REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 158 OF 2017

JOSEPH WEKESA WAMALWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Kabarnet Cr. Case(S.O) no. 1044 of 2016 delivered on the 4th day of May, 2017

by Hon. E.M. Ayuka, RM]

JUDGMENT

1. The appellant was charged with defilement contrary to section 8 (1) (4) of the Sexual Offences Act no. 3 of 2006 the particulars whereof were that he "*on diverse dates between 9th March 2016 and 11th November 2016 at [particulars withheld] Village in Baringo Central Sub-county within Baringo County did unlawfully and intentionally cause the penis to penetrate the vagina of F J K a girl aged 15 years in contravention of the Act*".

2. Upon full trial, the trial court convicted the appellant and sentenced to imprisonment for 15 years. The appellant appealed citing want of evidence to prove the charge and seeking leniency in sentencing alternatively.

3. The DPP opposed the appeal and gave notice to the appellant that she would seek the correct sentencing under the applicable section 8 (1) (3) of the Sexual Offences Act for defilement of a child aged 15 years which provides for a minimum sentence of 20 years. However, in oral submission set out below, the Ass. DPP abandoned the request for enhancement of the sentence as follows:

> "***DPP***
>
> *Appeal is opposed. Appellant convicted for defilement contrary to section 8 (1) and 8 (4) of the Sexual Offences Act and sentenced to serve 15 years on 29/5/17.*
>
> *Appellant was wrongly charged under 8 (1) (4) instead of 8 (1) (3). The sentence under section 8 (3) is 20 years.*
>
> *Sentence of 15 is not prejudicial as it was below the 20 years prescribed. We do not seek enhancement because of the Muruatetu Supreme Court decision.*
>
> *Evidence on record shows that she was 15 years at the time of incident. A Child Health Card showed date of birth was 21/3/2001.*
>
> *Pw1 testified that on 9/11/15. She was headed to a neighbour's house at about 5.00pm when she met the appellant. Appellant held her hand and took her to his house where he locked her for 2 days and defiled her severally.*
>
> *On the morning of 11/11/2015 Pw2 passed by the appellant's house on her way to Tenges and saw the complainant peeping from the appellant's window. She called the complainant's name and the complainant came out. The appellant was also in the house. She took the complainant to the D.O's Office and then to Kabarnet Hospital. She then reported the matter Kabarnet Police Station.*
>
> *Appellant went into hiding and was arrested later the following day. Pw4 is a Clinical Officer who examined the complainant and she testified that on examination the vagina was hard, labia minora and majora were reddish and there was a whitish discharge.*

Hymen was absent and vagina was red and the concluded there was sexual penetration.

Pw1 in her evidence testified that she was in appellant's house for 2 days and she was defiled repeatedly.

Pw2 recovered the complainant from the appellant's house after 2 days. The appellant was well known to Pw1 and Pw2 and was found at the scene of crime. Evidence is overwhelming. He was lucky to have been sentenced to 15years instead of 20 years.

15 years is sufficient and I urge court to dismiss the appeal. That is all.

Determination

4. In discharging its duty as a first appellate Court, this Court has re-evaluated the evidence before the trial court to determine the question before the court whether the defilement of the complainant was proved and that the appellant was the perpetrator.

5. Pw1, the complainant aged 15 gave sworn evidence, which, therefore, was not subject to corroboration in terms of Section 124 of the Evidence Act and Section 19 of the Oaths and Statutory Declarations Act. However, the court warned itself of the need to confirm the evidence of the minor even though given on Oath. Was there corroboration of the complainant's evidence. Section 124 of the Evidence Act and section 19 of the Oaths and Statutory Declarations Act requires corroboration of the unsworn statement of a minor. However, section 124 Proviso exempts the need for corroboration in Sexual Offence where the only evidence is that of a victim of the Sexual Offence. In this case there being other evidence by other witnesses, the court shall examine whether the unsworn statement of the complainant is supposed by independent evidence.

6. The complainant testified that the appellant had upon threats taken hold of her and taken her to his house at a neighbor Betwel's home where he worked and for 2 days had sexual intercourse with her using force and had locked her in the house and was rescued by her mother in the evening of the second day.

7. Pw2, the complainant's mother testified that the complainant had disappeared on 9/11/2016. She searched for her for 2 days. On the third day while she had gone to Tenges Centre she saw the complainant peeping from the window at the accused's house which was near the road. She said that the accused/appellant worked at a neighbour's home and that "*and she had then called her out, and took her to the DO's Office, Tenges*".

8. Pw1's father, Pw3, said that he had heard his wife Pw2 scream at the accused's house after she had got the accused and the complainant locked up in the house which was about 200 metres from his home. He said that many people had gathered and the appellant had ran away only to be arrested the next day and brought to the Police station.

9. The Clinical Officer at Kaptimbor Dispensary Pw4 testified on his examination of the complainant and found that "*there were numerous epithelial cells on H.V.S. Hymen was absent [and] based on the H.V.S which showed numerous epithelial cells, whitish discharge for the vaginal and the absence of hymen and the reddening of the vagina, I concluded that there had been an act of sexual penetration*".

10. Pw5, the Investigating Officer produced the child's Health Card which indicated that she was born on 21/3/2001 making her 15 years at the time of the incident.

11. When put on his defence, the appellant confirmed that he had worked at the Betwel homestead for 4 months but denied the charge and alleged that his "*boss told me that the complainant's mother had vowed to frame me up if I did not go back to Kitale",* having declined her approach from him to work for her.

12. Weighed against the consistent evidence of the prosecution witnesses who knew the appellant as a worker at their neighbor Betwel's home, which fact the appellant concedes, the appellant's allegation of a frame up is bare and insufficient to raise any reasonable doubt. It would appear that the complainant may, for the mother's evidence that the appellant and the girl had locked themselves in his house, have agreed to stay with the complainant but, being of minor age, no agreement or consent can validate a sexual relationship with her.

13. In any event, the appellant had not raised a defence, as he would have under section 8 (4) of Sexual Offences Act, under which he was charged, that the complainant child had deceived the accused into believing that she was over the age of eighteen years at the time of the offence.

14. I, accordingly, find the appellant guilty as charged save that the correct section ought to have been 8 (3) of the Sexual Offences Act which applies to children of 12-15 year. The appellant is therefore convicted for defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act.

15. As regards the sentence, it has been established since ***Francis Karioko Muruatetu v. R*** Supreme Court Petition no. 15 of 2015, that mandatory sentences taking away the discretion of the Court are unconstitutional. However, on the principle of deterrence of the serious offence of defilement, I consider that imprisonment for a term of 15 years for defilement of a child aged 15 years for which the law provides a minimum sentence of not less than twenty years is not excessive as to call for this court's intervention.

Orders

16. As the DPP has not sought the enhancement of the term of imprisonment, the sentence remains at 15 years and the appellant's appeal from the sentence herein is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF OCTOBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.