REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 13 OF 2019

DUNCAN ODHIAMBO ONYANGO.....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. 10 of 2018 delivered on 01/08/2018

JUDGMENT

1. The Appellant herein, **Duncan Odhiambo Onyango,** was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** 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 the 19/5/2018 and 25th day of May 2018 at [Particulars Withheld], unlawfully and intentionally caused your penis to penetrate the vagina of BKO a girl aged 14 years old*'.'

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

4. Four witnesses testified in support of the prosecution's case. **PW1** was the victim one **BKO** A brother to the victim and who was also the guardian one **DOO** testified as **PW2**. A Clinical Officer attached to Rongo Sub-County Hospital testified as **PW4** and the investigating officer one **PC Miriam Nathan** attached to Kamagambo Police Station testified as **PW3**. The Appellant appeared in person during the trial and was a neighbour to the victim and PW2. 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 gave a sworn defence without calling any witness. Thereafter the court rendered its judgment on 01/08/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 26/02/2019 (albeit out of time, but with leave of this Court) in challenging the judgment on the following six grounds: -

> ***1. THAT the trial magistrate erred in law and fact by convicting and sentencing the appellant notwithstanding that there was no evidence of age assessment which failure occasioned an injustice.***
>
> ***2. THAT the pundit magistrate made a studded misdirection by failure to observe that there was no D. N. A. test carried out in accordance to Section 36(1) of the sexual offence act no 3 of 2006 which failure led to a miscarriage.***
>
> ***3. THAT the trial magistrate made a non-direction on the fact the evidence tendered was weak farfetched, distorted that could not hold water but based on speculation and conjecture attested by PW1, PW2, PW3 and PW4 hence the evidence was null and void.***
>
> ***4. THAT the learned trial magistrate erred in law by convicting the appellant basing on circumstances evidence.***
>
> ***5. THAT the trial magistrate erred in law by failure to consider my alibi defence which defence was not challenged by the***

prosecution side in compliance with Section 121 of the Criminal Procedure Code to case hence fundamental prejudiced.

6. THAT I cannot comprehended of what was attested during the trial period hence beg for certified copies of court proceeding under Cap 75 laws of Kenya of Section 170 of the Criminal Procedure Code to enable me construct further grounds of appeal.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant mainly submitted on the conduct of the complainant which, according to him, the complainant's conduct was not commensurate with that of a minor as she seemed to enjoy sex and did not raise any adverse concern. He further submitted that the offence was not proved and in particular the age of the complainant was not properly settled. On sentence the Appellant relied on the Court of Appeal in **Eliud Waweru Wambui vs. Republic (2019) eKLR** in submitting that the minimum mandatory sentence is unconstitutional and must be vacated. The Appellant 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 hotly contested in this appeal. The Appellant contend that the age was not properly settled as the prosecution produced three Certificates of Birth for the complainant bearing three different dates of birth and the court relied on one of them without any proper basis.

13. The record instead has one Certificate of Birth which produced during the trial. I have tried to understand the Appellant's submission on multiple Certificates, but in vain. The same is for rejection. The age of the complainant was properly settled by way of a Certificate of Birth No. [xxxx] which gave the date of birth as 15/07/2003.

14. I therefore find that the age of the complainant was rightly settled at 14 years old and the complainant was a minor within the meaning of the law.

(b) On the issue of penetration:

15. **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.

16. 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).

17. 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.

18. The Appellant has taken twin positions on the issue of penetration. On one hand he alleges that penetration was not proved whereas on the other end he contends that the complainant was a more willing party and should not be heard to complain. The Appellant seemed to introduce the defence contemplated in **Section 8(5)** and **(6)** of the **Sexual Offences Act**, but again he disqualified himself from relying on the very defence by stating that he failed to take steps to confirm that the complainant was not a minor.

19. The prosecution's case is that the Appellant and the complainant who are neighbours had developed a sexual relationship and they were at one point in time warned by PW2. That, the relationship did not end and eventually the complainant ran away from her home and went to live with the Appellant for over a week. The two were arrested while sleeping together in a rented room in Riosiri market by PW2 and PW3 together with other officers. The complainant narrated how the two severally engaged in sex which position was medically proved by PW4 who even produced medical documents to that end. This evidence may have formed the reason why the Appellant attempted to raise the defence in his submissions. I also find that the circumstances of this case did not call for a D.N.A. test contrary to the submission by the Appellant.

20. 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 and found the witnesses truthful and reliable.

21. I have equally re-evaluated the evidence and have no difficulty arriving at a similar finding as the trial court as there is nothing on record to impeach the credibility of the prosecution witnesses. The evidence of the complainant and PW4 taken cumulatively therefore prove penetration in this case.

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 instead in his defence denied knowing the complainant. The complainant and PW2 testified that the Appellant was their neighbour and that evidence was not challenged. PW2 further testified that he had at one point warned the Appellant to cease the sexual relationship with the complainant who was still in school, but the Appellant ignored the call and again the evidence was not challenged. The complainant stayed with the Appellant for the whole week she had ran away from her home and narrated how they moved from one place to another together until when they were arrested while sleeping together. The contention by the Appellant that he did not know the complainant can only be an afterthought at its best and is for rejection. In such circumstances one cannot even think of raising a case of mistaken identity.

23. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as such the identification of the Appellant by way of recognition 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 for a whole week. The third ingredient of the offence of defilement is also answered in the affirmative.

24. 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.

25. On **sentence**, the Appellant was sentenced to the mandatory 20 years' imprisonment term under **Section 8(3)** 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: -***
>
> ***……****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).*

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.

26. Likewise, I allow the appeal on sentence. The sentence of 20 years' imprisonment is hereby set-aside and the Appellant shall be re-sentenced. Given the powers of this Court to take additional evidence on appeal, I order that 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:

Duncan Odhiambo Onyango, 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