



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 50 AND 52 OF 2017 (Consolidated)**

**BETWEEN**

**ROBERT SIMIYU WAFULA.....1<sup>ST</sup> APPELLANT**

**DANCUN ASIEMBA ADUFUGA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in Criminal Case Number 924 of 2013*

*in the Senior Principal Magistrate's court at Kimilili by Hon D.O.Onyango (SPM) on 26.04.17)*

**JUDGMENT**

**The trial**

1. **ROBERT SIMIYU WAFULA** (*hereinafter referred to as the 1<sup>st</sup> Appellant*) has appealed against sentence and conviction in the 1<sup>st</sup> count of benefitting from child prostitution contrary to section 15(d) of the Sexual Offences Act (*hereinafter referred to as the Act*) by taking advantage of the influence he had over the complainant herein, ENN aged 14 years (*hereinafter referred to as the 1<sup>st</sup> complainant*). **DANCUN ASIEMBA ADUFUGA** (*hereinafter referred to as the 2<sup>nd</sup> Appellant*) has appealed against conviction and sentence for the offence defilement of the 1<sup>st</sup> complainant's herein contrary to section 8(1) as read with section 8 (3) of *the Act*. The offences were committed between 17<sup>th</sup> June, 2013 and 25<sup>th</sup> June, 2013 at Naitiri Location, Bungoma North District within Bungoma County.

**The prosecution's case**

2. The prosecution called 6 witnesses in support of the charges. **PW1 IGNATIOUS OKUMU**, a clinical officer testified that he examined the complainants herein. He noticed that the 2<sup>nd</sup> complainant had bruises around the labia minora and vagina and a broken hymen an indication that she had been defiled. He produced her P3 form as **PEXH. 1**. Upon examining the 1<sup>st</sup> complainant, he noticed that she had an old tear on her hymen with bruises around the labia minora and vagina an indication that she had been defiled. He produced her P3 form as **PEXH. 3**.

3. **PW2, SNK**, the 2<sup>nd</sup> complainant testified that on 16.06.13 at 06.00 pm, she met the 1<sup>st</sup> complainant who told her that the 1<sup>st</sup> Appellant had promised to get them jobs. She stated that she collected her clothes and together they went to 1<sup>st</sup> Appellant's house. It was her evidence that the 1<sup>st</sup> Appellant took them to the house of the 2<sup>nd</sup> Appellant where they spent the night and 2<sup>nd</sup> Appellant defiled her. The 1<sup>st</sup> complainant stated that the following day, the 1st complainant went away with one Benjamin and she stayed with the 2<sup>nd</sup> Appellant in his house until the date of her arrest and that the 2<sup>nd</sup> Appellant defiled her every day that she stayed in his house.

4. **PW3 NNM** the 1<sup>st</sup> complainant's father stated that she was born on 04<sup>th</sup> April, 1999 as shown on her certificate of birth. It was his evidence that the 1<sup>st</sup> complainant disappeared from home on 17<sup>th</sup> June, 2013 and was found on 25<sup>th</sup> June, 2013 together with the 2<sup>nd</sup> complainant locked in a house from where the 1<sup>st</sup> Appellant was found standing outside and from where the 2<sup>nd</sup> Appellant and one Benjamin escaped from.

5. **PW4 BKA** the 2<sup>nd</sup> complainant's father stated that the complainant was sent to fetch water at about 6.30 pm on 17.06.13 but did not return home and was found 25<sup>th</sup> June, 2013 together with the 1<sup>st</sup> complainant locked in a house from where the 1<sup>st</sup> Appellant was found standing outside and from where the 2<sup>nd</sup> Appellant and one Benjamin escaped from. **PW5 ALEXANDER SIMIYU MASIKA** arrested the 2<sup>nd</sup> Appellant on 27<sup>th</sup> June, 2013 and handed him over to the police.

6. **PW6 PC SILAS CHERONO** stated that on 18.06.13, PW3 and PW4 reported that their daughters, the complainants herein, had disappeared from home. He recalled that on 25.06.13, the 1<sup>st</sup> Appellant and the two complainants were taken to the police station and it was reported that the 1<sup>st</sup> Appellant had been arrested near the house where the complainants were found locked. It was his evidence that one Benjamin and the 2<sup>nd</sup> Appellant were handed over to him on 26.06.13 and 27.06.13 respectively and it was reported that they had defiled the minors. He stated that the complainants were examined and the Appellant were charged. He produced the complainants' certificates of birth as **PEXH. 3** and **PEXH. 4** respectively which show that the 1<sup>st</sup> complainant was born on 04.04.99 and the 2<sup>nd</sup> complainant on 27.03.98.

### **The Defence Case**

#### 1<sup>st</sup> Appellant's case

7. The 1<sup>st</sup> Appellant denied the offence and stated that he was framed by the 2<sup>nd</sup> complainant's father who was his former employer and who had refused to pay his 3 years 'salary.

#### 2<sup>nd</sup> Appellant's case

8. The 2<sup>nd</sup> Appellant denied the offence and stated that he was arrested on 27.06.13 and charged with offences that he did not commit.

9. The 1<sup>st</sup> complainant did not testify. The learned trial magistrate considered the evidence and acquitted the 1<sup>st</sup> Appellant of count 1 but convicted him of the 3<sup>rd</sup> count and sentenced him to 10 years imprisonment. The 2<sup>nd</sup> appellant was convicted and sentenced to 20 years imprisonment.

### **The Appeal**

10. Aggrieved by the conviction and sentences, the appellants lodged the instant appeal on 12<sup>th</sup> May, 2017. From their separate 5 grounds of appeal and written submissions, I have deduced the following issues: -

***1. That the trial court shifted the burden of proof to the Appellants***

***2. That the sentences were harsh***

11. When the appeal came up for hearing on 05<sup>th</sup> August, 2019, both Appellants submitted that he was wholly relying on the grounds of appeal and written submissions. Ms. Nyakibia, learned Counsel for the state opposed the appeals and submitted that the complainants' ages were proved by way of certificates of birth, penetration by way of a P3 forms and that the 1<sup>st</sup> Appellant was well known to the complainants while the 2<sup>nd</sup> Appellant interacted with the 2<sup>nd</sup> complainant for a considerable length of time such that he was able to identify him.

### **Analysis and Determination**

12. This being the first appellate court, I have to start by reminding myself that I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. (See ***Okeno v Republic [1972] EA 32***).

13. 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. Whether the 1<sup>st</sup> Appellant benefitted from child prostitution

ii.. Age of the victims.

iii. Identity of the offender

iv. Penetration

#### **i. Whether the 1<sup>st</sup> Appellant benefitted from child prostitution**

14. Section 15 of *the Act* provides that:

Any person who—

**(d) takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any**

## **form of sexual abuse or indecent exhibition or show**

15. Evidence has been led that the 2<sup>nd</sup> complainant knew the 1<sup>st</sup> Appellant well since he was employed by her father. Evidence was led by the 2<sup>nd</sup> complainant that it was the 1<sup>st</sup> Appellant that convinced her to leave home with the promise of a job and later took her and the 2<sup>nd</sup> complainant where she was defiled.

16. From the evidence on record, I find that the trial magistrate rightfully found that the 1<sup>st</sup> Appellant was employed by 2<sup>nd</sup> complainant's father and that he was well known to the 2<sup>nd</sup> complainant. I also find that the trial court correctly found that the 1<sup>st</sup> Appellant took advantage of the relationship he had cultivated with the 2<sup>nd</sup> complainant to procure her for sexual intercourse with the 2<sup>nd</sup> Appellant. From the foregoing, I am convinced that the 1<sup>st</sup> Appellant was rightfully convicted.

### **ii. Age of the victim**

17. The 2<sup>nd</sup> complainant's certificate of birth **PEXH. 4** shows that she was 15 years at the time that the offences were committed.

### **iii. Penetration**

18. 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."**

19. 2<sup>nd</sup> complainant's evidence of penetration by the 2<sup>nd</sup> Appellant was corroborated by medical evidence contained in the P3 form produced as **PEXH. 1** by **PW1 IGNATIOUS OKUMU**, a clinical officer who testified that complainant had a broken hymen with bruises around the labia minora and vagina an indication that she had been defiled.

### **iv. Identification of the 2<sup>nd</sup> Appellant**

20. The 2<sup>nd</sup> Appellant was not a stranger to the 2<sup>nd</sup> complainant before the material date. 2<sup>nd</sup> complainant also stated that she stayed with the 2<sup>nd</sup> Appellant from 17<sup>th</sup> June, 2013 until on 25<sup>th</sup> June, 2013 and that he defiled her daily. The 1<sup>st</sup> complainant who'd have corroborated the 2<sup>nd</sup> complainant's evidence did not testify. The foregoing notwithstanding, **Section 124 of the Evidence Act** is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful.

21. I have considered the judgment of the trial court and I am convinced that the trial court arrived at the accurate conclusion that the prosecution case that 2<sup>nd</sup> complainant was defiled was well corroborated by the medical evidence contained in the P3 form. The 2<sup>nd</sup> complainant and the 2<sup>nd</sup> Appellant stayed together for 8 days which is a considerable length of time and I am convinced that the 2<sup>nd</sup> Appellant was properly identified as the one that defiled the 2<sup>nd</sup> complainant. From the foregoing, I am convinced that the 2<sup>nd</sup> Appellant was rightfully convicted.

### **v. Are the sentences harsh**

22. The 1<sup>st</sup> Appellant was convicted of an offence under Section 15 of the Act which attracts a minimum sentence of ten years whereas the 2<sup>nd</sup> Appellant was charged under section 8 of the Act which carries a minimum sentence of 15 years. These are mandatory minimum sentences under the Act. 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.

23. 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.**

24. 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.

25. **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 1<sup>st</sup> Appellant took advantage of the relationship he had cultivated with the 2<sup>nd</sup> complainant to procure the 14-year-old complainant for sexual intercourse with the 2<sup>nd</sup> Appellant. The Appellants are relatively young persons. They are first offenders 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.

27. From the foregoing, I am persuaded to interfere with the mandatory minimum sentences imposed on the Appellants. In respect of the 1<sup>st</sup> Appellant, the sentence of 10 years is substituted with a sentence of 5 years and that sentence of 20 years against the 2<sup>nd</sup> Appellant is substituted with a sentence of 10 years. The sentences will run from the date of conviction which is 26<sup>th</sup> April, 2017.

**DELIVERED AND SIGNED AT BUNGOMA THIS 09<sup>th</sup> DAY ON August 2019.**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant** - **Brendah**

**Appellants** - **Present in person**

**For the State** - **Ms. Nyakibia**