REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 42 OF 2017

SALIM EGO HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Hola

Criminal Case No. 193 of 2016 by Hon. M.D. Kiprono (SRM) dated 4th November 2016)

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between the months of February to June 2016, at Laza Township in Tana Delta Sub-County within Tana River County the Appellant intentionally caused his penis to penetrate the vagina of F.S.B a child of 13years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that between the months of February to June 2016, at Laza Township in Tana River Sub-County within Tana River County the Appellant intentionally touched the vagina of F.S.B a child of 13years old with his penis.

3. The prosecution called five witnesses in support of their case. The complainant, F.S.B (PW1), gave a sworn statement after *voire dire* examination was carried out. She stated that on the 4th June 2016, the Appellant went to their home and asked for a place to sleep and he was allowed to sleep in her brother's (PW2) room. That they had had supper and went to sleep where the Appellant went to sleep in her brother's (PW2's) room. Later that night as she was sleeping, she felt someone sleeping beside her. That the Appellant then went on top of her and after a struggle removed her dress. That the Appellant lowered his trouser to the knees and proceeded to have sex with her.

4. PW1 stated that her brother (PW2) discovered in the night that the Appellant was not in his room and started looking for him. He entered her room and found them having sex. Her brother alerted their father and that they were both tied and taken to the D.O's office from where the police were called. She said that the police took her to hospital where she was examined by a doctor and issued with a P3. She told the court that she was not having an affair and it was the first time she had had sex with the Appellant. She later stated that the first time they had sex was in February 2015 and then again in May 2016. She told the court that she knew the Appellant from 2015.

5. S.S (PW2), the complainant's brother, told the court that he knew the Appellant as he came from the same village and he would regularly visit their home. He stated that on the 4th June 2016, the Appellant went to their home to look for him (PW2) but he was at the neighbour's house studying. That the Appellant asked for a place to sleep and was allowed to sleep in PW2's room. That at night after they had slept at around 2:00 am, PW2 turned and found that the Appellant was not there. He then heard PW1 say "sitaki, sitaki" (I don't want, I don't want). When he went to check he found the Appellant was having sex with PW1. PW2 further stated that he woke his father who tied the Appellant and PW1 and they escorted them to the AP camp. That the police were called and they went and arrested the Appellant. PW2 stated that he had a torch that he used to see the Appellant.

6. S.B.V (PW3), the complainant's father told the court that on the 4th June 2016, the Appellant went to their house and asked for a place to sleep. That PW3 told him that he could sleep with his son (PW2). That PW2 woke him at around 2:00am. That he went and found the Appellant at the door while PW1 was sitting on the bed. He said that the Appellant asked him for forgiveness but he tied the Appellant and PW1 and took them to Galole AP camp from where they were referred to Hola Police Station.

7. PC Sarah Barmen (PW4) testified that the case was booked on 5th June 2016 at around 3.30hrs, and the Appellant and PW1 were placed in the cells. That she interrogated PW1 and learnt that PW1 had a relationship with the Appellant from February 2016 which the parents knew nothing about. PW4 recorded the witness statements and took both the Appellant and the complainant to hospital for age assessment. That

the Appellant's age was assessed to be above 18 years while PW1 was found to be 13 years old. She said that the doctor filled the P3 and confirmed that PW1 was not a virgin.

8. Dr. Ashako Wario (PW5) from Hola Referral Hospital examined the complainant on the 7th June 2016 and filled the P3 form. He stated that there were no bruises or lacerations but that the complainant had a sexually transmitted disease. He said that the complainant was not a virgin and that she had had repeated episodes of intercourse. He stated that the age assessment which was done based on the dental formula revealed that the complainant was 13 years old while the Appellant was above 18 years old. He produced the P3 form (Pexh 1); treatment notes (Pexh 2), the complainant's age assessment (PW4) and the Appellant's age assessment (Pexh 4).

9. The Appellant was placed on his defence and he chose to give an unsworn statement. He stated that he was 17 years old. That on the 4th June 2016 he was at home when at around 8:30pm, PW3 went and inquired whether there was a boy who had entered his room and left. That after around 40minutes PW3 returned with PW1 and PW2 and they took him to the AP lines from where he was arrested by the police and he was later charged. He said that he knew nothing about the charge.

10. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to 20 years imprisonment.

11. Aggrieved by the conviction and sentence, the Appellant lodged his homemade petition of appeal on the 31st January 2017 based on four grounds of appeal. These were that: he was 17 years old at the time of trial and therefore the sentence of 20 years was in breach of Article 53 (1)(f)(i)(ii) of the Constitution; he was a minor and ought to have been provided with legal representation during trial by the state under Article 50(2)(h) of the Constitution and Section 18(4) of the Children's Act 2001; that section 8(3) of the Sexual Offences Act violated his rights as an accused person to fair trial, and; that the medical evidence did not support the prosecution evidence and his conviction was unsafe.

12. Subsequently, on the 23rd October 2019, he filed an amended petition of appeal on four grounds and attached a copy of his birth certificate. He also filed his written submissions.

13. When the matter came up for hearing on the 24th October 2019, the Appellant relied on his written submissions. His submissions were to the effect that he was 17 years old at the time of the offence. He faulted the trial magistrate for relying on an age assessment which overestimated his age without calling for his birth certificate. He argued that he ought to have been sentenced in accordance to section 8 (7) of the SOA and section 191(1)(g) of the Children's Act and that the sentence of 20 years was in violation of his rights under Article 53 (1)(f)(i)(ii) of the Constitution and section 190 of the Children's Act.

14. The Appellant submitted further that he was a minor at the time of the trial and ought to have been accorded legal assistance by the State in accordance with section 18 (4) of the Children's Act and Article 50(2)(h) of the Constitution, 2010. That in the absence of an advocate, the trial court should have allowed his parents to assist him as provided for under Article 50(7) of the Constitution and in line with paragraph 20.14 of the Judiciary Sentencing Policy Guidelines 2016.

15. On the third ground of appeal, the Appellant submitted that section 8(3) of the SOA violates an accused's right to fair trial under Article 25(c) of the Constitution, 2010. He argued that section 8(3) of the SOA deprived the trial magistrate of judicial discretion in sentencing provided for under section 216 of the Criminal Procedure Code (CPC) and rendered the mitigation by an accused person of no value. He urged the court to pronounce that section 8(3) of SOA was unconstitutional. He relied on the case of **Amedi Omurunga V. Republic, Cr. App. No. 178 of 2012 [2014] eKLR**.

16. Finally, he submitted that the medical evidence did not link him with the offence, as he was not examined to prove that he had the infection traced in the complainant. He faulted the trial magistrate for relying on the evidence of the complainant whom he claimed was confused and was not trustworthy making her evidence unreliable. He relied on the case of **Ndungu Kimani vs Rep 1979 KLR 282.**

17. Mr. Mwangi, counsel for the Respondent, opposed the appeal in its entirety through oral submissions. He submitted that the P3 form indicated that the age of the victim had been proved. He further submitted that the burden of proof was met. He recalled the evidence of PW2 and PW3 who were at the scene and that of the doctor who proved penetration. Finally, on the age of the Appellant, he submitted that the Appellant had failed to produce his birth certificate in the trial court. In response to the Respondent's submission, the Appellant stated that his people were not around during the trial to produce his birth certificate.

18. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

19. I have considered the grounds of appeal, the respective submissions, and the record. The issues for determination in this appeal are whether the Appellant was a minor at the time of the trial; and, whether the prosecution proved its case against the Appellant beyond reasonable doubt.

20. With respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

21. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement; and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

22. The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v Republic [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence …."**

23. In the present case, a birth certificate was not produced. However, PW4 took the complainant for age assessment while PW5 produced the age assessment report (P.exh 3) which indicated that the complainant was 13 years old. He stated that the age assessment was based on the dental formula. From this evidence, I find that the age of the complainant was properly established based on the principle established in **Thomas Mwambu Wenyi v Republic** *(Supra).*

24. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant corroborated by medical evidence. See **Dominic Kibet Mwareng vs Republic [2013] eKLR.**

25. In this case, the complainant (PW1) gave evidence that on 4th June 2016 as she was sleeping, the Appellant went to her room and got onto her bed. He then went on top of her, removed her dress and had sex with her. She stated that she had had sex before with the Appellant. PW2 told the court that he woke up at around 2:00 am and found the Appellant was not in the room they were sharing. He then heard the complainant say "sitaki! sitaki!" (I don't want! I don't want!). That he went to the complainant's room where he found the Appellant having sex with her.

26. PW5, Dr. Wario, produced the P3 (Pexh 2) which indicated that the victim's hymen was broken but there were no fresh lacerations. He noted that there were pus and yeast cells in the complainant's urine. He concluded that the girl had had repeated sexual episodes.

27. It is clear therefore that the uncontroverted evidence by the complainant, which the court believed, was in this case corroborated by medical evidence and proved penetration**.**

28. In his judgement, the trial magistrate observed that the complainant was candid with what happened, how she tried to resist and reached the conclusion that the complainant could not be lying.

29. The Appellant has however challenged the evidence of the complainant on the ground that she was confused and therefore unreliable. He alleges that the complainant contradicted herself.

30. I have looked at the complainant's evidence. It is true that the complainant gave seemingly conflicting statements when she stated that it was the first time she had sex with the Appellant but later stated that she had previously had intercourse with the Appellant from February 2015. I would however not consider that to be a mark of incredibility. It must be remembered that testifying about one's sexual activity cannot not be walk in the park for 13 year old. I would still believe her testimony that she was defiled on the material date regardless of how many times she may have had sexual intercourse in the past.

31. Even if the complainant's evidence were excluded, penetration can still be proved by surrounding circumstances and the evidence of other witnesses. In **Mark Oiruri Mose v Republic [2013] eKLR.**

32. In the current case, if the court was to disregard the evidence of the Appellant, there was the evidence of PW2 who found the Appellant having sex with the complainant and, the medical evidence, which indicated that the complainant had been defiled. Additionally, there was the circumstantial evidence adduced by PW3 who found the Appellant in the complainant's room. I find that penetration was proved to the required standard.

33. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> **"In <u>LESARAU – v-R, 1988 KLR 783,</u> this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."**

34. This was a clear case of identification by way of recognition. The complainant stated that she was having a sexual relationship with the Appellant for over a year since February 2015. Both PW2 and PW3 knew the Appellant as he came from the same village. In addition, PW2 stated that the Appellant would visit their home and he would sleep in his (PW2's) room.

35. Furthermore, the Appellant was placed at the scene of the crime. PW1, PW2 and PW3 all stated that the Appellant had gone to their house and requested for a place to spend the night and he was allowed to sleep in PW2's room. PW2 stated that when he went to the complainant's room he caught the Appellant red-handed having sex with the complainant. PW3 stated that when he was woken by PW2, he found the Appellant standing by the complainant's door.

36. From the evidence above, the Appellant was well known to the complainant and her family and was properly identified. There was no possibility of mistaken identity as the Appellant was placed at the scene of the offence.

37. On the contrary, I find the Appellant's defence that he was at home and that PW3 brought the complainant and PW2 to his house to be afterthought. He did not bring it up in his cross-examination of any of the witnesses.

38. The Appellant also contended that he was 17 at the time of the offence and that his rights under Article 50(2)(h) and section 186(b) of the Children's Act had been infringed. He attached a copy of his birth certificate with his amended appeal showing that he was born on 2nd December 1999 and was therefore 17 years at the time of the offence. However, as stated earlier the Respondent opposed the production of the birth certificate at the appeal stage questioning why the same was not produced during trial.

39. Section 358 (1) of the Criminal Procedure Code gives the appellate court discretion to take additional evidence and states that "***In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."***

40. Principles for taking additional evidence were laid down in **Elgood vs. Regina (1968) E.A. 274** where the Court of Appeal stated thus:-

> **"(a) That the evidence that is sought to be called must be evidence which was not available at the trial.**
>
> **(b) That it is evidence that is relevant to the issues.**
>
> **(c) That it is evidence that is credible in the sense that it is capable of belief.**
>
> **(d) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."**

41. Guided by the foregoing principles, I observe from the record that the Appellant was in custody from the time of his arrest and throughout the trial in the lower court. There is no evidence that his family members attended court during his trial. It is therefore believable that the Appellant did not have an opportunity to obtain and produce his birth certificate in the trial court. The evidence adduced by the Appellant is crucial in determining the sentence to be meted out upon him especially in light of the harsh minimum mandatory sentence provided for in the SOA. I therefore find sufficient reason to allow the production of the birth certificate by the Appellant.

42. The copy of the birth certificate produced by the Appellant indicates that the Appellant was born on the 2nd December 1999, making him 17 years old when the offence was committed. However, I note that the said birth certificate was registered on the 3rd April 2017 which was after the case against the Appellant had been concluded.

43. In the case of **William Odhiambo Siara -Vs- Republic [2014] eKLR,** Muchelule J dealt with a similar scenario thus:-

> **"It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence." (Emphasis mine)**

44. Flowing from the above persuasive authority, I hold that the birth certificate, having been registered after the case at the trial court had ended, is not admissible. Even if the Appellant was not in custody during the trial, he would not have managed to produce it in the trial court as it did not exist at the time.

45. Having found that the birth certificate is inadmissible, the only other evidence to prove the age of the Appellant was by way of medical evidence, as earlier stated in this judgment. PW4 told the court that she took the complainant and the Appellant to hospital for age assessment. PW5, Dr. Wario, on his part produced the Appellant's age assessment report (P.exh 4) which indicated that the Appellant was over 18 years old. He stated that age assessment was based on the dental formula of the Appellant.

46. There being no other contrary evidence on the Appellant's age, I find that the medical evidence proved the age of the Appellant and that he was not a minor at the time of the offence. It follows therefore that his rights under section 186(b) of the Children's Act were not infringed and that ground therefore fails. In the end, I uphold the conviction.

47. On the sentence, the Appellant contended that the sentence meted out was harsh and excessive as he was a minor at the time of the offence. As already established, the Appellant was not a minor and the sentence was lawful.

48. However, on the issue of sentencing it has been held that the mandatory minimum sentence as prescribed in the Sexual Offence Act (SOA) takes away the judicial discretion of courts in passing an appropriate sentence. This was evident in the trial court during sentencing, when the learned trial magistrate stated that, ***"However, the hands of the court are tied to mete out the minimum sentence."***

49. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where is stated thus:-

> **"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."**

50. In **Hamisi Mwangeka Mwero v Republic [2018] eKLR** Odunga J, stated that:-

> **"Having said that in this appeal, the complainant was 15 years old. She said she had agreed with the appellant during the day and she went to the appellant's house by herself. I must however emphasise that where the law provides that a person is, as a result of his or her vulnerability incapable of giving a consent, it is no defence to state that the person did actually consent. However, such circumstances, as opposed to, for example where the person is forcefully dragged into a thicket and is thereby defiled, ought to be taken into account. In other words the circumstances of each case must be considered**."

51. I am persuaded by the authorities above to take into consideration the circumstances of this case. The complainant admitted that she had willingly had sexual intercourse with the Appellant from February 2015 and that she never informed anyone about it. Additionally, the Appellant was remorseful and asked for leniency in mitigation. He is a young man who was around 18 years old at the time of the offence and was a first offender. I find that the sentence of 20 years imprisonment was harsh and excessive in the circumstances of this case and I set it aside. In the upshot, the appeal on sentence succeeds.

52. The Appellant has served approximately 4 years taking into account the time he spent in pre-trial custody. I consider the period served as sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

53. Orders accordingly.

Judgment delivered, dated and signed at Malindi this 29th day of November, 2019.

.....

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Appellant in person

Mr. Nyoro holding brief for Mr. Mangi for the Respondent