REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 54 OF 2018

ALFRED KHAEMBA BUNYENZI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Magistrate in Rongo Magistrate's Court Criminal Case No. 12 of 2018 delivered on 29/06/2018)

JUDGMENT

1. **Alfred Khaemba Bunyenzi,** the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of **committing an indecent act with a child**. The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 22nd day of May 2018 at [particulars withheld], unlawfully and intentionally caused his penis to penetrate the vagina of SAO a girl aged 11 years old*'.'

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was the victim one **SAO.** A school mate to SAO one **EO** testified as **PW2** and the mother to SAO testified as **PW3**. A Clinical Officer attached to Rongo Sub-County Hospital testified as **PW5.** The investigating officer one **No. 105386 PC Elizabeth Kyembura** attached to Kamagambo Police Station testified as **PW4**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and remained silent. Thereafter the court rendered its judgment on 29/06/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 25/10/2018 (*albeit* out of time, but with the leave of this Court) in challenging the judgment on the following six main grounds: -

1. THAT I pleaded not guilty

2. THAT the trial court failed to avail crucial witnesses in support of their case

3. THAT the age of the complainant was not proved beyond reasonable doubt as by law required.

4. THAT the trial court failed to consider that the prosecution evidence was not well corroborated to support a conviction.

5. THAT no medical evidence was adduced to link me with the alleged offence.

6. THAT my sworn defense statement was not given due consideration whereas the same was capable of awarding me an acquittal.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant expounded on the grounds and prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any

peradventure and that none of the grounds tendered are holding. Counsel prayed that the appeal be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. I must say that the prosecution's evidence as well as the defence were well captured in the judgment under appeal which evidence I herein incorporate by way of reference.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) On the age of the complainant:

12. The age of the complainant was contested in this appeal. The Appellant contends that the exact age of the complainant was not settled as PW3 informed the court that she gave birth to the complainant on 26/07/2017 whereas the Age Assessment Report stated that the complainant's age was between 10 and 11 years. I have seen the evidence of PW3 in the typed proceedings which I have counter-checked with the handwritten proceedings and noted that the handwritten proceedings indicate the date of birth as 26/07/2007. There was hence a typographical error in the typed proceedings which error is easily reconciled courtesy of **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya.

13. That being the case the complainant was between 10 and 11 years old when the offence was allegedly committed, a position is confirmed by the Age Assessment Report. The complainant was hence a minor of tender age within the meaning of the law.

(b) On the issue of penetration:

14. **Section 2** of the **Sexual Offences Act** defines '**penetration**' as: ***the partial or complete insertion of the genital organs of a person into the genital organ of another person.***

15. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

> ***…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….***
>
> (emphasis added).

16. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

> ***In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.***

17. Penetration is hotly contested. The Appellant contends that there was no medical evidence linking him with the offence. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence of the witnesses and said the following about the complainant: -

> ***…...I find her evidence credible and I am clear in my mind that she was telling the truth. Her evidence was unchallenged…….***

18. Be that as it may, the complainant narrated the events that unfolded on the 22/05/2018 as she walked home from school. She stated that at around 05:00pm her right hand was grabbed by someone and as she screamed the person removed a knife and ordered her to keep quiet. She obliged. She was pulled into a place near the river and was undressed as the assailant also undressed. The description of the events that followed fitted a sexual act between the complainant and the assailant.

19. When the assailant was done he ran away as the complainant dressed up and went back to the road leading to her home where she met PW2 and immediately informed him what had happened. The complainant then went home crying and informed PW3 who examined her in her private parts. PW3 saw a white discharge in the vagina which had a foul smell which substance was also on the under pant. PW3 rushed the complainant to Marindi Dispensary where she was examined and treated and advised to go to Rongo Sub-County Hospital the following day since the night had already fallen.

20. PW5 attended to the complainant on 25/05/2018. She produced the P3 Form, a Laboratory Request Form, the Age Assessment, the PRC

Form and the Treatment Notes as exhibits. The said exhibits had the detailed examination conducted on the complainant and the results thereof. PW5 also physically examined the complainant 3 days post the incident. A high vaginal laboratory examination was also conducted. The examinations revealed bruises and lacerations on the *labia minora,* the hymen was missing, the vagina was tender, there was the presence of a whitish vaginal discharge and the presence of epithelial cells. PW5 formed the opinion that there had been a forced penile penetration into the complainant's vagina. PW3's testimony that she found a whitish discharge in the vagina of the complainant was hence confirmed by PW5 as well as the complainant's evidence that she had engaged in a sexual act with a man.

21. Whereas the testimony of PW5 did not directly connect the Appellant with the commission of the offence as submitted by the Appellant, the same coupled with the testimony of the complainant and PW3 went a long way into proving penetration. I therefore find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) <u>On whether the Appellant was the perpetrator:</u>

22. The issue of identification was contested given that the Appellant denied committing the offence. The Appellant opted to remain silent after he had been placed on his defence. However, that is not to say that the prosecution's burden to prove its case beyond any peradventure was lessened.

23. The complainant knew the Appellant as the one who worked at the home of Dismas Okuku and had previously seen him. The incident occurred at 05:00pm and the complainant saw the face of the assailant clearly. She even saw a mark on the face of the assailant which the complainant showed the court as she testified. PW2 also confirmed that he knew the Appellant who worked at the home of Dismas Okuku.

24. The complainant also readily gave the name of the Appellant when she met PW2 and PW3. She also consistently revealed the Appellant's name to the police thereby sealing any doubt as to whom the complainant referred to. The assailant was also identified before the trial court. (See the Court of Appeal in **<u>Simiyu & Another vs. R. (2005) 1 KLR 192</u>**, **<u>R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR</u>**, **<u>Lesarau vs. R. (1988) KLR 783</u>**, **<u>Morris Gikundi Kamunde vs. Republic (2015) eKLR</u>** among others).

25. On corroboration, I am alive to the fact that the sexual assault happened when the complainant was alone. That being so, the trial court was enjoined to comply with the calling in **Section 124** of the **Evidence Act** for the sole evidence of the complainant to hold. For clarity purposes, a court must state the reasons why it believed that the complainant was truthful. The trial court in this case so complied.

26. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful identification of the Appellant by the complainant and as such the identification of the Appellant as the aggressor was not in error. I now find and hold that the prosecution proved that it was the Appellant who sexually assaulted the complainant. The third ingredient of the offence of defilement is also answered in the affirmative.

27. There is another issue raised by the Appellant on some alleged potential witnesses who did not testify. However, the Appellant did not identify those witnesses and their alleged roles. Be that as it may, **Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya gives the prosecution the discretion to decide on the number of witnesses to avail in a trial. Unless a crucial witness is not availed and no reasonable explanation tendered, no adverse inference can be made for such a failure. The ground appears not to be rooted in this case and is dismissed.

28. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

29. On **sentence**, the Appellant was sentenced to the mandatory life sentence under **Section 8(2)** of the **Sexual Offences Act**. The record is clear on that. I have previously dealt with the mandatory nature of sentences in **<u>Migori High Court Criminal Appeal No. 58 of 2018 Morris Odero Nyangoko versus Republic</u>** (unreported) and since I am still of that considered position I herein below reiterate what I stated therein: -

> ***25. ……..The Sexual Offences Act No. 3 of 2006 is a pre-2010 statute and introduced a raft of mandatory, sole and/or minimum sentences in sexual offences. It is therefore one of those statutes which must be applied in light of the Constitution which was promulgated in 2010. The issue of mandatory and sole nature of sentences was well settled by the Supreme Court in the much celebrated case of <u>Francis Muruatetu & Another -vs- Republic 2017 eKLR</u> where the Court stated in part thus: -***
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> > *…….On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. <u>We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution</u>, which as we have said, makes no such mandatory provision.*
> >
> > *……..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. <u>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 tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution</u>; an absolute right." (emphasis added).*
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> ***26. Applying the foregone reasoning, the Court of Appeal in <u>Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR</u> while considering an appeal against life sentence imposed under Section 8(2) of the Sexual Offences Act had the following to say: -***

…..In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic(supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.

27. Section 8(1) and (2) of the Sexual Offences Act states as follows:

8(1). ……..

(2) ……..

28. It therefore goes without say that the mandatory life sentence imposed by Section 8(2) of the Sexual Offences Act cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the Constitution contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by Section 8(2) of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing. The appeal on sentence is hereby allowed for the reason that the trial court stated that it had no discretion in sentencing in view of the mandatory nature of Section 8(2) of the Sexual Offences Act. The life sentence is hence set-aside.

29. To enable this Court arrive at a fair and a balanced sentence I am of the very considered view that this is a case where a Pre-Sentence Report ought to be considered. Given the power of this Court to take additional evidence on appeal I hereby direct that a Pre-Sentence Report be filed for consideration.

30. Likewise, I allow the appeal on sentence. The sentence of life imprisonment is hereby set-aside and the Appellant shall be re-sentenced. To that end, a Pre-Sentence Report shall be availed for consideration and sentencing on 07/08/2019.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 26th day of July 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Alfred Khaemba Bunyenzi, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant