REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 51 OF 2018

MOSES MUSA CHEPTUM……..……APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Cr. Case no. 892 of 2016 delivered on the 29th day of December, 2016 by Hon. E. Ayuka, RM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for 15 years for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act on 29/12/2016. The particulars of the offence were that the appellant had "*on 17th day of September 2016 at around 9.00am in Baringo North Sub-county unlawfully and intentionally caused his penis to penetrate to the vagina of CJ a girl aged 17 years".*

2. Although the Petition of Appeal indicated that the appeal was from *"the conviction and sentence"*, the appellant's grounds of appeal entitled *"Mitigation Grounds"* only challenged the sentence as follows:

> "*1. My lords in the light of the fact that I am a first offender and both remorseful and apologetic for the above offence, I pray for reduction for the sentence.*
>
> *2.* ***That my lords the above offence emanated from influence of alcoholic and bad company which I promise to shun.***
>
> *3. That my lords I am a father of three kids that depends soley on me for their daily upkeep.*
>
> *4. That my lords I am the sole breadwinner to both my siblings and my elderly parents".*

3. To be sure, the appellant's written submissions on the appeal were similarly intoned as follows:

> "***WRITTEN SUBMISSIONS***
>
> *My lords prior to the commission of the above offence, I used to be law abiding Citizen and that I have no crime records. Therefore my lords I am both remorseful and apologetic for having committed the above offence.*
>
> *My lordship I do belief that the above offence emanated from bad company which I had engaged in and also I was under the influence of alcohol. My lordship I diligently promise to shun all this since it has only landed me in trouble.*
>
> *My lordship I am a father of three kids that depend upon me for their daily upkeep. Therefore their future lines might be at doom – should I serve the sentence to maximum. My lords also I am the sole bread winner to both my siblings and my elderly parents.*
>
> *My lords for the time that I have been in prisons, I have undergone through various rehabilitation Programmes which have reformed me. For example, Bible correspondence courses such as*
>
> *1. Lamp and Light*
>
> *2. Discover*

3. Prisoner's Journey

4. AFCM.

And Grade 1 in Carpentry and Joinery.

My lords this course have reformed me and will see me be a resourceful citizen to my family, the society and the nation at large. My lordship I have learnt a lesson that crime does not profit at all and I promise to avoid it all all costs.

My lordship it is my prayer to this honourable Court to consider that I have served a substantial part of my sentence thus I am liable to enjoy the benefits of section 39 (2) of the Sexual Offences Act No. 3 of 2006.

My lords in sum total it is my humble prayer to this honourable Court to consider my prayers in reducing the sentence imposed upon me, set it aside and replace with a non-custodial one or do as otherwise deems fit.

***REASONS WHEREFORE**: the appellant kindly pray that may my appeal be allowed, sentence reduced."*

And the prayer is for **the sentence to be reduced**!

4. The DPP opposed the appellant's appeal by oral submissions set out in the record of proceedings as follows:

"***Appellant***

We have filed submissions. I pray for a reduction of the sentence.

DPP

Appeal is opposed.

Appellant convicted of defilement contrary to section 8 (1) (4) of the Sexual Offence Act and sentenced to serve 15 years on 29/12/16.

Pw1 testified that she knew the appellant well as Moses Musa as he was their neighbor and worked at a saw mill. She said at 7/9/2016 she was washing dishes outside their house and she was still in uniform as she had come from school. Appellant came and confronted her and pulled her to the back of her house where he defiled her. Her uniform got torn in the process. She stated that as the appellant pulled her the table on which she was washing dishes fell down. This is corroborated with evidence of Pw2, the mother of the complainant who found the table had taken fallen down. After the incident the appellant gave 20/= to the complainant to buy fruits and want her not to tell anybody what happened.

She told her mother after a few days and she was taken to hospital.

Pw2 said she had left the complainant at home washing dishes and went to the kiosk and on coming back she found her dishes table had fallen down and she inquired from the complainant what had happened. The complainant did not tell her anything on that day. However, she testified that the appellant disappeared from that date and when she was arrested he offered to marry the complainant but the mother was not agreeable. Pw1 opened up to Pw2 told what happened. Pw2 took her to Kabartonjo Sub-County Hospital where she was treated. She produced a Clinical Card showing that she was born on 11/10/1998. She was therefore 17 years at the time of the incident.

Pw3 Clinical Officer examined the complainant and testified that on examination, the complainant hymen was broken and she had whitish vaginal discharge. She had numerous epithelial cells and test there from sexually transmitted infection.

The complainant was also retarded. Pw4 testified that the appellant was arrested on 1/10/2016 and the incident had taken place on 17/9/16. This corroborating.

The evidence of Pw2 that the appellant disappeared after the incident. The allegation that he thought the complainant was over 18 years does not hold any water as he did not say that in his defence. Secondly, he was a neighbour and he knew that the complainant nor already school and had she was mentally retarded. In his defence appellant complained that he was at the complaints house and that he gave her 20/=. He places himself at the scene of crime.

I submit that the offence was proved beyond reasonable. We urge Court to dismiss the appeal consider; the nature of the offence and condition of the complainant.

Appellant in reply

I wish to add that the infection on the complainant was not found on me. I was not able to raise the defence of 18 years. I pray for leniency.

Determination

5. Although the appeal does not challenge the conviction, I think it is appropriate in discharge of the duty of the first appellate Court, and as a Court of law and justice, to re-evaluate the evidence before the trial Court and make own conclusion, as counseled by ***Okeno v. R*** (1932) EA 32, on conviction before considering whether the findings of the trial Court on conviction and, therefore, sentence is to be upheld, or reduced, as prayed by the appellant in the case before the Court.

6. The prosecution case is set up by the testimonies of the complainant Pw1, her mother Pw2 and Clinical Officer Pw3 as follows:

*"**PW1***

Am CJ I hail from [particulars withheld]. At home I stay with MB.

I know the accused. He is Moses Musa. I usually see him at home area. He works at a saw mill. On 17/9/2016 I was washing dishes when the accused came and held me by my clothes- dress. He then undressed me. I had my uniform on. Its for [particulars withheld] primary school. He tore my dress in the process. The accused gave me some fruits and money – two coins of Ksh. 20/-.

The accused then pulled me to the back of the house. He forcefully removed my pants. He also removed his trousers and removed his penis. He then did to me "tabia mbaya" pointing to her private parts. The accused inserted his penis into my vagina. I felt a lot of pain. The accused then went away. I reported the incident to my mother. *I school at [particulars withheld] Primary in class six (6). I was taken to Hospital.* ***The table fell down.***

CROSS-EXAMINATION

You defiled me. It's you who did tabia mbaya to me. You did not tell me to give my mother money.

RE-EXAMINATION BY COURT PROSECUTOR

The accused is also known as Paul 'is' his nickname at home. The accused came along alone.

PW2

Am ZJ. I stay at [particulars withheld]. The complainant is my daughter. She is the 1st born. I also know the accused. He hails from my home area.

On 17/9/2016 at about 9:00 am. I left the complainant back at home washing dishes as I rushed to the kiosk. ***On coming back, I found the dish table had been fell down.*** *I enquired from the complainant what had happened but she did not tell me anything. I had earlier met two people who usually operate power saw. They stated that they had seen the accused at home with the complainant.*

The accused disappeared from home when he was arrested he offered to marry the complainant or that he would take responsibility over whatever the outcome.

The complainant revealed to me that the accused had defiled her. I took the complainant to Kabartonjo Sub-County hospital for treatment. I reported the incident at Kabartonjo police station. *The P3 form was filled up at the hospital. Treatment notes PMFI 1 P3 form – PMFI 2. Post Rape Care form PMFI-3. The complainant was born on the 11.10.1998.*

I have her Clinic Card. Child health card – PMFI 4.

The accused is popularly known as 'Paul' at home.

CROSS-EXAMINATION

The table had been fell down. The utensils were on the ground. *The complainant implicated you in the defilement.*

RE-EXAMINATION

I left home at about 9:00 am. I came back home at about 9:30 am. I got two fundis who had come to cut trees. Complainant was also at home. They were near where the complainant was washing dishes. They had not started cutting the trees.

PW3

Am Jeniffer Chelick Senior Clinical Officer Kabartonjo Sub-County hospital. I have a P3 form for the complainant its me who filled it up on 23/9/2016. On the 23/9/2016, the complainant was brought to the hospital by her mother. It was alleged that she had been defiled by someone known to her.

I examined the child on her inner [wear], there were wetness and blood stains.

She stated that she had been lured into sexual intercourse by someone known by her 20/- and some fruits.

She was in fair general condition. She was/looked retarded approximate age of injury was 5 days.

We gave her medication – drugs. Nature of offence was defilement. On the genitalia examination the hymen was broken. She had whitish vaginal discharge. We did lab examination which revealed numerous epithelial cells. She tested positive for STI. In conclusion, the complainant was defiled. *I checked and signed the P.3 from. I also filled up the Post Rape Care Form. – PRCF – for the complainant. I also have the medical impatient card. Treatment notes O/p No. dated 21/9/2016. I saw her again on 22/9/2016. I wish to produce the documents in evidence.*

Treatment notes – P exh 1. P3 form P. Exh 2 P.R.C.F – P Exhb 3.

CROSS EXAMINATION

The complainant tested positive for an STI. We did not subject you to lab text. *The STI could be revealed in exhibit itself within 3 days.*

RE-EXAMINATION: Nil"

7. In his defence the appellant testified admitting his presence at the complainant's home but denied the defilement as follows:

"DW1

On the material day I had gone to measure timber. It was on a Friday.

I heard people talking at 5 the complainant's home. I went there and found some other fundis on site. I left and went away.

Before I left the complainant requested me to bring for her a cake. I gave her 20/-. The next week on a Monday, I met her father.

On 21/9/2016 I met the complainant's father who led me to his home. He then question me whether I had defiled the child. He called some other people with whom they roughed me up. They then forced me to write down on paper that I had defiled the complainant. They released me. Later on the 1.10.2016. I was arrested and arraigned before Court.

The charges are fabrications. I did not convict the offence. That is all. I urge Court to set me at liberty."

Analysis of Evidence

8. The court is required to weigh the evidence presented by the prosecution and the defence before the trial court as a whole, and to keep the Defence in mind while considering the credibility of the evidence of the prosecution to see whether there is raised a doubt as to the guilt of the accused person by the whole evidence, without considering any evidence singly and or separately, bearing in mind at all times that it is the duty of the prosecution to prove the charge beyond reasonable doubt. See important case law on this aspect of evaluation of evidence in ***Okethi Okale v. R*** (1965) EA 555; ***Achieng' v. R*** (1981) KLR 174 and ***Ouma v. R*** (1986) KLR 619..

9. Weighing the prosecution evidence against the defence, it is clear that the complainant whose age was established by a Health Clinical Card as 17 years (Date of birth 11/10/1998) as confirmed by medical evidence of penetration with hymen broken, numerous pus cells, numerous yeast cells with examiner noting *"hymen was broken but no physical injuries seen. Indicates possible rape with venereal or sexually transmitted disease (STI) infection."* Although the appellant was not tested and established to have sexually transmitted disease, the evidence of Pw1 on the defilement, which was reported to her mother Pw2 and the appellant's oral admission that he was at the scene of the alleged defilement puts the matter beyond doubt.

10. The evidence showed offence under section 8 (4) and not 8(2) of the Sexual Offences Act, as charged as the complainant was 17 years old at the time of the defilement. The particulars of the Charge correctly stated the age of the complainant and the appellant was not prejudiced in any way (within the meaning of section 382 of the Criminal Procedure Code) by the error in the reference to the charge as brought under section 8(2) of the Sexual Offences Act because he was correctly sentenced under section 8(4) of the Act, which provides for a penalty of imprisonment for a minimum of 15 years.

Finding of Court on Conviction

11. I find the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act proved against the appellant who was well known by the complainant and her mother even by his nickname *"Paul"* and appellant himself, in defence, having confirmed his interaction with the complainant and her father, when respectively, according to the appellant she had *"requested me to bring*

her a cake[and] I gave her 20/=” and *“on 21/9/2016, I met the complainant’s father who led me to his home”.*

12. The finding of the trial court on conviction of the appellant for the offence of defilement contrary to sections 8(1) and 8(4) of the Sexual Offences Act must be upheld.

Finding on the Sentence

13. The appellant’s submission on section 39 (2) of the Sexual Offence Act as allowing the release of an offender upon serving a substantial part of a sentence is misconceived. The section is a provision for **the continued supervision of an offender** upon his release, where it happens earlier than upon completion of a sentence. It is not a provision permitting early release of an offender upon serving a substantial portion of the sentence. It is a provision for imposition of additional penal consequence of supervision for “*a dangerous sexual offender*” and even imposes further sanction under sub-section (12) for breach of the supervision order. The section is set out in full below:

> ***“39. Supervision of dangerous sexual offenders***
>
> *(1) A Court may declare a person who has been convicted of a sexual offence* ***a dangerous sexual offender*** *if such a person has—*
>
> *(a) more than one conviction for a sexual offence;*
>
> *(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or*
>
> *(c) been convicted of a sexual offence against a child.*
>
> *(2) Whenever* ***a dangerous sexual offender has been convicted of a sexual offence and sentenced by a Court to imprisonment without an option of a fine, the Court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a Court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.***
>
> *(3) For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.*
>
> *(4) A Court may not make an order referred to in subsection (2) unless the Court has had regard to a report by a probation officer, social worker, or other persons designated by the Court for the purposes of this section as such, which report shall contain an exposition of—*
>
> *(a) the suitability of the offender to undergo a long-term supervision order;*
>
> *(b) the possible benefits of the imposition of a long-term supervision order on the offender;*
>
> *(c) a proposed rehabilitative programme for the offender;*
>
> *(d) information on the family and social background of the offender;*
>
> *(e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and*
>
> *(f) any other matter directed by the Court.*
>
> *(5) An order referred to in subsection (2) shall specify—*
>
> *(a) that the offender is required to take part in a rehabilitative programme;*
>
> *(b) the nature of the rehabilitative programme to be attended;*
>
> *(c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and*
>
> *(d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.*
>
> *(6) An order referred to in subsection (2) may specify that the offender is required to—*
>
> *(a) refrain from visiting a specified location;*
>
> *(b) refrain from seeking employment of a specified nature; and*
>
> *(c) subject himself or herself to a specified form of monitoring.*

(7) A long-term supervision order made by a Court in terms of this section shall be reviewed by that Court within three years from the date on which the order was made or within such shorter period as the Court may direct upon referral by the Commissioner of Prisons of such an order to that Court for review.

(8) Upon making a long-term supervision order in terms of this section, the Court shall explain to the victim, including the next of kin of a deceased victim, that they have the right to be present at the review proceedings referred to in subsection (7) and may make representations. (9) A Court which has granted a long-term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with the order or with any condition imposed in connection with such order, direct that such an offender be—

(a) ordered to appear before that Court or another Court of similar or higher jurisdiction at a specified place and on a specified date and time; or

(b) arrested and brought before such Court.

(10) Upon the appearance of a dangerous sexual offender at a Court pursuant to the provisions of subsection (9), the Court shall direct the accused person to show cause for failure to comply with a long-term supervision order or with any condition imposed in connection with such order and the Court may—

(a) confirm the original order and any conditions imposed in connection with such order;

(b) vary or withdraw such order or any conditions imposed;

(c) impose an additional condition or conditions; or

(d) make any other order as the Court deems fit.

(11) If a Court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme contemplated in this section, the Court may order that the offender, upon being found by the Court to have adequate means, shall contribute to the costs of such programme to the extent specified by the Court.

(12) A person who has been declared a dangerous sexual offender and who does not comply with a supervision order in accordance with this section is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.

(13) A register for convicted sexual offenders shall be maintained by the Registrar of the High Court and any person who has reasonable cause to so examine it may examine the register."

14. The appellant did not take up the issue of apparent age of the complainant. He merely alluded to the defence in his submissions before this Court. Section 8 (5) of the Sexual Offences Act allows a defence to a charge of defilement that the accused was misled by the complainant to think that she was over the age of eighteen years as follows:

"8. (5) *It is a defence to a charge under this section if—*

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

It is clearly a **defence** to be raised and proved at the trial not on appeal as sought herein.

15. The victim who was in primary school uniform at the time of the assault and who was known to the appellant could not have led the appellant into thinking that she was over the age of 18 years.

16. The complainant who is known to the appellant was epileptic and mentally retarded. To such members of our Community we owe a duty of care and protection rather than exposure and preying by sexual predators. In defiling the complainant the appellant committed a heinous act of betrayal over and above the sexual violation and in the exercise of its discretion, this Court may have imposed a higher imprisonment sentence, if there had been a cross-appeal.

17. I cannot, however, now interfere on appeal with the sentencing discretion of the trial merely because I would have sentenced the appellant to a higher sentence had I been trying the case. See ***Omuse v. R*** (2009) KLR 214.

18. The Court is aware of the salutary holding of the Supreme Court in ***Francis Karioko Muruatetu & Anor. R*** (2017) eKLR that legislative stricture on the sentencing discretion of the Court by prescribing mandatory sentences is unconstitutional. However, I am not certain that the principle extends to ***minimum*** sentences which leave the actual sentences over and above the ***minimum*** at the discretion of the Court, the ***minimum*** expressing the lowest limit of tolerance of the Society by way of sanction necessary to give effect to the Society's revulsion towards the given criminal act. I have not been served with full argument on the matter to be able to make determination in that regard.

19. However, even if the ***Muruatetu*** principle applied to ***minimum*** sentences, rather than ***mandatory*** sentences, I would find the sentence of imprisonment for 15 years to be appropriate in the circumstances of this case, having regard to the victim's grave vulnerability by reason of the mental retardation and the appellant's knowledge thereof as a neighbor of the complainant.

20. I, therefore, do not find any error to justify interference with the sentence by trial Court. (See ***Wanjema v. R*** (1971) EA 493).

Orders

21. Accordingly, for the reasons set out above, the Court finds no merit in the appeal both on conviction and sentence, and the same are dismissed.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.