REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CRIMINAL APPEAL NO. 65 OF 2018

MM..APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(Being an appeal from the conviction and sentence delivered on the 31st day

of August 2018 in Eldoret Chief Magistrate's Criminal Case No. 60 of 2016

by Hon. E. Kigen, RM)

JUDGMENT

[1] This appeal emanates from the Judgment of **Hon. E Kigen, RM**, delivered on **31 August 2018** in **Eldoret Chief Magistrate's Criminal Case No. 60 of 2016: Republic vs. MM**. The Appellant herein, **MM**, was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on diverse dates between 5th and 9th March 2018 in Likuyani Subcounty within Kakamega County, he unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (anus) of **SO**, a boy child aged 9 years.

[2] In the alternative, the Appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on diverse dates between 5th and 9th March 2018 in Likuyani Subcounty within Kakamega County, he unlawfully and intentionally touched, with his penis, the buttocks and anus of **SO**, a boy child aged 9 years.

[3] The Appellant denied those allegations, whereupon the Prosecution adduced evidence from five witnesses in proof of its allegations. Thereafter, in a considered Judgment delivered on **31 August 2018**, the trial court found the Appellant guilty of the Main Count of defilement and convicted him pursuant to the provisions of **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The Appellant was thus sentenced to life imprisonment; which is the penalty prescribed for the offence under **Section 8(2)** of **the Sexual Offences Act**.

[4] Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **6 September 2018** on the following grounds:

> **[a]** That the Learned Magistrate erred in both law and fact by convicting him yet the trial she presided over was an irregular trial;
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> **[b]** That the trial magistrate erred in fact and law when she convicted him and yet failed to note that penetration was not proved;
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> **[c]** That the trial magistrate erred in law and fact when she convicted him and yet failed to find that the Prosecution had proved the case against him beyond reasonable doubt;
>
> **[d]** That the learned trial magistrate erred in law when she sentenced the appellant to life imprisonment and yet failed to note that the medical evidence fell below the standard of proof required by law to prove defilement;
>
> **[e]** That the learned trial magistrate erred both in law and fact when she dismissed the Appellant's plausible defence, which defence was strong enough to displace the Prosecution case.

[5] It was on the basis of the foregoing grounds that the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside. He argued the appeal by way of written submissions, contending that the Prosecution failed to discharge the burden of proof before the lower court beyond reasonable doubt as required by law. He pointed out that since the Complainant was a minor, it was imperative that his evidence be corroborated by credible evidence; and that this is notwithstanding the provisions of **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya.**

[6] The second limb of the Appellants submissions comprised an attack on the medical evidence adduced by **PW4** before the lower court. He submitted that **PW4**'s evidence was entirely worthless for the purposes of the proceedings before the lower court in that he was unable to ascertain the age of the injuries. The Appellant relied on **Ben Mwangi vs. Republic Nairobi High Court Criminal Case No. 471 of 2001** and **Gabriel Muchira Mwenja vs. Republic [2000] eKLR** to underscore the importance of medical evidence, and for the proposal that where medical evidence adduced falls short of connecting the accused with the alleged crime, then that evidence is worthless. Accordingly, the Appellant urged the Court to re-evaluate the evidence adduced before the lower court, including his defence, and find that his guilt was not proved beyond reasonable doubt.

[7] In response to the Appellant's written submissions, **Ms. Mokua**, Learned Counsel for the State, submitted that the Prosecution proved its case before the lower court beyond reasonable doubt. She pointed out that the minor's Child Health Card was produced in proof of the age of the minor, and that he was born on **29 June 2009**, and was therefore aged 9 years as at **5 March 2018** when the offence is said to have taken place. On penetration, **Ms. Mokua** urged the Court to believe the Complainant's testimony that he had gone to his grandmother's house, where the Appellant, who is his step-brother, lived; and that the Appellant, with whom he would share a bed during the night, defiled him on various occasions between **5th and 11th March 2018**, by inserting his (the Appellant's) penis in his (Complainant's) anus.

[8] It was further the submission of **Ms. Mokua** that upon the matter being reported to the Police by the Complainant's father, the Complainant was taken for medical examination and found to have tears in the anus which were consistent with defilement. She urged the Court to find that the issue of identification was not in dispute, as the Appellant had conceded that they were step-brothers; and that he used to stay with his grandmother. On whether the Appellant's defence was considered by the lower court, **Ms. Mokua** made reference to page 30 of the Record of Appeal and submitted that the same was duly considered and dismissed as a mere denial; and that since the Appellant only spoke about his arrest, the Prosecution evidence remained unshaken. In the circumstances, she urged the Court to dismiss the appeal.

[9] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[10] Testifying as **PW1**, the Complainant told the lower court that he had gone to visit his grandmother; and that at night on **5 March 2018**, the Appellant asked him to share his bed with him. That the Appellant then removed his (Complainant's) clothes and then proceeded to insert his penis into his (Complainant's) anus. He added that he reported the incident to his grandmother the following morning; and the matter was brought to the attention of his mother, but that they did not believe him. He further testified that his happened consecutively between Wednesday and Sunday and he began to feel pain. He decided to go back home and report the matter to his father, who promptly took action by reporting the incident to the Police. He was thereafter taken to Moi Teaching and Referral Hospital for examination and treatment. He further stated that the Appellant had threatened to stab and kill him if he reported the incident to anybody.

[11] FOM, the Complainant's father, testified as **PW2** and confirmed that the Appellant is his stepson; and that he was at home on **11 March 2018** when he saw the Complainant standing outside near the wall and that, on seeing him, the minor began to cry in anguish. He took him inside the house and got to learn from him that the Appellant had defiled him severally and had threatened to kill him if he revealed the matter. He further confirmed that he took action by reporting the matter to the Chief who then caused his Administration Police Officers to arrest the Appellant. He was then handed over to **Matunda Police Station**. The minor was issued with a P3 Form and advised to go to **Moi Teaching and Referral Hospital** for examination and treatment.

[12] APC Nedama Nganai (PW3) told the lower court that he was at **Sango AP Post** on **12 March 2018** when **PW2** filed a defilement complaint against the Appellant, his older son, on behalf of his younger son. He confirmed that, on the basis of that report they arrested the Appellant on **13 March 2018** and handed him over to **Matunda Police Station**. **Dr. Eunice Temet (PW4)** similarly confirmed that she was on duty at of **Moi Teaching and Referral Hospital** when the Complainant herein was presented for examination following allegations that he had been defiled by his brother at night. It was her evidence that the Complainant's anus was bruised and torn at positions 5 o'clock and 6 o'clock; and that the injuries were in the process of healing. **PW4** accordingly came to the conclusion that the minor had indeed been defiled.

[13] The last Prosecution witness before the lower court was **PC Rajab Korir (PW5),** who was then attached to **Matunda Police Station**. He testified that he was on duty on **13 March 2018** when he received a report from an officer from **Sango AP Post** that they had arrested the Appellant in connection with defilement. He thereupon proceeded to the AP Post and collected the Appellant and escorted him to **Matunda Police Station**. He thereafter escorted the minor to **Moi Teaching and Referral Hospital** for examination before causing the Appellant to be charged with defilement of his 9-year-old brother.

[14] Upon being placed on his defence, the Appellant denied the allegations against him, contending that they are untrue. He stated that he had gone to work as a sand harvester as usual, after which he stayed with a friend at **Mawe Tatu** until 10.00 p.m. when he returned home and

slept. He further stated that he was arrested the following morning and taken to the Police Station without being told the reason for his arrest. That after two days, he was charged with defilement and taken to court. He confirmed that he was then living with his grandmother; and that the Complainant is his step-brother.

[15] Granted the foregoing summary of the evidence, the learned trial magistrate correctly framed the issues for determination in her Judgment at page 28 of the Record of Appeal. She then proceeded to analyze the evidence and the applicable law before coming to her conclusion that all the essential ingredients of the offence of defilement as set out in the Main Count had been proved beyond reasonable doubt. The Main Count had been laid pursuant to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act,** which provision stipulates that:

> **(a) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(b) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.**

[16] In the premises, the burden of proof was on the Prosecution to prove beyond reasonable doubt that:

> **[a]** That the Complainant was, at the material time, a child for purposes of **Section 8(2)** of the **Sexual Offences Act**;
>
> **[b]** That there was penetration of the complainant's genital organ;
>
> **[c]** That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[17] The learned trial magistrate properly guided herself and relied on the case of **<u>Dominic Kibet Mwareng vs. Republic [2013] eKLR</u>** as to the aforestated ingredients. Needless to say, that the age of a minor is a critical component of a defilement charge. In **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal reiterated this point thus:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

[18] Accordingly, in **Rule 4** of the **Sexual Offences Rules of Court Rules** it is recognized that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

[19] Before the lower court, the Prosecution produced the Complainant's Child Health Card as **the Prosecution's Exhibit 1**; and that document does prove that the minor was born on **30 June 2009**. He was therefore 9 years old for all intents and purposes. He told the lower court that he was then in Class 2. Indeed, the Appellant conceded that the minor is his brother; and that he was then 9 years old. There is therefore credible and uncontroverted evidence on record to show that the Complainant was aged 9 years at the material time and was therefore a minor for the specific purposes of **Section 8(1) as read with Section 8(2)** of the **Sexual Offences Act.**

[b] <u>On Penetration of the Complainant:</u>

[20] The minor testified as to how the defilement occurred; namely that he had gone to visit his grandmother when the Appellant invited him to share his bed, only to forcefully insert his penis into his anus; an act that he repeated for the following nights until Sunday. He further told the lower court that, although the Appellant had threatened to kill him if he reported the matter, he brought it to the attention of his grandmother who informed his mother, but no action was taken. He ultimately decided to report the matter to his father; a fact corroborated by **PW2.**

[21] In particular, it was the evidence of **PW4** that upon examining the minor, he noted that his anus was bruised and torn at positions 5 o'clock and 6 o'clock; which injuries were in the process of healing. She was of the finding that the injuries were consistent with defilement. She produced the P3 Form that she filled and signed in respect of the examination and it was marked the **Prosecution's Exhibit No. 2** before the lower court. Clearly, there was cogent proof, in the light of the foregoing, that the complainant was subjected to penetration of his genital organ for purposes of **Section 8(3)** of the **Sexual Offences Act;** and although the Appellant tried to discredit the evidence of **PW4,** that evidence remained unshakable and does corroborate the evidence of the minor in proof of penetration. Accordingly, in my re-evaluation of the evidence, I am satisfied that the Prosecution did prove beyond reasonable doubt that the minor was defiled as charged in the Main Count as the medical evidence was cogent.

[c] <u>On whether the penetration of the Complainant was perpetrated by the Appellant</u>:

[22] There was no dispute before the lower court, or in this appeal that the Appellant and the minor are step-brothers and therefore well known to each other. The incident complained of occurred in the home of their grandmother, where the Appellant was then living; and evidence to this effect was adduced by, not only the Complainant but also by **PW2,** the father of both the minor and the Appellant. Moreover, the Appellant explicitly admitted that he was then living with his mother; and that he did not have any reason to believe that the Complainant was merely out to fix him. In the premises, the lower court cannot be faulted for coming to the conclusion that credible

evidence was presented before it to inculpate the Appellant.

[23] Although the Appellant complained that his defence was not taken into account by the trial court, the record of the lower court shows otherwise. At page 29, the trial magistrate gave consideration to the defence and concluded that it did not raise any tangible issues to displace the Prosecution evidence. Likewise, at page 30 of the Record of Appeal, the trial magistrate again considered the Appellant's defence under the heading, **"Defence adduced".** Clearly therefore, there is no merit in that argument. To the contrary, all the essential ingredients of defilement as charged in the Main Count were proved by the Prosecution beyond reasonable doubt. Consequently, I have no doubt that the Appellant's conviction was premised on sound evidence.

[24] Regarding the sentence, **Section 8(2)** of the **Sexual Offences Act,** does provide for life imprisonment and whereas it is expressed as a minimum sentence, the trial magistrate did not feel constrained in any way in passing the life sentence on the Appellant. The record shows that she put into consideration the mitigation of the accused, and the fact that he was a first offender. She also took into account the age of the minor. Hence, the sentence was provided for in law. Nevertheless, following the decision of the Supreme Court in **Francis Karioko Muruatetu vs. Republic [2017] eKLR,** the life sentence has since been held to be unconstitutional. Here is how the Court of Appeal looked at it in **Jared Koita Injiri vs. Republic [2019] eKLR**:

> **Arising from the decision in** *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**
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> *"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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*
>
> **In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by** *section 8 (1)* **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."**

[25] In the premises, the appellant is entitled to a review of the sentence based on the circumstances of the case and any mitigating circumstances evinced by the record. It is also noteworthy that the Appellant, a 33-year-old married man, defiled his younger brother repeatedly on the pain of death before the intervention of their father. Accordingly, I would set aside the sentence of life imprisonment imposed on him by the lower court and replace it with imprisonment for 30 years, to be served from the date of his conviction and sentence by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST, 2019.

OLGA SEWE

JUDGE