REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 27 OF 2018

BETWEEN

EDMOND WAMBAYA WASIKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in S.O Criminal Case Number 75 of 2016 in the* Senior Principal Magistrate's court at *Kimilili by Hon. D.O.Onyango (SPM) on 24.04.18)

JUDGMENT

The trial

1. **EDMOND WAMBAYA WASIKE (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 main count are that

> ***On 31st December, 2012 in bungoma North Sub-County within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of MMW a girl aged 14 years***

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. PW1 ***MMW***, the complainant stated that she was born in the year 1998 and was in class 7 at [particulars withheld] Primary School at the material time. She recalled that on the material date at about 10.00 pm, she as walking home from church when Moraa and Rose took her to a bar where she found the Appellant whom she knew before that date who offered her a soda which she later suspected was laced with alcohol because she got drunk after which the Appellant proceeded to defile her. She stated that while there, she heard people shouting outside and the Appellant helped her to climb onto the ceiling but when she finally got out met her mother who escorted her to the police and later to a health centre where she was examined and was issued with a P3 form. **PW2 AW**, the complainant's mother recalled that the complainant was born on 30th October, 1998 as shown on her certificate of birth PEXH. 4. She recalled that her daughters the complainant and AS went to church at about 08.00 pm and the latter returned alone at about 10.00 pm and informed her that complainant had been taken to a bar by one Edward. She stated that she went to the said bar and saw the Appellant who he knew as Edward escape after which the complainant emerged half naked at about 03.00 am. It was her evidence that she examined complainant and found that she had been defiled as a result of which she escorted her to the police and to a health centre the following day. **PW3 MICHAEL OKUMARUT**, a clinical officer examined complainant on 03.01.13 and filled her P3 form on 18.02.13 PEXH. 1. He stated that her labia minora had bruises, the hymen was broken and there was presence of epithelial cells which was an indication of friction in the inner vagina. **PW4 ANW,** the complainant's elder sister recalled that she went to church with the complainant at about 08.00 pm. She stated that she later realized that the complainant was not in church and upon inquiry was told that two women had taken her to Edward's (Appellant's) bar. She stated that she reported the matter to her parents who went to the bar from where Appellant emerged and later the complainant emerged at about 03.00 am and informed them that she had ben defiled. **PW5 PC WALTER OJWANG**, the investigating officer confirmed that the Appellant who he knew as Edward operated a bar and a shop at [particulars withheld] market and that the bar had a small room with a bed where the complainant was alleged to have been defiled.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence. He conceded that he owned a shop at [particulars withheld] Market, He stated that he left Kiminini at about 04.00 pm after buying stock and went to the shop where he took stock and then went home. He stated

that he did not know what happened at his shop at night but was informed that some people were there looking for a girl. In cross-examination, the Appellant conceded that his shop was next to his bar and that he had been at the bar at about 09.00 pm. He also conceded that he had an employee called Moraa. **DW2 CHRISPINUS WEKESA KAKAI** stated that he used to work at the Appellant's shop. He conceded that the Appellant arrived at the bar at about 06.00 pm, went to the shop and they parted ways at about 06.30 pm and he didn't see him again, He conceded that he heard people asking for the Appellant who was alleged to be hiding a girl at the bar but she had not been found by the time the bar Moraa closed at about 11.00 pm**. DW3 FRED BARASA** an employee of the Appellant stated that the Appellant left the bar sometimes after 06.00 pm on the material night. He conceded that he heard people allege that the Appellant whom he knew as Edward was hiding a girl at the bar but he didn't see the girl.

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 19th June, 2018 From the 5 grounds of appeal and written submissions filed by the appellant on 18.01.19, I have deduced the following issues: -

1. The Appellant had been charged with a similar offence in KIMILILI CRIMINAL CASE NO. 415 OF 2013

2. Complainant's age was not proved

3. That there were inconsistencies in the prosecution case

4. The Appellant's alibi was not considered

5. That the sentence was harsh

6. When the appeal came up for hearing on 05th August, 2019, Mr. Kituyi submitted that he was wholly relying on submission filed on 18th January, 2019. Ms. Nyakibia, learned Counsel for the state opposed the appeal and submitted that the complainant's age was proved by way of a certificate of birth, penetration by way of a P3 form and that complainant identified her assailant as the Appellant who was known to her before the material date. The state submitted that **in KIMILILI CRIMINAL CASE NO. 415OF 2013** was withdrawn under section 87 (a) of the Criminal Procedure Code before it was prosecuted to its logical conclusion.

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.

i. Age of the victim

9. The complainant's certificate of birth PEXH. 4 shows that she was born on 30th October, 1998 and was therefore 14 years old at the material time. The fact that the certificate of birth was issued a month after the offence was committed does not change the fact that the complainant was 14 years at the time that she as allegedly defiled and the trial court therefore rightfully found that complainant's age had been proved by the certificate of birth to be 14 years. The holding in the Ugandan case of **FRANCIS OMURONI V UGANDA COURT OF APPEAL CRIMINAL APPEAL NO, 2 OF 2000** that the age of a victim can only be proved by medical evidence does not hold true of the situation in Kenya where age of a victim can be proved by a certificate of birth or even by the oral evidence of the victim's mother. In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".***

ii. Identification of the appellant

10. The complainant told court that she knew the Appellant before the material date because he had some business at [particulars withheld] market. The fact that the Appellant was a businessman in [particulars withheld] market has been corroborated by all the prosecution and defence witnesses including the Appellant himself.

11. The Appellant was therefore not a stranger to the complainant. Complainant stated that on the material night, Moraa and Rose took her to a bar where she found the Appellant who offered her a soda which she later suspected was laced with alcohol because she got drunk after

which the Appellant proceeded to defile her. The fact that the Appellant had an employee called Moraa has been confirmed by the Appellant and his two witnesses.

12. The Appellant and his witnesses have confirmed that Appellant went owned a bar and that he went to the bar on the material night. The Appellant's witnesses do not appear to have seen the Appellant leave the bar but PW2 and PW3 told court that they saw Appellant leave the building that housed the bar at about 02.00 am and that it was from the same building that the complainant emerged from. Complainant told court she had been with the Appellant in the bar since 08.00 pm. She therefore had adequate time to be with the Appellant whom she knew and there is therefore no possibility that she was mistaken as to who her assailant was. PW2 and PW3 similarly knew the Appellant before the material time and their evidence that they saw him emerge from the building from where the complainant later emerged is corroborative of the complainant's evidence.

iii. Penetration

13. 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."***

14. Complainant's evidence of penetration was corroborated by medical evidence contained in the P3 form produced by PW3 which confirmed that complainant's labia minora had bruises, the hymen was broken and there was presence of epithelial cells which was an indication of friction in the inner vagina. From the foregoing, I find that there was evidence of penetration.

iv. The Defence of Alibi

15. The Court of Appeal in the case of ***Kiarie v Republic [1984] KLR*** held:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

16. From the totality of the evidence on record that I have analyzed above, I am persuaded that the trial court rightfully considered the defence of alibi and justly rejected it for not having cast doubt on the well corroborated prosecution case. The state submitted that **in KIMILILI CRIMINAL CASE NO. 415OF 2013** was withdrawn under section 87 (a) of the Criminal Procedure Code before it was prosecuted to its logical conclusion.

v. *Was Appellant charged twice for the same offence*

17. Article 50 prohibits double jeopardy in the following terms:

> **(2) Every accused person has the right to a fair trial, which includes the right**
>
> **(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted**;

18. The submission on behalf of the state that **KIMILILI CRIMINAL CASE NO. 415OF 2013** was withdrawn under section 87 (a) of the Criminal Procedure Code and that the Appellant was neither convicted nor acquitted has not controverted.

19. Section 87 of the Criminal Procedure Code provides that in a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

> **(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.**

20. Consequently, I find that the Appellant was rightly charged afresh has not been exposed to double jeopardy for the reason that in the previous case, he was neither convicted nor acquitted.

v. Was the sentence harsh and excessive

21. The Appellant was convicted of an offence under 8(1) as read with section 8 (3) of the Act which attracts a minimum sentence of 20 years. 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.** In ***Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014** the court 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**.**

22. 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 under the Sexual Offences Act are serious offences 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.**

23. The Sentencing Policy Guidelines require the court, in sentencing an offender to a 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.

24. **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".**

26. I have considered the fact that the Appellant is a relatively young person. 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 and procuring a minor to be defiled.

25. From the foregoing, I am persuaded to interfere with the mandatory minimum sentences imposed on the Appellant. The sentence of 20 years is substituted with a sentence of 10 years. The sentences will run from the date of conviction which is *24th April, 2018*.

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 Appellant - Mr. Kituyi

For the State - Ms. Nyakibia