submitted that the defence was rejected by the trial court as it was a mere denial; and further contended that there was no reason why a nine (9) year old would have a grudge against a person as old as her grandfather;

19. The prosecuting counsel submitted that the Appellant was properly convicted; and prayed the appeal be dismissed and the conviction and sentence be upheld.

ISSUES FOR DETERMINATION

20. After taking into consideration the forgoing submissions made by the Appellant and those of the Counsel for the State, this court has framed the issues as set out hereunder for determination;

(i) Whether the Charge Sheet was defective;

(ii) Whether there were contradictions and inconsistencies in the evidence of the prosecution witnesses;

(iii) Whether the prosecution proved its case to the desired threshold;

(iv) Whether the trial court disregarded the Appellant's defence without giving sound reasons;

(v) Whether to substitute the sentence imposed.

ANALYSIS

21. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses; reference is made to the case of **Okeno vs Republic (1972) EA 32.**

Whether the Charge Sheet was defective;

22. The Appellant contends that with the omission of the words ***"as read with"*** the Charge Sheet was rendered defective; that Section 8(1)(2) does not exist in the Sexual Offences Act;

23. The record indeed shows that the Charge Sheet reads that the Appellant was charged under Section 8(1) (2) of the Sexual Offences Act; but the omission of the words **"as read with"** in between the two sections does not mean that the offence that the Appellant was charged with was not disclosed; the Charge and the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence that the Appellant was faced with as required by Section 134 of the Criminal Procedure Code; the Appellant knew the exact offence that he was alleged to have committed; the record also shows that the Appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was able to cross-examine all the prosecution witnesses; and was able to ably defend himself;

24. This court is satisfied that the particulars on the Charge Sheet clearly stated that the child was aged nine (9) years which places it within the provisions of Section 8(2) of the Sexual Offences Act; and finds that the omission of the words **"as read with"** did not occasion any miscarriage of justice as the Appellant was always aware of the charge against him and the particulars and the essential elements of the offence had been disclosed to him.

25. This ground of appeal on the charge sheet being defective is found lacking in merit and is disallowed;

Whether there were contradictions and inconsistencies in the evidence of the prosecution witnesses;

26. The Appellant contends that the evidence of the prosecution witnesses **PW2, PW3** and **PW5** was contradictory and therefore raised doubts in the prosecution's case; his contention was that the complainant went for a medical examination even before the commission of the offence; that upon **PW5** being summoned by the minor's teacher (**PW2**) took no action; and therefore the report having being made only on 30/01/2017 would mean that the medical examination carried out on the 19/01/2017 took place even before any offence was committed;

27. Upon perusal of the evidence on record this court notes that there was no contradictory evidence or inconsistencies in the dates as contended by the appellant; the Charge Sheet reads that the offences were committed on diverse dates between 4/01/2017 and 30/01/2017; the evidence of **PW2** is that on the 10/01/2017 she noticed the minor was walking awkwardly and informed the father of the minor (**PW5**); the evidence of the Investigating Officer (**PW6**) was that the report was made on the 19/01/2017 and she started her investigations and escorted the minor to hospital; indeed this date is corroborated by the PRC Report which is dated 19/01/2017; it follows from the evidence of the investigating officer and the exhibit that there was a first report that had been made;

28. **PW6** went on to state that even before she had completed investigations another report was made on the 30/01/2017 of second case of defilement of the minor by the appellant; the second defilement is supported by an Out-Patient Card (**PExh.2**) and a second PRC Report (**PExh.3**) and both exhibits confirm that PW1 received treatment and care on the 30/01/2017 at Mukuruweini Sub-County Hospital on that date; the grandmother's (**PW3**) evidence relates to the defilement of 30/01/2017; that she had sent her two granddaughters (the minor and another) to the shop for food; one granddaughter came back without **PW1** who when found narrated what the appellant had done to her; the father (**PW5)** confirmed that the defilement that occurred on the 30/01/2017 and reported the same;

29. This court is satisfied that any inconsistencies in the evidence of **PW2**, **PW3** and **PW5** on the reports made are not fundamental and are resolved by the production of the PRC Reports dated 19/01/2017 and 30/01/2017 (**PExh,3**) and the Out-Patient Card; which evidence is corroborated by the evidence of **PW6** and confirms that there were two sets of reports made to the police on the two incidents of defilement; who made the reports is found to be immaterial as this does not dent or raise any doubts in the prosecutions' case;

30. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether the prosecution proved its case to the desired threshold;

31. The key ingredients for the offence of defilement are identification, penetration and age;

32. **On identification**; the Appellant raised the issue identification and stated that the names used by the minor which were "**Mzee wa Kamari alias Githuri gia Kamari"** that these names are not contained in the Charge Sheet and his contention was that **PW1** was referring to someone else other than the Appellant;

33. From the record it is noted that the trial court in its judgment made a finding that the Appellant was a person well known by the complainant and the record states as follows;

> ***"Nothing would lead this court to any other conclusion than the accused committed the offence against the complainant and that he was a person well known to her."***

34. On identification, **PW2's** evidence was that the complainant revealed to her that **"Kuria"** the accused used to call her to his house to cook for him and would make her undress and then defile her; the evidence of her father (**PW5**) was that the Appellant was a casual worker of his grandfather EK who lived a short distance away; his testimony was the same as **PW2's** that his daughter told him that the Appellant had waylaid her and taken her to his house cooked some beef and later had sex with her;

35. The minor it is noted indeed identified the appellant in court and used the names alias **'Mzee wa Kamari';** the appellant during cross examination never challenged the minor or **PW2, PW3** and **PW5** on the usage of the nicknames and whether they referred to someone else other than the Appellant;

36. It is clear from that the evidence of **PW1, PW2, PW3** and **PW5** that the names and the alias' of Appellant were not challenged or controverted; that they all knew him very well and there was no chance of mistaken identity;

37. Upon carefully re-evaluating the prosecution evidence on identification this court is satisfied that the trial court properly analyzed the evidence on identification and this court finds no justifiable reason to interfere with the trial court's finding that the Appellant was a person well known to the complainant;

38. This court is satisfied that the Appellant was positively identified by the complainant by recognition; and that the prosecution proved the ingredient of identification to the desired threshold;

39. **As for the ingredient of penetration**; the appellant's contention is that for this ingredient to be proved it must be as set out in Section 2 of the Act; which provides for partial or complete insertion of the genital organs of a person into another's; the words used by the minor in her evidence are **" …he put his thing inside me…"**; the question that then arises is what caused the hymen to be broken because for an act of penetration to amount to defilement it must be by a genital organ; and this was never mentioned by the minor; therefore the prosecution failed in its burden of proving this key ingredient;

40. The applicable law is found at Section 2 of the Sexual Offences Act defines penetration as follows;

> **"….as the partial or complete insertion of the genital organs of a person into the genital organs of another person"**

41. The record reflects evidence of **PW1** was that on the material dates she had been waylaid by the appellant and that he had removed her clothes and placed his '***thing***' into her; that she screamed due to the pain and the Appellant had threatened her with a beating if she told anyone;

42. The Court of Appeal in **Muganga Chilejo Saka Versus Republic (2017) eKLR** acknowledged that there are certain words that are generally used by child victims such as **"thing" "munyunyu" "susu" and "dudu"**; and that the use of such words by child victims has become acceptable in defilement cases;

43. In this instance the minor used the word **"thing"**; and this court also acknowledges the fact that due to her tender age she was unlikely to use such technical or appropriate words to describe the appellant's genital organs; this court is satisfied that by use of the word **'thing'** this was an apt description of the appellants' genital organ by the minor;

44. **PW4** a doctor based at Mukuruweini Sub-County Hospital where **PW1** was examined stated in evidence that he stated that the minor had a history of defilement and had noted that **PW1** had a broken hymen and reddish vulva and he had made a conclusion that there was evidence of defilement; the P3 Forms were tendered as evidence and was marked **"PExh.1 and 2"**; the PRC Form was also produced and marked as **"PExh.3";**

45. Upon re-evaluating the evidence adduced this court finds that there is sufficient medical evidence that demonstrates and corroborates the evidence of the minor that there was indeed contact of the genital organs; this court is satisfied that the prosecution proved this key ingredient of penetration to the required threshold;

46. **On age**; the appellant it is noted did not raise the issue of the age of the minor in his submissions on appeal; the trial court it is noted that he did not raise it even in cross-examination of any of the prosecution witnesses; in re-evaluating the evidence on record this court notes that the P3 Forms (**PExh.1 & 2**) which were the medical documents produced by **PW4** in evidence stipulated that the apparent age of PW1 was nine (9) years; this evidence was not challenged or controverted at trial;

47. This court is satisfied that the prosecution provided sufficient documentary evidence that proved the age of **PW1** as at the date when the offence was committed. The prosecution is found to have satisfactorily proved the key ingredients of defilement to the desired threshold; this ground of appeal is found to have no merit and is disallowed;

Whether the trial court disregarded the Appellants defence without giving sound reasons.

48. The Appellant contends that the trial court failed to consider the defence he raised; and upon perusal of the court record notes that the trial court indeed in its judgment made no finding on the appellants' statement of defence; and stated as follows;

> ***"The accused's defence was a bare denial. He did not materially controvert the prosecution case either in cross examination or evidence in chief…….***
>
> ***Nothing would lead this court to any other conclusion than the accused committed the offence against the complainant and that he was well known to her."***

49. This court notes from the record that the defence the appellant raised at trial was that he was arrested for no good reason and that it was due to the existence of a grudge; but as stated by the trial court in its judgement the appellant failed to raise the issue of the existence of a grudge during cross examination of the prosecution witnesses particularly **PW3** and **PW5**; as for PW1 this court concurs with the submissions of prosecuting counsel that there was no reason absolutely why a nine (9) year old would have a grudge against a person as old as her grandfather;

50. This court is satisfied that the trial court correctly evaluated and analyzed the Appellant's defence and found it to be a ***'bare denial'*** and that it did not displace the prosecution's case; this court is satisfied that the defence did not introduce any doubt in this court's mind; and the conviction is found to be safe;

51. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether to substitute the sentence imposed.

52. The trial court having found the Appellant guilty convicted the Appellant and gave him the mandatory life sentence as stipulated in Section 8(2) of the Sexual Offences Act; the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic SC Petition No.16 of 2015** held that the mandatory sentence deprives courts of its legitimate jurisdiction to exercise its discretion to impose the appropriate sentence;

53. In the spirit of this decision this court finds that the life sentence imposed herein by the trial court is considered unconstitutional on the same basis and inappropriate as the appellant was found to be a first offender;

FINDINGS

54. In the light of the forgoing this court makes the following findings;

(i) The Charge the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence; the omission of the words **"as read with"** did not render the Charge Sheet as defective;

(ii) That any inconsistencies and contradictions in the evidence of the prosecution witnesses were resolved by the evidence adduced and were found to be immaterial as they did not create any doubts in the prosecutions' case;

(iii) The prosecution is found to have proved the key elements of the offence of defilement to the desired threshold;

(iv) The trial court is found to have taken into consideration the appellant's defence and gave sound reasons for rejecting it;

(v) The life sentence imposed by the trial court is found to be unconstitutional.

DETERMINATION

55. The appeal is partially found to be meritorious;

56. The conviction is hereby upheld; the life sentence is hereby set aside and substituted with a term of fifteen (15) years with effect from 13/09/2017.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 20th day of June, 2019.

HON.A.MSHILA

JUDGE