REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 29 OF 2018

MICHAEL KATANA JEFWA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the Original Conviction and sentence in Criminal Case No. 195 of 2010 of the senior Principal Magistrate's Court at Kilifi – Hon. A.M. Obura, SRM)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Ms Sombo for DPP

JUDGEMENT

The Appellant was charged with the offence of Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence allege that the Appellant defiled **HU** a girl of 10 years, on the 2nd of March 2016 at [Particulars withheld] Village in Kilifi County. He entered a plea of not guilty hence the court proceeded to conduct a full trial after which he was convicted and sentenced to life imprisonment.

Being dissatisfied with the conviction, the Appellant do hereby appeal against the same. The Respondent opposes this appeal.

The Appeal is predicated upon the grounds that the learned trial magistrate erred in law and fact by failing to consider that the prosecution case was not proved beyond reasonable doubt, the minor's evidence was unreliable and his defence was not taken into account.

Analysis of the evidence at the trial

This being a first appeal, I'm well aware of this court's duty to examine the evidence on record afresh, exhaustively and to form its own independent decision on the evidence. See the Court of Appeal in **Okeno v Republic (1972) EA 32, 36.**

A brief summary of the evidence tendered during trial is as follows. The prosecution called a total of five witnesses in support of its case. **PW1 the complainant** was subjected to a voire dire examination after which the court found that she does not know the meaning of oaths hence the court directed that she was to give unsworn testimony. Further that she understood the need to tell the truth. She testified that she was a 10 years old class two pupil at [Particulars withheld] Primary School.

It was her testimony that on the material date she met the accused on her way from school who was seated beside the road. He called her but she declined going where he was. He then ran after her and managed to catch up with her. The minor raised alarm by screaming when he pulled her towards some bushes and undressed her. She told the court that the accused did not do anything to her as the members of the public came and rescued her from the hands of the Appellant.

He was arrested and taken to the police station. She also testified that she knew the accused by his name before incident and that they are from the same village.

Pw2, MTN testified that on the material date she was at her work place when a young man came to call her and told her that he had caught her someone at a shamba with her niece. She told the court that the complainant was about 11 years old at the time of the commission of the

offence. She rushed to the scene of crime where she found the complainant and accused naked. It was in a thicket. She told the court that she could see traces of blood on the ground and there was a crowd which had gathered and they wanted to kill the appellant. Shortly, the village chairman came and prevented the crowd from occasioning mob justice, he took the complainant and the appellant to Kijipwa Police Station. They then proceeded to Vipingo Hospital where the child was examined and found that the minor had been severally defiled by the appellant.

She further stated that they then went to Kilifi District Hospital for the filling in of the P3 form. She identified the same in court, herein marked as MFI P-1. She also told the court that she saw blood stains on the girl's skirt. She reiterated that the appellant was naked when he was caught by the crowd. Upon-cross examination by the Appellant, she stated that the person who saw the Appellant leading the minor into the bush climbed a mango tree and witnessed the incident. Further that the child's blood-stained panty and dress was not in court.

PW3 is Dr Malik who works at Kilifi District Hospital. He produced the P3 form which was prepared and filled by **Dr. Kerubo** upon examining the minor. The minor was said to have been aged 10 years. upon examination, she had inflammations on her genitalia, her hymen was broken and there was discharge noted on the vulva. The Pw3 Form filled and signed on 4/3/2010 was produced and marked as Exh 1.

PW4, Mtama Mwuko, the village chairman, testified that on the material date he was at home when he was informed that there was something going on in the thicket. He rushed to the scene and found the Appellant seated on the ground in front of a young girl. She was lying on the ground on her side and in a coiled position. They were both naked. He noticed that the girl had a discharge on her private parts and thighs. The Appellant also had some on his genitals area and it appeared he had just had sex with the girl.

He averred that the girl told him it was not the first time the Appellant did that to her. He then called the police, which came to the crime scene and arrested the Appellant. When asked by the OCS why he committed the heinous act, the Appellant responded by saying that it was the devil's work. Pw4 later went to record a statement at the police. The Appellant comes from PW4's village and he is well known to him as well as the minor.

PW5, No. 219277 CIP David Kipsigut OCS Kijipwa the investigating officer in this matter, testified that he rushed to the crime scene with his officers amid reports that a man had been caught having sex with a minor and had been arrested by the members of the public who wanted to kill him. He found the Appellant half naked and the girl was in school uniform. He calmed the crowd, arrested the Appellant and took him to the police station together with the victim and her parents. He also instructed his officers to take both the Appellant and victim to the hospital.

The trial court upon evaluating the evidence on record made a ruling that the prosecution made out a prima facie case to warrant placing the accused on his defence. He was therefore placed on his defence and section 211 CPC was read and explained in Swahili a language he understood very well.

The Appellant testified as DW1 and he was the sole defence witness. He denied having committed the offence preferred against him. He testified that on the material date while on his way to shops, he met people who were new to him. They greeted him and told him that they were looking for a young man by the name: **John Kazungu**. He told them he did not have knowledge of him. They then asked for his name after which they insisted, he was **John Kazungu** as he resembles him.

He further stated that they arrested him, he protested and resisted, after which they forced him to accompany him to the police station. They beat him up along the way and told him that they would release him once **John Kazungu** is traced. He was detained for a night and interrogated. He denied the allegations levelled against him after which he was arraigned in court. He still denied the charges.

Upon cross examination by the counsel for the state, he stated reiterated that he was not arrested on 2/3/2010 and that it must have been an error. He denied having known Pw1 and Pw2. He stated that he was a stranger to the allegations that he was caught naked with a child. He stated that it was out of bitterness and hatred that he was implicated and that the complainant's family planned to frustrate him

He claimed that there is a shamba that his father bequeathed him that the complainant's family is also fighting for. He claimed that he knew them a long time ago and they disagreed. He reiterated that he was not caught red handed.

The Appellant filed submission dated 2/11/2018 in support of the instant appeal. The state opposed the appeal by way of submissions dated 13th February, 2018. I have considered both the Appellant's positions as expounded in their submission. The same is to be applied in the analysis below.

Findings & Determination

Having considered the evidence on record, submissions, exhibits and all relevant evidence and positions of both the Appellant and the State; this court finds the following as the main issue for determination is whether the prosecution proved its case beyond reasonable doubt.

To secure conviction in defilement matters, the prosecution ought to prove three important ingredients which are the minority age of the complainant, penetration of the complainant's genitals by the Appellant and the prosecution must positively identify for the perpetrator or the author of the complainant's misfortune. The same is entrenched in the case of **Charles Karani v Republic, Criminal Appeal No. 72 of 2013** where the court stated as follows:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

In this appeal, one of the appellant's major contention is that the age of the complainant was not proved to the required standard and that the document produced as her birth certificate could not be relied on to prove her age. The onus of proving age of the victim beyond reasonable

doubt resides with the prosecution. **Mwilu J** (as she then was) in the case of **Hillary Nyongesa Vs Republic (Eldoret Criminal Appeal No.123 Of 2000)** stated that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

In the present case, the Appellant pointed that the complainant gave her evidence as 10 years old while Pw2, her Aunt placed the victim's age at 11 years. The appellant complains that the prosecution witnesses did not even state the victim's date of birth. This court also notes that the prosecution did not produce the victim's birth certificate. In the furtherance of this contention, the Appellant resorted to the court of Appeal Case of **Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009 (Kisumu)** were it was stated that:

> ***"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."***

The Counsel for the State opposed the Appellant's foregoing contention by citing the case of **Michael Kihara Kariuki v Republic, HCCR No. 44 of 2015** and **Ambrose Mwawindo Ngwatu vs Republic, CR No. 54 of 2013** to advance the proposition that in the absence of a birth certificate, the court may rely on medical evidence contained in the P3 form as well as in the medical assessment report to determine the age of the victim. I would also add that according to the case of **Francis Omuromi vs Uganda, C.O.A CR No. 2 of 2000,** apart from medical evidence age may also be proved by the victim's parents or guardian and by observation and common sense.

My understanding of the facts on record is that on the 5th of November 2010, the complainant was subjected to voire dire and testified that she was 10 years of age. However, the testimony was prematurely aborted because the court made an observation that the minor was frightened. The complainant later testified before the trial court on the 22nd of February 2011. That is when her Aunt Pw2 also testified and estimated her age to be about 11 years old. The honorable trial court also interrogated this issue and found no doubt in its mind that she was about 10 years old after having seen the child in court. Since age of the victim is capable of being proved by the victim herself, the victim's guardian, medical evidence and the court's own observation, I find no reason to doubt these aspects as they are all responsive in this matter. In the premises, the age of the minor was proved to be 10 years old.

On penetration, the Appellant disputes the Learned Trial Magistrate's contention that there was partial penetration. Further that the court ought not have relied on his demeanor to make a finding that he indeed had sex with the minor. He also brought to the attention of the court that the minor herself testified that the Appellant did not do anything to her. The Learned Trial Magistrate in his interrogation of this issue made an inference that the complainant was very naïve and of young mind that she may not have comprehended what took place.

In my view, the foregoing puts the veracity of the evidence of the minor into test. Firstly, upon voire dire examination the court made an inference that even though the minor did not know the meaning of oath, she understood the need to tell the truth. It seems that the Learned Magistrate went back on his inference. I have noted that the minor on two occasions have narrated her ordeal with the Appellant but however she maintained that he did not do anything to her.

This is despite the fact that the evidence of Dr. Malik shows that her hymen was broken. I have perused the P3 form and this evidence supports the fact that the minor was indeed defiled. The evidence of PW2 and PW3 is that the minor told them that it was not the first time that the Appellant defiled her, a fact she did not mention during trial. In fact, she stated to the contrary.

The question to ponder is as to whether the Appellant is the perpetrator of the alleged defilement. All the prosecution witnesses testified that the Appellant was caught red-handed at the crime scene. PW1 stated that the appellant chased after her, pulled her towards some bushes and stripped her naked. She also told the court that she raised alarm after which the members of the public responded to the same immediately hence the Appellant could proceed with the intention to defile her. She explicitly stated on two occasions that the accused did not do anything with her.

It must be noted that none of the prosecution witnesses saw the Appellant and the victim having sex. PW2 stated that it was the appellant who defiled the minor because he was caught while naked at the crime scene. She did not witness the sex part of the ordeal. The same with PW3 and PW4, they corroborated the fact that they found both the Appellant and the victim naked. PW5 who arrested the Appellant stated that he found him half naked surrounded by a vicious crowd.

In my view, there is an odd coincidence that the victim would be spotted naked with the appellant but at the trial her evidence was contrary to testimony of PW2, PW3 and PW4. In **Baskerville v R [1916] 2KB658** the court had this to say in regard to the evidence given by the above witnesses:

> ***"We hold that evidence in corroboration must be independent testimony which affects the accused by connection or tending to connect him with the crime. In other words it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."***

What comes out clearly from the facts on record is an intention to defile which was shown by the fact that the appellant ran after the minor, pulled her towards some thicket and stripped her and himself naked. The only thing that might have happened afterwards was the defilement had taken place interrupted by the crowd that responded to the minor's screams, rescued and arrested the Appellant. According to the medical evidence on record, the victim hymen was missing that is prima facie evidence of penetration in Law under Section 2 of the Sexual Offences Act.

In sexual assault cases the victims are normally children under the age of 18 years who fall under the category of vulnerable witnesses. The

trial court should be conscious of the fact depending on their social orientation they might be instances due to their vulnerability they tend to recant the evidence or refuse to give any evidence with regard to the incident. The change of attitude of a child witness as to whether she will stick to the original version of the statement may sometimes be attributed to external pressure, threats, duress or coercion. It may even be a case of sympathy extended to the offender who is likely to face a sentence of imprisonment.

In this case, one can see clearly that the account given by the complainant had been interfered with so as to impeach that part of the prosecution case. However, luckily enough the prosecution had available evidence of PW2, 3 & 4 to establish the presence of the accused at the scene of the crime.

In the instant case, there is sufficient evidence of intention and unlawful act of defilement and positive identification of the Appellant as the perpetrator who defiled the minor.

In the premises, the Appellant is hereby found guilty of the offence of defilement contrary to Section 8 (1) as read together with Section 8 (2) of the Act.

On sentence in the case of **Francis K. Muruatetu v R** the Supreme Court declared mandatory death penalty under Section 204 of the Penal Code unconstitutional. The court stated that in passing sentences, it is the duty of the Judge to exercise discretion in a manner that is both fair and just with a view to come up with a proportionate sentence that fits the crime.

In light of this decision the mandatory and rigid nature of life imprisonment in sexual offences under Section 8 (1) & (2) with regard to defilement has been found to be unconstitutional. At the moment the courts follow the emerging jurisprudence in the **Muruatetu case (supra)** in allowing some measure of discretion as the justice of the case with demand.

Through a structured discretion I form the view that the appellant is entitled to a resentencing. On the basis of the foregoing, the appellant be given an opportunity to offer mitigation and the state to submit on issues touching on the aggravating factors.

Sentence

In this case, I have considered the mitigation offered by the appellant where he purports to be remorseful. The state has no previous record of the appellant relevant to present crime.

However, I note that the appellant is a young man who went after a vulnerable child of ten years to satisfy his lustful sexual desires. The pleasure of sex derived from carnal knowledge with a child of ten years is a matter in itself difficult to fathom. The appellant in his mitigation never took the opportunity to demonstrate the personal and individual circumstances relevant to this court to factor at this time of re-sentencing him on appeal. There are no defenses known in law likely to have caused the appellant to commit acts of sexual assault against the complainant.

Its horrifying to the victims of sexual assault particularly victims of tender years to be subjected to mental or physical torture by a sexual predator ignoring the fact that such scars are difficult to heal even in a lifetime unless the case falls on any of the recognized statutory defenses the aggravating factors in sexual offences normally outweighs many mitigation offered by an accused.

In **R v Nkhoma Criminal Case No. 3 of 1996** the court applying the concept that the sentence passed must be just to the offender, the offence, the victim and public interest held as follows:

> ***"It is not proper that the court, to achieve any of the purposes of sentencing, retribution, determine, incapacitation, reformation and rehabilitation, should compromise principles of sentencing. Principles of sentencing are different from the purposes of sentencing. Normally, the purpose of sentencing do not assess the court in arriving at the proportionate quantum of sentence. An appropriate sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance."***

In the instant case, applying the principle in **Muruatetu case** and the Law on the penalty of life imprisonment for the charge of defilement. One regard has been accorded to all these factors to occasion an appropriate sentence.

There is no dispute that the offence the appellant is faced with is a serious offence punishable with life imprisonment. But I should admit that circumstances of the case demand some measure that conforms the fundamental principle of justice and fairness for a shockingly sexual violence against the minor. I hold the view that any sentence invariably must be broadly within the authority of the legislature, the victim and the public interest.

In view of that, the sentence of life imprisonment is hereby set aside to the extent that a definitive custodial sentence of 30 years is hereby imposed against the appellant with effect from the date of his arrest.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE