REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 33 OF 2018

PAUL MBOYA OMANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau Magistrate in Rongo Magistrate's Court Criminal Case No. 245 of 2016 delivered on15/01/2018)

JUDGMENT

1. **Paul Mboya Omanga,** the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(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 7th day of April 2016 at [particulars withheld], intentionally caused your penis to penetrate the vagina of LA a girl aged 12 years old*'.'

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

4. Six witnesses testified in support of the prosecution's case. **PW1** was the victim one **LA.** The father to the victim one **COO** testified as **PW2.** A Clinical Officer attached to Awendo Sub-County Hospital testified as **PW3. PW4** was the Head Teacher of [particulars withheld] Primary School where the victim was a pupil. The investigating officer one **No. 63085 Cpl. Stephen Murunga** attached to Awendo Police Station was also the arresting officer and testified as **PW5**. **Dr. Sammy Ruwa Mwatela** testified as **PW6**. 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 gave a sworn defence without calling any witness. Thereafter the court rendered its judgment on 15/01/2018 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 with the leave of this Court by filing a Petition of Appeal on 26/06/2018 in challenging the judgment on grounds that the trial court erred in not finding that the offence was not proved and there is no corroboration as potential witnesses did not testify.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant and expounded on the grounds of appeal. 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 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) <u>On the age of the complainant:</u>

12. The age of the complainant was contested in this appeal. However, the issue was well settled by the trial court which relied on an Age Assessment Report undertaken by PW6 which placed the age of the complainant at 12 years old. There was also the Child Heath Card for the complainant which confirmed the assessment. The complainant was hence a minor within the meaning of the law.

(b) <u>On the issue of penetration:</u>

13. **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.***

14. This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** 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. <u>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</u>….***

(emphasis added).

15. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** 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.***

16. Penetration was hotly contested. The Appellant contended that there was no evidence of penetration as the medical evidence was not cogent enough and that the complainant never raised alarm. I have carefully perused and considered the medical document and the evidence on record. The document was the P3 Form for the complainant issued by the Awendo Police Station on 09/04/2016. The P3 Form captured the physical appearance of the complainant at the hospital and a detailed physical examination of the complainant's vagina. It was recorded that at the time of examination both the *labia majora* and *labia minora* were bruised and red. There was whitish discharge at the vaginal opening and a foul smell as well. The hymen was missing. The complainant further underwent a laboratory high vaginal examination where the presence of spermatozoa, pus cells and red blood cells was revealed. PW3 was categorical that the complainant's vagina was penetrated by a penis.

17. The complainant also gave a narration of the events and how she was attacked and forced into a sexual act by a known assailant. The description of the act between the complainant and the assailant cannot be less than a physical sexual act. The evidence of the complainant on penetration was hence corroborated by the medical evidence and the medical exhibits. Therefore, going by the evidence of the complainant coupled with the evidence of PW3 and the contents of the P3 Form, I 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>

18. The issue of identification was also hotly contested. According to PW2 the Appellant is his cousin and a neighbour. Therefore, the Appellant is an uncle to the complainant. At one time the complainant told PW2 that the Appellant had told her that she was beautiful and PW2 confronted and warned the Appellant accordingly. The complainant also knew the Appellant well and that he lived near the shop where she went to buy '*maandazi*.' The complainant stated that she saw the Appellant at his home as she went to the shop. The complainant gave a candid description of the events from the time she was grabbed on the road, taken into a house, given tea and *maandazi*, partook thereof, some clothes put on the floor to make a bed, the undressing of the assailant, how she undressed, the assailant putting on a condom and the sexual act that followed. The act was also not a one-off. PW2 stated that the complainant was away from home for 2 days. The complainant further narrated how the assailant blind-folded her and took her to Stella stage. The blind-fold was however removed on the way.

19. Upon release the complainant first sought assistance from a nearby hospital at Stella where she was taken to the nearby Administration Police Post and reported the matter. She gave the name of the assailant and PW4. The police called PW4 and asked him to go to the Post. PW4 did so at around 05:30pm on 09/04/2016 where the complainant narrated what had happened to her. PW4 accompanied the complainant to Awendo Police Station where PW2 was and the complainant was later taken to Awendo Sub-County Hospital for examination and treatment. The complainant consistently gave the name of the assailant to the police and PW2 as the Appellant herein.

20. The Appellant denied committing the offence and stated that he had disagreed with PW2 over keys and that PW2 was out to fix him. There is no doubt that the first incident occurred during the day. The complainant was taken to the assailant's house where she was well treated to tea. She stayed with the assailant and had ample opportunity to see and recognize him. Furthermore, the assailant was a close relative and lived in their neighbourhood. Without shifting the burden of proof to the Appellant, I note that the Appellant never raised the issue of the grudge with PW2 when PW2 testified. The issue only came up at the tail-end of the proceedings and denied the prosecution an opportunity to challenge it. Be that as it may, the magnitude of the disagreement and how it was used to fix the Appellant was not revealed so

as to enable the Court to reasonably address it. I equally find that the defence was an afterthought and was rightly rejected.

21. I have carefully weighed the foregone evidence and the defence by the Appellant. Taking caution as required in law since the complainant is the only identifying witness, 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 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.

22. The Appellant was properly found guilty and convicted. The appeal on conviction hereby fails.

23. On **sentence**, the Appellant was sentenced to the mandatory minimum term of 20 years' imprisonment under **Section 8(3)** of the **Sexual Offences Act**. The record is clear on that. I have previously dealt with the mandatory nature of minimum sentences in **Migori High Court Criminal Appeal No. 58 of 2018 Morris Odero Nyangoko versus Republic** (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 Francis Muruatetu & Another -vs- Republic 2017 eKLR 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. 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, 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. 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; an absolute right." (emphasis added).*
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> ***26. Applying the foregone reasoning, the Court of Appeal in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR while considering an appeal against life sentence imposed under Section 8(2) of the Sexual Offences Act had the following to say: -***
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> > *…..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.*
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> *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.*
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> ***27. Section 8(1) and (2) of the Sexual Offences Act states as follows:***
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> > ***8(1). ……..***
> >
> > ***(2) ……..***
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> ***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.***
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> ***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.***

24. Likewise, I allow the appeal on sentence. The sentence of 20 years' 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:

Paul Mboya Omanga, 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