REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.165 OF 2016

JONATHAN MUTUKU KANYIA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. C. C. Oluoch SPM delivered on 15th November 2016 in Nairobi CM Cr. Case No. 762 of 2015)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act. The particulars of the offence were that on 20th April 2015 within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of LSM, a child aged thirteen (13) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child, contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 20th April 2015 within Nairobi County, the Appellant touched the vagina of LSM, a child aged thirteen (13) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge and sentenced to serve twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He faulted the trial court for relying on the evidence of the complainant, and disregarding his defence statement, in arriving at its decision to convict him. He was aggrieved that the trial court failed to comply with the provisions of Section 169 of the Criminal Procedure Code. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Ms. Akunja for the State opposed the appeal. She averred that the complainant who was twelve (12) years of age at the time, was mentally challenged. The complainant's mother left her in the house with other children. When she came back, the complainant informed her that the Appellant had sexually assaulted her. Rose witnessed the incident. PW3 testified that the complainant's hymen was absent, which was also confirmed by PW4. Learned State Counsel was of the view that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. In the premises, she urged this court to dismiss the Appellant's Appeal.

The facts of the case according to the prosecution are as follows: PW1 TW, is the complainant's mother. She stated that the complainant had mental disability. She was born on 12th August 2001. She produced the complainant's birth certificate before court. On 20th April 2015, she left for work at about 10.00 a.m. She left the complainant in the house. When she came back home at about 8.00 p.m., she found the complainant at Rose's house. Rose operated a baby daycare. The complainant informed her that the Appellant had inserted his *'thing'* in hers. The said Rose confirmed what the complainant told her. However, she declined to record a statement with the police. PW1 took the complainant to Nairobi Women's Hospital. The doctor informed her that the complainant had been sexually assaulted. She reported the matter at Kenyatta National Hospital Police Post. She told the court that the Appellant was her neighbour. The complainant informed her that the Appellant had sexually assaulted her in his house. However, PW1 later learnt that the complainant was defiled in her house.

The complainant, LSM (PW2), gave an unsworn statement. She told the court that the Appellant did *"tabia mbaya"*. He put his *"dudu"* in hers (pointed to her vagina). She stated that she cried due to the pain she felt. The Appellant thereafter gave her mandazi. The complainant refused to answer any more questions from the prosecution.

PW3 Edward Mbugua, was a clinical officer at Nairobi Women's Hospital. He adduced evidence on behalf of Dr. Zugudi who examined the complainant at the said hospital on 20th April 2015. PW3 stated that the complainant was mentally challenged. Her clothes were soiled when she was taken to the hospital. Her external genitalia was normal. There was presence of a whitish discharge. Her hymen had been broken at 3 O'clock. He produced her Post Rape Care Form into evidence. PW4 Dr. Maundu from Police Surgery, examined the complainant on 21st April 2015. He stated that the complainant's external genitalia was normal. However, her hymen had been broken. He produced her P3 Form into evidence. On cross-examination, PW4 stated that tear on the complainant's hymen was fresh at 3 O'clock.

PW5 AP Joseph Thuo, based at AP Camp in Kibera was the arresting officer. He told the court that on 24th April 2015, PW1 came to the Police Camp with an arrest request for the Appellant from Kenyatta National Hospital Police Post. The Appellant was alleged to have defiled a girl aged thirteen (13) years. He arrested the Appellant at his house. PW6 Anne Wangeci, is an analyst working at the Government Chemist. She stated that she received exhibits from Cpl James Kabutu from Kenyatta National Hospital Police Post on 29th April 2015 and 18th May 2015. The exhibits were underwear belonging to the complainant, a buccal swab extracted from the Appellant and a High Vaginal Swab (HVS) extracted from the complainant. She was instructed to establish whether there was presence of semen in the underwear. After her analysis, she stated that there was no semen found on the complainant's underwear. The underwear was bloodstained. DNA test of the blood and HVS indicated that they belonged to a woman. PW6 testified that she did not identify whether the blood belonged to the complainant since her blood sample was not availed for DNA profiling as compared with the said exhibits. She produced a report of her findings into evidence.

PW7 Cpl James Kabutu investigated this case. He was assigned the case on 21st April 2015. He interrogated the complainant and her mother (PW1) on the same day. He stated that the complainant was not able to communicate coherently since she was mentally challenged. PW1 informed him that she had left the complainant in the house. When she came back, the complainant told her that the Appellant had sexually assaulted her. The Appellant was her neighbour. PW7 forwarded an undergarment recovered from the complainant and buccal swab from the Appellant to the Government Chemist. After his investigations, he proceeded to charge the Appellant with the present offence.

The Appellant was put on his defence. He told the court that on the night of 24th April 2015, he was at his house with his wife and children. At about 10.00 p.m., PW1 came to his house accompanied by two police officers. After identifying themselves, the police officers arrested him and took him to the Chief's Camp. He was informed that PW1 had reported that he had sexually assaulted the complainant. The complainant told PW1 that Baba K had done *'tabia mbaya'* to her. The police took him to Kenyatta National Hospital laboratory. He was later arraigned before the trial court on 27th April 2015. The Appellant denied having sexually assaulted the complainant. He stated that he knew PW1 and PW2. They

had been neighbours for close to four years. He stated that he was not known as *"Baba K"*. He availed his wife, Grace Mitiko (DW2) to adduce evidence on his behalf.

DW2 stated that she was at home with her husband and children (DK and J) when the police came and arrested the Appellant. He was taken to the Chief's Camp. The Appellant was alleged to have sexually assaulted the complainant. She stated that she worked as a hair stylist, and that she once had a disagreement with PW1 over customers. On cross-examination, she stated that the Appellant was known as Baba K. All the children in the estate knew him by that name.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32).

In the present appeal, the issue for determination is whether the prosecution established the charges of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case as well rival submission by the parties. Section 8(1) of the Sexual Offences Act provides that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The prosecution is required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator. On the age of the complainant, PW1, who was the complainant's mother, testified that the complainant was born on 12th August 2001. The complainant's birth certificate produced in evidence confirmed that the complainant was thirteen (13) years of age at the time of the sexual assault. **The Appellant did not challenge the evidence adduced with regards to the complainant's age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:

> ***"the partial or complete insertion of the genital organ of a person into the genital organs of another person."***

The complainant, albeit with difficulty, testified that the Appellant sexually assaulted her. She stated that:

> **"Baba K (points at Accused) did tabia mbaya here (points at her private parts. He put his dudu in mine. I felt pain. I cried. He gave me a *'ndazi'*..."**

PW1 testified that when she came back home from work, the complainant informed her that the Appellant had sexually assaulted her. Her assertions were confirmed by Rose, who was also a neighbour. However, the said Rose declined to record a statement with the police**.** The medical evidence adduced by the prosecution established that indeed the complainant's vagina was penetrated. The complainant was examined at Nairobi Women's Hospital on the same day the incident occurred. The Post Rape Care Form adduced in evidence indicated that the complainant's hymen was broken at 3 O'clock, which was indicative of penetration. The complainant was also examined by Dr. Maundu (PW4) the following day on 21st April 2015. He stated that the complainant's hymen was broken at 3 O'clock with fresh margins. **Taking into consideration the P3 form and the Post Rape Care form produced in court, as well as the complainant's testimony, this court is of the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

> **The third issue is whether the penetration was perpetrated by the Appellant. The Appellant was a neighbour to the complainant. She referred to him as *"Baba K"*. He was therefore not a**

stranger. The Appellant's identification was by recognition. The complainant informed her mother (PW1) that the Appellant sexually assaulted her. The Appellant denied that he was known as '*Baba K*'. However, his wife (DW2) informed the trial court that the Appellant was known in the estate as '*Baba K*'. They had a son by the name DK.

From this evidence, the Appellant was properly identified as the perpetrator of the sexual assault. The Appellant in his defence merely denied sexually assaulting the complainant. His defence did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no evidential value. **The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt.** This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.**

As regard sentence, Section 8(3) of the Sexual Offences Act provides a mandatory sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. However, the recent decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic [2017] eKLR* held that the mandatory death sentence prescribed for the offence of **murder** by **Section 204** of the **Penal Code** was unconstitutional and that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the **Muruatetu case** was also extended to mandatory sentences imposed by the **Sexual Offences Act** in recent decisions by the Court of Appeal in **Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR**. The Court of Appeal in Jared Koita Injiri (supra) held thus:

> ***"...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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.***
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> ***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."***

Guided by the aforestated decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the sentence that was meted on him was deserved or another sentence ought to be imposed. In the present appeal, the Appellant spent one and a half years in custody prior to his conviction before the trial court. In the premises, this court sets aside the custodial sentence of twenty years (20) years imposed by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from the date he was sentenced before the trial court. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE