REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO 21 OF 2019

COLONEL NYANTABIGA MORANG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction judgment and sentence from the judgment

of Hon. P. Wamuci RM dated the 9th November 2018 in Kisii Criminal case no. 35 of 2018.)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act**. The particulars were that the appellant on 13th May 2018 in Kisii County intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ, namely vagina, of DS a girl aged 5 years. The Appellant was tried, found guilty, convicted and sentenced to serve life imprisonment.

2. The Appellant aggrieved by both the conviction and sentence filed the appeal setting out the grounds of appeal as follows:-

> *1. The learned trial magistrate erred in fact and in law in finding and/or holding that the appellant was guilty of the offence charged when the prosecution had not established guilty beyond the required standard of proof.*
>
> *2. The learned trial magistrate erred in law and in fact in analyzing and/or evaluating the respondents evidence separately, forming a considered opinion of impression thereof and there lying the burden of disproving and/or dispelling the pre-meditated impression upon the appellant contrary to the established principle in criminal law, which cast the burden of proof upon the respondent.*
>
> *3. The trial magistrate convicted the appellant on entire wrongly principle and conclusion without addressing on whether or not the ingredients of the offence. The appellant was accused of had been proved beyond reasonable doubt.*
>
> *4. The learned trial magistrate erred in law and in fact in making a finding that the prosecution had established guilty against the appellant to the required standard of beyond any reasonable doubt when the respondent's evidence was riddled with massive contradictions that could not sustain a conviction.*

3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (*see* ***Okeno v Republic [1973] EA 32***).

4. The evidence emerging at the trial is as follows. To prove its case the prosecution called 4 witnesses DA (Pw1), (Pw2), DN (Pw3) and OO (Pw4). The trial magistrate Hon. P. Wamucii conducted voire *dire* examination on Pw1 and came to the conclusion that she understood the need to tell the truth and directed that Pw1 to give unsworn testimony. PW1 recalled that on 13th May, 2018 she was playing when the appellant called her and she proceeded to his house. She explained that the appellant lived downstairs while they lived upstairs. When she arrived at his house the appellant put her on the bed removed her dress and biker and defiled her. That the appellant told her that he will give her indomie once he finished. That when she went home she told her mother what had transpired and she was taken to the hospital for treatment.

5. Pw2 testified that Pw1 was her daughter and was 5 and half years old. She testified that they lived with the appellant in the same plot and the appellant's house was closer to the gate situated on the lower part while she lived on the upper part. She told court that on the material day Pw1 and her sister were playing outside, when she called for the children Pw1 could not be found. She searched for Pw1 in some of the neighbour's house but could not find her, when she was outside the appellant's house she called for Pw1 and she came out from the appellant's house. Pw2 told court that Pw1 cried when she asked her why she was at the appellant's house. The appellant told her that Pw1

was in his house so that he could give her food. She went back home with Pw1 and noticed that her biker was worn inside out, got suspicious and asked Pw1 what happened. Pw1 told her that the appellant beckoned her from the verandah promising to give her indomie, told her to lie on the bed, removed her biker and defiled her. She examined Pw1's private parts and found that they were red, covered with blood and had cracked between the vagina and anus. They went to Kisii Teaching and Referral Hospital for treatment.

6. The clinical officer at Kisii Teaching and Referral Hospital, Pw3, produced Pw1's treatment card. She told court that according to P3 form the hymen was freshly broken and that the minor was 5 years at the time of the examination. Pw1 had pain and injuries in her private parts and the injuries approximated to be 2 days old. It was concluded that there was penetration into the vagina of the minor.

7. The investigating officer Pw4 testified that on 13th May 2018 the complainant, her father and Pw2 reported that Pw1 had been defiled. They had gone to a private hospital, Nyanchwa Mission Hospital and Pw4 advised them to go to Kisii Training and Referral Hospital for examination. Medical examination revealed that Pw1 had been defiled. He testified that he interviewed the minor who told him about the ordeal and he also noted that she was traumatized and had difficulties walking.

8. After considering the above prosecution evidence the trial court found that the appellant had a case to answer and put him to his defence. The appellant testified as Dw1 and told court that he was not at home when the incident occurred but was later called by a neighbor and informed that there was a problem. That he went to hospital and was arrested but knows nothing about the case.

9. The main issue is whether the prosecution proved its case beyond reasonable doubt. The ingredients of an offence of defilement are; identification or recognition, penetration and the age of the victim. Penetration is defined as follows under **Section 2 (1)** of the **Sexual Offences Act No. 3 of 2006** as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Pw1 gave clear testimony as follows;

> *"I went to his house. He put me on his bed and removed my biker and dress. He told me to lie facing up. He put in my private part that I use to urinate his thing which he uses to urinate (sic). He told me he will give me indomie after he finishes. I felt pain when he put his thing in mine."*

10. I note that the trial magistrate in her judgment did not comment on whether she believed the child to be telling the truth as required by **section 124** of the **Evidence Act**. Section 124 of the Evidence Act provides as follows;

> ***"Notwithstanding the provisions of section19 of the Oath and statutory declaration Act, where the evidence of a child of tender years is admitted in evidence with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him"***

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth""***

11. I find that there was non compliance of the proviso of **section 124** of the **Evidence Act** as the trial court did not record the reasons for why it was satisfied that the victim was telling the truth. Nonetheless I find that this is not fatal to the prosecution case. Moreover the evidence of Pw1 was corroborated by both Pw2, Pw3 and Pw4. Pw2 testified that when she asked Pw1 what happened she stated that she had been defiled and upon examination of her private parts Pw2 found that she was bleeding and had a tear between her vagina and anus. This was soon after PW1 left the appellant's house. The P3 form confirmed that the minor was defiled. Pw4 who took the statement of the minor observed that the complainant had difficulties while walking and appeared traumatized. Pw3 testified that medical examinations revealed that the hymen was freshly broken. I therefore find that the prosecution proved the act of penetration beyond any reasonable doubt.

12. On whether the appellant was positively identified, the incident occurred during broad day light in the house of the appellant. Pw1 knew the appellant as the person who lived downstairs and also described the appellant as someone known to her when she sought for treatment. Pw2 confirmed that the appellant was one of her neighbors who lived downstairs near the gate. I have considered the principles as set out by the Court of Appeal in ***Cleophas Otieno Wamunga v Republic [1989] eKLR*** on identification by recognition. The court observed that

> ***"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

13. In this case the appellant was positively identified by Pw1 and was found in the house of the appellant immediately after the incident. Pw2 called for the complainant who came from the house of the appellant and noticed that her biker was worn inside out and the complainant told Pw2 that the appellant had defiled her. The totality of the prosecution evidence shows that the identification by the complainant was not doubtful and I find that the appellant was positively identified.

14. I now turn to whether the prosecution proved the age of the child and find that she was 5 years. Pw2 who was the mother of the complaint testified that the minor was 5 and half years. The clinic card indicates that the minor was born on 31st July 2012 and was 5 years at the time she was defiled. The appellant was sentenced to imprisonment for life as per **section 8 (2)** of the **Sexual Offences Act** which provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The Court of Appeal in ***Jared Koita Injiri v Republic KSM CA CRA No. 93 of 2014 [2019] eKLR*** after considering the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 [2017] eKLR*** reduced the sentence of the appellant who defiled a girl aged 9 and the court observed as follows;

> *"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.*
>
> *Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic (supra)**, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."*

15. I note that the trial court considered the mitigation and social inquiry reports and found that they were favorable. The court however imposed the sentence of life imprisonment for reasons that it was the mandatory sentence and found that the mitigation and social inquiry reports could not affect the length or nature of sentence. In light of the holding in **Jared Koita Injiri v Republic (supra)**, I allow the appeal only to the extent that I quash the sentence of life imprisonment and substitute it with a sentence of thirty (30) years' imprisonment. Save for the sentence, the conviction is affirmed and the appeal thereon dismissed.

Dated, signed and delivered at Kisii this 8th dayof August, 2019.

R. E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Counsel for Office of DPP

Rael Court clerk