REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 138 OF 2015

JOSEPH MBUGUA NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against original conviction and sentence in criminal case number 1170 of 2014 Molo delivered before Hon. H. Nyaga – Chief Magistrate dated 8th May 2015)

JUDGMENT

1. The appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement of a 15 years old girl RW on the 2nd May 2014 at Turi forest within Nakuru County. He also faced an alternative charge of Indecent Act with a child contrary to **Section 11(1) of the Sexual Offences Act** (hereinafter called "the complainant.")

2. He was convicted and sentenced under **Section (8) (3) of the Act** on the 15th May 2015. It states

> *8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

3. The appeal is against both the conviction and sentence and is premised on grounds that the trial magistrate did not accord a fair hearing to the appellant, that his defence was ignored and generally that the conviction was against the weight of evidence.

He has urged for quashing of both the conviction and sentence, and an order for a re-trial.

4. As I re-examine the totality of evidence adduced before the trial court, I am minded that my duty as the first appellate court is to weigh the conflicting evidence and draw my own findings and conclusions.

5. The complainant testified as **PW1** that her age was fifteen (15) years, and a form two student at [particulars withheld]'s Secondary School.

It was her evidence that she knew the accused as they used to go to the same church and that at the material time about 10.00a.m, she was with other four girls – PW2, PW3, PW4 and PW6 when the appellant grabbed her as they went to fetch firewood, pushed her to the bush and defiled her.

6. The evidence of the four girls was that they were going to fetch firewood on the 2nd May 2014 around 10.00a.m. when the accused emerged from a bush and grabbed the complainant upon which she started screaming but he took her to the bush and defiled her for about one hour.

7. It was their testimony that they ran to the nearby school and informed parents who were there and upon going back to the bush with the parents, they found the complainant crying and naked with her skirt torn, and upon being interrogated, she testified to have been raped by the appellant. The complainant was then taken to hospital.

8**. PW5** was NWC and mother of the complainant who took the complainant to the hospital with others and to the police station. She knew the appellant as he used to attend their church.

9. **PW7** the investigating officer received the appellant at the Molo police station who had been arrested by members of the public. He issued the complainant with a P3 form and recorded statements of the other girls.

10 The medical Evidence of defilement was tendered by **Dr. James Motaya PW6** the medical superintendent at Molo District Hospital, on behalf of Dr. Joy Gathua who examined the complainant but had left and could not be traced.

The findings were

- Dress torn at the zip and back
- Complained of pain on her genitalia, was 15 years old
- Vaginal swab revealed Red blood cells and puss cells
- No tears or discharge noted
- Hymen had fresh tears, cervix normal – The Report produced as **PExt 3**.

11. The appellant was called upon to defend himself. The record shows that provisions of **Section 211 Criminal Procedure Code** were explained to him upon which he opted to give sworn evidence in Kiswahili. He did not call any witnesses.

He denied committing the offence stating that he was at work and never met the complainant on the material day.

12. It is upon the above evidence that the trial magistrate founded the conviction and the sentence upon findings that all the prosecution witnesses were consistent even on cross examination and were able to identity the appellant as the assailant and placed at the scene of the crime.

13. I have carefully re-examined the evidence.

The appellant was given an opportunity to urge his case by cross examining the prosecution witnesses and to tender his defence.

Article 50 of the Constitution gives all persons rights to have any dispute resolved by application of the law in a fair and public hearing in a court or an independent tribunal.

14. The appellant did not complain that he was not informed of the charge facing him with sufficient detail nor did he say that he was not given adequate time to prepare his defence.

He did not state the trial was unduly delayed.

It is therefore not clear what his complaints are as far as fair hearing are concerned. I find no substance in the said ground of appeal.

15. The appellant stated that his defence was not considered by the trial court.

The record is clear that the appellant was given an opportunity to defend himself and to call witnesses. He put forth an *alibi* defence, stating that he was at work at the material date and time and did not meet the complainant. He however failed to call any of his co-workers to authenticate his defence that around 10.00a.m. on the material date, he was at work and therefore not at the scene of the crime.

16. The trial magistrate cannot be faulted in his findings that the defence had no substance against the overwhelming evidence that he was placed at the scene and was the perpetrator of the crime against the complainant.

There is sufficient evidence that the appellant was the one who defiled the complainant.

The five prosecution witnesses identified the appellant as they were all together at the scene when the appellant whom they knew grabbed the complainant, pushed her to the bush and defiled her before help could come from the school where the other girls rushed and reported to parents therein.

17. **PW5** the investigating officer confirmed having received the appellant at the police station from members of the public who arrested the appellant after commission of the offence.

To that extent, the complainant's evidence was fully corroborated by all other prosecution witnesses. I find no inconsistency or contradiction in the prosecution evidence.

18. On the medical evidence, the doctor's report was plain on the examination on the complainant.

The age was confirmed as 15 years and that her hymen was torn with fresh tears, and bleeding but no discharge was noted.

Upon cross examination by the appellant, the doctor stated that it was desirable that he too should have been examined. He did not cross examine the Doctor on the findings.

It is therefore not true that the appellant was not given an opportunity to defend himself as the record speaks otherwise.

19. It is not a fatal omission if an accused person in defilement cases is not subjected to medical examination to link him to the offence,

more so when it is not in issue as to the identity of the said defiler. **Section 36(1) of the Act** requires, though not mandatory, that where a person is charged with committing an offence under the Act to direct that appropriate sample or samples be taken from the accused for forensic and other scientific testing, including DNA, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

The above is necessary in my view, when the evidence is circumstantial.

20. In his case, the appellant was seen grabbing the complainant and pushing her into the bush by the complainant's friends who were with her and present, and who knew the appellant and who found the complainant naked with torn clothes at the scene.

21. The Court of Appeal in **Robert Mutingi Mumbi –vs- Republic Cr. Appl. No. 52/2014 (Malindi),** and also in **Williamson Sowa Mbwaga –vs- Republic**, rendered that the provision (Section 36 (1) was not mandatory as DNA testing was not the only evidence of commission of the offence may be proved.

The four girl friends (PW2, PW3, PW4 and PW6) were all at least 15 years old and understood clearly what they testified to, and the nature of the offence that faced the appellant against the complainant.

22. Upon thorough analysis of the evidence on record, I find no iota of doubt that the appellant is not the one who committed the heinous offence against the complainant, a girl well known to him from being a neighbour and one time a member of their church.

I find no reason to upset and/or set aside the conviction by the trial magistrate. The conviction is upheld.

23. **Section 8(3) of the Act** provides for the sentence upon conviction, being not less than 20 years imprisonment. This a minimum sentence. It ties the court's hands and robs it of judicial discretion.

Various courts are divided on this matter. The Kenya Judiciary Sentencing Policy Guidelines Paragraph 7.17 provides

> ***"where a law provides for mandatory minimum sentence, then the court is bound by these provisions and must not impose a sentence lower than what it prescribed***."

24. However, the Supeme Court decision in the **Muruatetu case** opened a window for consideration of these minimum sentences, and the courts have since then taken advantage of the same and the rational behind, to apply their judicial discretion in sentencing, upon the peculiar circumstances and character of each case. A few cases will suffice **Christopher Ochieng –vs- Republic (2018) e KLR, Jared Koita Injiri –vs- Republic (2019) e KLR, Cr. Appeal No.93 of 2014, Republic -vs- Johanna Munyao Mweni (2018) e KLR, Cr. Appeal No. 93 of 2017 Eliud Muchonde –vs- Republic (2019) e KLR, Gidraph Mwangi Mugo –vs- Republic (2019) e KLR, RKS –vs- Republic (2018) e KLR.**

25. The clarion call for a serious national conversation on the minimum sentences must be encouraged so as to give the courts judicial independence and discretion in sentencing.

26. For the foregoing and having considered the peculiar circumstances pertaining to this case, I come to a conclusion that the twenty (20) years imprisonment meted to the appellant, being the minimum sentence under Section 8(3) of the Sexual Offences Act to be excessive. I have also considered the five years period the appellant has been in custody and serving jail term. I reduce the 20 years imprisonment to seven (7) years to run from the date of the trial court's judgment, the 8th May 2015.

It is so ordered.

Delivered, Signed and Dated at Nakuru this 25th Day of July 2019.

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J.N. MULWA

JUDGE