REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 85 OF 2017

JL.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. G. Sitati in Kitale CMCCRC No. 162 of 2015)

BETWEEN

REPUBLIC.....PROSECUTION

VERSES

JL..... ACCUSED

JUDGMENT

1. The Appellant was charged 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 of the offence was that **on the 10th day of September, 2015 at No. 20 within Trans-Nzoia County intentionally and unlawfully caused his organ namely penis to penetrate into the vagina of SC a child aged 1-year-old.**

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that **on the 10th day of September, 2015 at No. 20 within Trans-Nzoia County intentionally and unlawfully caused the contact between the genital organ namely penis and the genital organ namely vagina of SC a child aged 1 year.**

3. The Appellant was convicted and sentence to life imprisonment hence this appeal. The appeal has raised about three grounds in his amended petition of appeal and the court shall consider them later in this decision. The court ordered the parties to file written submission in this appeal which they did. Prior to making any analysis and determination herein it shall be worthwhile to consider the summary of the proceedings at the lower court first.

4. PW1 IC a minor and a class 3 pupil at [particulars withheld] primary school testified that the Complainant was her cousin and so young and by then was not yet able to talk. She said that on the 10th September, 2015 she was preparing vegetables for supper when the Appellant came and the child was playing near the kitchen. Earlier own the Appellant had been splitting firewood and was waiting for his pay from her cousin **CC** who had gone to Ann's place for some change.

5. She went on to state that the Appellant took the child and placed her on his laps as she faced him. The child's legs were apart and she only had a dress. The child then began to cry and he threw her to the witness and when she checked she was bleeding from her private parts. She said that the child was not bleeding before he took her. She then rushed the child to her mother who in turn rushed her to the hospital.

6. PW2 CC the mother to the Complainant stated that she was one year and three months old and the Appellant was her neighbour. She said that on the material day she had gone to the neighbour to look for change for the Appellant who had split firewood for her that day and she had left her with PW1. PW1 came with the child and told her to check as she was bleeding on her private parts. They inquired from the Appellant who said that the child had been pricked.

7. She then took the child to Tugoin dispensary but were referred to Moi Teaching and Referral Hospital (MTRH) where she underwent an operation. The matter was reported at Tugoin police post and later Cheranganyi police station and the appellant arrested. She produced the

child's notification of birth as well as identified the P3 Form.

8. PW3 KL testified that the appellant was his neighbour as they bought the farm from the same person and the complainant was his granddaughter. He said that he came home on the material day and he saw PW1 cutting vegetables and the Appellant was holding the child on his laps. She heard PW2 crying and on checking the child she found that she was bleeding from her private parts. The Appellant escaped and he followed him to his home where his brother told him that he had escaped to the maize farm. He went and advised PW2 to take the child to the hospital. Later one Kimtai told him that the Appellant had been arrested.

9. PW4 DR. PAUL RONO from Moi Teaching and Referral Hospital produced the treatment notice as well as the discharge summary on behalf of **Dr. Yatich** from the said hospital and who had treated the Complainant. The doctor found that the child had vaginal injuries and there were severe tears of the labia minor. She was taken to the theatre and repaired.

10. PW5 PHANICE SILALI from Kitale District hospital produced the Dental Age Assessment Report on behalf of **Dr. Oyieke** who found that the child was aged approximately one-year-old.

11. PW6 CORPORAL JOSEPH NGACIA from Tugoin Patrol Base testified on behalf of the Investigating Officer Corporal John Maelo who had been transferred and he had recorded witnesses evidence. He said that the appellant was brought to the police station by the members of the public after arresting him.

12. When placed on his defence the Appellant gave unsworn evidence denying the charge. He admitted that on the material day he split wood for PW2 who was to pay her Ksh.200. He did so and left but was arrested at 5pm at the centre by 2 people and taken to the police station and later brought to court.

ANALYSIS AND DETERMINTION

13. The amended grounds of appeal which are contained in the home-grown submissions by the appellant basically challenges the evidence as presented by the respondent, namely, that the same was insufficient to establish the charge as they were inconsistent.

14. The court has perused the said submissions by the appellant and the learned state counsel. The ingredients of the defilement offence are now clear, **namely the age of the victim, the identity of the perpetrator and whether penetration occurred.**

15. The court is alive to the famous and often cited decision in **OKENO VS. REP (1972) EA 32**, specifically that the duty of this court is to re-evaluate the evidence afresh and arrive at an independent finding with a caution that the court did not have the benefit of seeing the demeanour of the witnesses.

16. The question of the age of the minor was not in my view disputed as PW2, her mother produced the clinic card which showed when she was born. The dental age assessment equally established that she was one-year-old.

17. This court is also satisfied that the minor was equally defiled based on the evidence of PW1, 2 and 4. The injuries she sustained caused her to bleed and underwent an operation and the medical documents produced was a testimony to this. There were serious injuries to her genitalia and the doctor concluded that there was defilement.

18. Was the Appellant the suspect? The evidence on record points irresistibly to him. PW1 was the primary witness. She was with the child when the appellant took her and placed her on his laps. After a while she heard the child cry and the Appellant handed over to her. Upon checking she noticed that she was bleeding and she took her to her mother. There was no evidence that the child was pricked by anything as the Appellant suggested in cross examination and in his submission.

19. At the same time there was evidence that the appellant went into hiding at the maize field immediately after the incident. Although he gave unsworn defence, there was nothing to suggest that he was arrested while on his frolics. Equally PW1 was clear that it was the Appellant who in any event were together that day as he split firewood for PW2.

20. In fact, the Appellant did not deny that he did not split firewood for the said witness and that he was to be paid some money. In the premises, I find that there was clear identification of the appellant by PW1 as well as PW3.

21. This appeal ought to fail. The unsworn evidence by the Appellant was of no probative value as he was never cross examined. There was nothing to indicate that the child sustained injuries elsewhere or caused by any other object. If this was the case the medical experts would have said so. The evidence by PW1 clearly showed that the child was playing when the Appellant took her and placed her on his laps and shortly thereafter she heard her cry and the Appellant threw the child to her. She found her bleeding and took her to her mother.

22. Although she was also a minor, I find that she was truthful as anticipated under the provisions of **Section 124 of the Evidence Act**, in particular the proviso thereof.

23. This appeal in the premises is hereby dismissed. The court notes that the appellant was sentence to life imprisonment which was correct as per the section he was charged under. This court shall however tamper with the sentence pursuant to the Court of Appeal decision in **JARED KOITA INJIRI VS. REPUBLIC KISUMU CA CRAPP NO. 93 OF 2014**, where the learned judges stated 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 provisions, it too should**

be considered unconstitutional on that 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."

24. The above authority applies appropriately with the situation herein. The Appellant is a danger to our daughters and therefore his place is in jail.

25. In line with the above authority therefore the Appellant's sentence is hereby reduced from life imprisonment and to serve 30 years' imprisonment from the date of the lower courts sentence.

Dated signed and delivered in open court at Kitale this 18th day of December, 2019.

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H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Mr Omooria for Respondent

Appellant – present

Court Assistant – Silvia

Judgement read in open court.