REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 29 OF 2017

BETWEEN

FRANCIS WAFULA NAKUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 61 of 2015

in the Principal Magistrate's court at Kimilili by Hon. D.O.Onyango (SPM) on 10.02.17)

JUDGMENT

The trial

1. **FRANCIS WAFULA NAKUKU (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

> ***On diverse dates between 08th August, 2015 and 30th September, 2015 in Bungoma North District within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of FNS a girl aged 15 years***

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. **PW1 MICHAEL OKUMERUT**, a clinical officer examined complainant on 30.09.15 and found that she had lacerations on labia minora and her hymen was perforated. He produced her P3 form as **PEXH. 1**. The complainant stated that she was17 years old. It was her evidence that she differed with her parents and she went to the home of the Appellant in August, 2015 and stayed with him until September, 2015 when both of them were arrested. It was her evidence that they had sex for the time she stayed with the Appellant. In cross-examination, she stated that she had another boyfriend. **PW3 APC BRIDGIT KENEKE** received the complainant and the Appellant from a member of public on 30.09.15 who reported that they were staying together as husband and wife. **PW3 BS** complainant's mother stated that complainant disappeared from home on 19.09.15 and was arrested together with the Appellant with whom she as staying on 30.09.15. In cross-examination by the Appellant, she conceded that the complainant and the Appellant were in a relationship and had lived together for over one year. **PW5 PC SILAS CHERONO** the investigating officer received the Appellant and the complainant on 30.09.15 and after investigations caused the Appellant to be charged. He produced complainant's age assessment report PEXH. 4 which showed that she was 16 years old.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence and said that she did not know the complainant.

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 30 years' imprisonment.

The Appeal

5.Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 21st July, 2017. From the 4 grounds of appeal and written submissions filed by the appellant on 24th July, 2019, I have deduced the following issues: -

1. That the prosecution case was not proved beyond reasonable doubt

2. That defence was not considered

3. That court relied on circumstantial evidence

4. That the P3 form was not produced by the maker

6. When the appeal came up for hearing on 07th August, 2019, Appellant submitted that he was wholly relying on submissions Mr. Akello, learned Counsel for the state opposed the appeal and submitted that the complainant's age was proved by way of an age assessment report and penetration by way of a P3 form. It was additionally submitted for the state that the Appellant at some point during the proceedings admitted that he was staying with the complainant and and further that the sentence of 20 years was lawful.

7. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

i. Age of the victim.

ii. Identity of the offender

iii. Penetration.

8. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

9. The trial court found as a fact that the complainant's age had been proved by an assessment report **PEXH. 4** which shows that she was 16 years old.

10. The complainant told court that she knew the Appellant well having stayed with him from sometimes in August 2015 up to 30.09.15 when both of them were arrested. The Appellant's denial that he did not know the complainant was in my considered view rightfully rejected by the trial court.

11. Concerning the question of penetration, the law under **Section 2** of **Sexual Offences Act** defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."

12. The P3 form **PEXH. 1** produced by **PW4 MICHAEL OKUMERUT**, who examined the complainant on 30.09.15 which shows that complainant had lacerations on labia minora and her hymen was perforated. Penetration was certainly proved beyond a doubt and Appellant was identified as the perpetrator.

13. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the Act; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014. It adopted what the** Supreme Court held in ***Francis Karioko Muruatetu & another v Republic*** **SC Petition No. 16 of 2015 [2017]eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

14. Since the mandatory minimum sentence has been declared unconstitutional, I am bound to re-examine the sentence having regard to the fact that the legislature had taken the view the offences of defilement are serious offence that merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by the legislature. In ***Dismas Wafula Kilwake v Republic*** **[2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the ***Act***. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on

the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

15. **Section 354** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, *"**in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence**"*.

16. The mandatory sentence for defilement of a child aged between 16 years and 18 years is a minimum sentence of 15 years' imprisonment under **section 8(4)** of the ***Act***. The Appellant is a first offender. I am alive to the fact that sentencing is at the discretion of the trial court that must be exercised judicially. The trial court with respect did not explain why it found it fit to sentence Appellant to 30 years' imprisonment yet he was a first offender and there being evidence that the complainant and the Appellant were in a relationship.

17. I have considered the fact that the complainant and the appellant were in a relationship. Indeed, the complainant's mother conceded that she was aware of the relationship between the complainant and the Appellant and the fact that they had lived together for over one year.

18. At the time the appellant was charged, he was aged 18 years old according to the charge sheet. He is a first offender and considering the totality of the circumstances, a long custodial sentence would not serve the interests of justice. On the other hand, the law recognizes the seriousness of the act of defilement. I therefore uphold the conviction. The Appellant has served 2 ½ years. The sentence of 30 years is substituted with the period already served.

DATED AND DELIVERED IN BUNGOMA THIS *09th* DAY *August*, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brendah

Appellant - Present

For the State - Mr. Akello