REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 24 OF 2016

BRIAN MUTINDA KALUSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(*Being an Appeal from Original Conviction and Sentence in **Kitui Chief Magistrate's Court Criminal Case (S.O.) No. 12 of 2016** by **Hon. R. Ombata (RM)** on **11/04/16)**

J U D G M E N T

1. Upon arraignment, **Brian Mutinda Kalusi** was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **2nd** day of **April, 2016** at about **3.00 p.m.** at **[particulars withheld], Mutungoni Location** in **Kitui County,** intentionally caused his penis to penetrate the vagina of **MW,** a child aged **11 years.**

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on **2nd** day of **April, 2016** at about **3.00 p.m.** at **[particulars withheld], Mutungoni Location** in **Kitui County,** intentionally and unlawfully committed an act of indecency with **MW,** a girl aged **11 years** by touching her private parts namely vagina and buttocks by using his hands.

3. At the outset, he admitted the charge and was convicted for defilement. The Complainant having been eleven (11) years old following the provisions of the law, he was sentenced to **life imprisonment.**

4. Aggrieved, he appeals on grounds that: He was not given the opportunity to refresh his mind on what kind of charge he was facing; the fact that he was a first offender was not considered; and that he was beaten and deceived by the police that if he admitted the charge he would be given an opportunity to meet the Complainant with her parents so as to settle the matter amicably.

5. Facts of the case were that on:

> **"2nd April, 2016, at about 3.00 p.m. the Complainant, a child aged 11 years accompanied by two other children, KW and MW were collecting firewood in the bush when the Accused appeared. He called the two children K and MW and send them to a nearby canteen to buy a bubble gum. The Accused was left with the Complainant. The two children returned and informed the Accused that the canteen was closed. The Accused in his pocket had a bubble gum which he gave the two and send them away. He remained with the Complainant. He gave the Complainant Kshs. 30/= to have carnal knowledge of her. The Complainant resisted. The Accused grabbed her and removed her inner pants, he removed his trouser half way, wrestled the Complainant and lay on her. He inserted his penis into the Complainant's vagina. After he completed the act, he wore his trousers and went away. The Complainant proceeded home where she found her younger sister and brother and narrated the story. The Complainant's mother was not present. On 3rd April, 2016 the Complainant woke up and went to one Mwangi and showed him the Kshs. 30/= she was given. The said Mwangi went and informed the mother. On enquiry, the Complainant narrated the story to the mother. The mother then proceeded to Kabati Police Post where she reported the matter on behalf of her child and were referred to Kauwi Sub-District Hospital for checkup. After examination as per the P3 form filled by Dr. Mutuku, he indicated that there was fresh blood on external genitalia, bruised vaginal wall and the hymen was broken. There was Post Rape Care Form filled by the Doctor who did the examination. The age assessment declared the child to be 11 years. Investigations were commenced. The Investigating Officer recovered the under pant and a dress (yellow tattered dirty dress seen), (the under pant also seen). Later the Accused was arrested and charged with the offence."**

6. The Appeal was canvassed by written and oral submissions, respectively. The Appellant urged that he did not know the consequences of a confession; he was deceived by the police to confess to the act and if the Court had given him the chance of reflecting on what had happened,

he would not have committed the charge.

7. The Respondent through learned State Counsel, **Mr. Mamba** opposed the Appeal. He urged that the Court was guided by the law; the offence was read to the Appellant who understood the ingredients prior to admitting the charge and when accorded the opportunity to mitigate he did not raise the allegations he came up with.

8. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

9. This is a case where the Appellant pleaded guilty to the charge. **Section 348** of the **Criminal Procedure Code** provides thus:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

10. In the case of **Muendo Musau vs. Republic (2013) eKLR** the Court of Appeal stated that:

> **"There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. The case law was reviewed by the predecessor of this Court in Adan (Supra). In Ndede vs Republic (1991) KLR 567 this Court held that the Court is not bound to accept the Accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the Accused, or the Accused is confused or there has been inordinate delay in bringing the Accused person to Court from the date of arrest. In this Appeal before us, we reiterate our satisfaction that the plea of guilty was unequivocal."**

11. This is a case where the Appellant's complaint is not that the plea was equivocal but that his expectations did not come to fruition. This is a case where facts were read to the Appellant. All ingredients of the offence of defilement were captured. The age of the Complainant, the act of penetration and positive identification of the perpetrator as captured in the case of **Fappyton Mutuku Ngui (2014) eKLR,** were disclosed.

12. After the facts were stated by the Prosecutor, the Appellant was granted the opportunity to dispute or give an explanation of any facts, that would be relevant to the matter **(Also see Section 207 of the Criminal Procedure Code; Adan vs. Republic (1973) EA LR 445).**

13. The Appellant replied by stating that facts as presented were true. After conviction, the Court granted him the opportunity to give a pre-sentence statement (mitigation) and he sought forgiveness. Having asked the Court to be lenient he promised not to repeat the offence.

14. The Appellant complains that the police assaulted him and advised him to admit the offence. When he appeared in Court he was under the protection of the Court but he raised no allegation to that effect. Even if he believed that they would settle the matter amicably, the fact remains that he committed the offence.

15. The Appellant argues that the sentence imposed was harsh and excessive. The victim was eleven (11) years old.

16. Section 8(2) of the **Sexual Offences Act** provides thus:

> **"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."**

17. However, with the emerging jurisdiction following the case of **Francis Karioko Muruatetu & Another vs. Republic SC Petition No. 16 of 2015** the Court of Appeal has delivered itself on sentences under the **Sexual Offences Act.** In the case of **Evans Wanjala Wanyonyi vs. Republic (2019) eKLR** the Court stated that:

> **"In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (Supra) and persuaded by the decisions of this court in Christopher Ochieng vs Republic (Supra) and Jared Koita Injiri vs Republic, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."**

18. Guided by the above decision and the circumstances in which the offence was committed, I set aside the sentence meted out and I substitute it with **twenty-five (25) years imprisonment** which will be effective from the date of sentencing by the trial Court.

19. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **26th** day of **November, 2019.**

L. N. MUTENDE

JUDGE