REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 45 OF 2012

HMJ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case 2995 of 2009, Hon. J. Omange, RM on 21st December, 2012)

REPUBLIC.....PROSECUTOR

VERSUS

HMJ.....ACCUSED

JUDGEMENT

1. The appellant, HMJ, was charged before the Chief Magistrate's Court at Machakos in Criminal Case 2995 of 2009 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant on the 8th day of November, 2009 in Machakos District within Eastern Province, intentionally caused his penis to penetrate the vagina of **NM**, a girl aged 3 years.

2. According to PW1, **MM**, the complainant's mother, she had left her child with the appellant, her brother while she went to the river. Upon her return, the child informed her that uncle had injured her. She then decided to report the matter to the chief who advised her to report the same to the police. At the police station she was given a letter to go to the hospital where the complainant was treated and it was confirmed that the complainant's private parts were swollen. According to PW1, when she examined the complainant she found that her private parts were swollen. It was her evidence that the appellant was known to the complainant and that they had lived together since the complainant's birth.

3. PW2, **Francis Chule Mbamba**, upon receipt of the report that a child had been caught, went to the home of the child where he found the mother of the appellant and the mother of the complainant. He then sent for the appellant who had gone to the neighbour's and told them to go to the police.

4. PW3, **Dr Nelly Kamweli Ongélo**, produced the medical report on behalf of **Dr Kuinyu** who was no longer in service of Machakos Level 5 Hospital. According to him the complainant was taken to the Hospital and upon examination it was found that she had labial bruises. While she had no vaginal bruises, her hymen was missing. There was fracture entry into vaginal canal of the child.

5. PW4, **PC Leonard Mjomba**, the investigating officer testified that after completing the investigations, he decided to charge the appellant with the offence after the medical evidence confirmed the fact of defilement. He produced the age assessment report which revealed that the complainant was 3 years old.

6. In his unsworn statement, the appellant stated that he was arrested while doing casual work in another compound.

7. In her judgement the learned trial magistrate was impressed by the manner in which PW1 gave her testimony which testimony the court found was corroborated by the doctor's examination. Having warned herself on the danger of relying on the evidence of PW1 in light of the complainant's age, the court found PW1's evidence reliable as it was supported by medical evidence. It was her finding that the appellant,

the complainant's uncle, had a lot of opportunity to be with the complainant who was left with him alone. She therefore found that the appellant did insert his penis into the complainant's vagina and rejected the appellant's defence as not convincing. Accordingly, she found the prosecution's case proved and convicted him accordingly.

8. On the sentence, she found that though the appellant was a first offender, the offence was serious with serious consequences on the child victim and that it carried a mandatory sentence. She proceeded to sentence the appellant to life imprisonment.

9. In this appeal the appellant contends that the evidence adduced by PW1 was inconsistent with that of PW2. It was submitted that the medical tests could not produce the results that would have proved the offence. It was submitted that the prosecution's case was not supported by the P3 form hence the prosecution failed to prove its case to the required standards. The appellant also took issue with the fact that the medical report was produced by a person other than the maker thereof. According to the appellant no evidence was tendered to prove the age of the complainant.

10. In opposing the appeal, the Respondent, through the learned prosecution counsel, **Ms Mogoi** reiterated the evidence on record and submitted that the ingredients of the offence of defilement were proved by the prosecution.

Determination

11. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

12. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

13. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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.***

14. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

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

15. In the case before the trial court, the evidence was that the appellant was left with the complainant and when PW1, the mother returned the complainant informed her that the appellant had injured her. Upon examining the complainant, PW1 found the complainant's private parts swollen. The medical examination of the complainant revealed that her hymen was broken and she had labial bruises.

16. From the age assessment report it is clear that the complainant was aged 3 years old. Accordingly, the age of the complainant was proved as required. As regards penetration, the medical evidence was clear that the complainant a child aged 3 years had labial bruises and broken hymen. PW1 examined her vagina and found it swollen. There is no doubt based on the said evidence that the complainant had been sexually assaulted. Accordingly, penetration was proved. As regards the identity of the appellant, the evidence was that it was the appellant who was left with the complainant. He had the opportunity to commit the offence. In his evidence he did not offer any explanation as to what happened when he was left with the complainant. In the absence of that explanation the learned trial magistrate was entitled to arrive at the conclusion she did and she cannot be faulted.

17. I have considered the submissions made by the appellant and none of the issues raised convinces me that the decision ought to be

interfered with.

18. In the premises, the appeal against the conviction has no merit. As regards the sentence, I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. 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."**

19. In the same vein I set aside the life sentence imposed upon the appellant herein and substitute therefore a sentence of 20 years' imprisonment. The said period run from 9th November, 2009 save for period between 24th October, 2010 to 15th March, 2011 when he was out on bond.

20. Judgement accordingly.

Judgement read, signed and delivered in open court at Machakos this 28th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey