REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 30 OF 2015

MICHAEL KARIUKI MURAGE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal

Magistrate's Court ((S. Jalang'o) at Baricho, Criminal

Case No. 88of 2014 delivered on 30th June, 2014)

JUDGEMENT

1. The appellant, **Michael Kariuki Murage**, was charged with defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act** before the Principal Magistrate's Court Baricho Criminal Case No. 88 of 2014. He pleaded not guilty. After a full trial he was found guilty and was convicted. He was sentenced to twenty (20) years imprisonment.

2. The appellant was dissatisfied with the conviction and the sentence and filed this appeal. He relies on the following grounds:

(i) That the learned magistrate relied on unsubstantiated evidence bearing in mind that there were 12 complainants but only 4 testified.

(ii) That the learned magistrate failed to consider inconsistencies of evidence adduced was greatly diminished by medical reports whose finding exonerated the appellant.

(iii) That the learned magistrate ought to have questioned rationale behind prosecution tendering loads of documentary evidence which they had no intention to use.

(iv) That the learned magistrate allowed himself to be swayed by emotion and passing sentence based on the urge to play to the crowd.

(v) That the learned magistrate failed to factor the cogent defence made by the appellant.

(vi) That the sentence of 20 years was inappropriate as it failed to address the long time the appellant had been in remand during the trial period.

3. The Appellant prays that the appeal be allowed, the conviction be quashed and the sentence of twenty (20) years be set aside.

4. The appeal was admitted and directions were given that the appeal proceeds by way of written submissions. This is a first appeal and this Court has a duty to evaluate the evidence and come up with its own independent finding. This was so held in the case of **Okeno -V- R (1972) E.A. 32**. All the Court has to do is to leave room for the fact that the trial magistrate had the benefit to see the witnesses and observe their demeanor.

5. The facts of the case are that the complainant M.M.W. was a class 3 student at [particulars withheld] Primary School and was aged ten (10) years. On 17thJanuary, 2014 while in company of two other girls F. and M. was coming from school when they met the Appellant who she knew by name Kariuki. The Appellant took them to his house where he did 'tabia mbaya' to them in his bedroom. The Appellant took the complainant to his bedroom where he undressed her and inserted his penis in her vagina. He performed ***'tabia mbaya'***. The Appellant gave the girls 50/=. She went home. Later she informed her teacher about the incident.

6. P.W. 11 F. M. W. testified that while in company of P.W. 1 she was defiled by the Appellant who took her to his house where he touched her private parts then placed his private parts on her and performed 'tabia mbaya'. The Appellant also defiled M.W.W.W. P.W. III. After P.W. 1 disclosed what had happened to her teacher, the parents of the girls were informed and the matter was reported to the Police. The complainant and the other girls were referred to hospital for treatment and their P. 3 forms were filled. The Appellant was arrested and charged.

7. The evidence adduced by P.W. 1, 2 and 3 was cogent. They testified that they knew the Appellant. They narrated how the Appellant took them to his house and defiled them. The trial magistrate was right to rely on the evidence of the P.W. 1, 2 and 3 to convict. The testimony was corroborated by the testimony of **John Ngatia Githaiga** (P.W. IX) who testified that he examined M.M.W. who was aged ten (10) years. He found that the hymen was not intact and there was a whitish vaginal discharge that was foul smelling. The offence was reported to have been committed on 17th January, 2014 and examination was on 24th January, 2014. He produced the P. 3 form as exhibit 1a, treatment notes exhibit 1b and laboratory results exhibit 1d.

8. I have considered the submissions. The appellant faults his conviction on the ground that the evidence was unsubstantiated and inconsistent. In his submission the Appellant consolidated grounds 1-5 and submits that *'the learned trial magistrate erred in law and in fact in convicting the Appellant on the charge of defilement against the weight of the prosecution evidence and thereby occasioned a miscarriage of justice.'*

9. He submits that the charge of defilement was not proved beyond any reasonable doubts. He states that the particulars of the charge are that:-

> *"On the 17th day of January 2014 at [particulars withheld] village in Kirinyaga West District, Kirinyaga County, intentionally caused his penis to penetrate the vagina of M.M.W. a child aged 10 years."*

The Appellant relies on the authority of **Dominic Kibet Wareng-V- R (2013) eKLR** where it was stated that the critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. He raises the issue as to whether the prosecution discharged the burden to prove these ingredients.

10. The Appellant has no issue with identification. The prosecution as admitted by the Appellant discharged this burden as the Appellant was recognized as the perpetrator of this crime. He was implicated by the complainant who knew him very well and therefore there is no doubt that the Appellant is the person who committed the offence. It has been held variously by the High Court and the Court of Appeal that recognition is better than identification of a stranger. In **Peter Musau Mwanzia -V- R**

Court of Appeal, (2008) eKLR which quoted with approval the holding in **R -V- Turnbull (1976) 3 ALL ER 549 at 552** it was held that recognition of an accused person is better than identification. We have best evidence in this case as the Appellant was well known to the complainant and was recognized as the person who defiled her. The Appellant has not challenged this fact that he was known to the complainant. The fact is not in dispute and it therefore proved that the Appellant was the perpetrator of this offence.

11. The Appellant submits that the prosecution fell short of discharging its duty to prove penetration and that the trial magistrate misdirected himself in finding that the prosecution proved its case. The prosecution called the complainant a child of tender years as she was aged ten (10) years. The trial magistrate properly addressed the issue before him as he stated that he would rely on the evidence of the complainant which must be corroborated by medical evidence and he found that the evidence of the complainant M.M. was corroborated by medical evidence. He further stated that he was able to reconcile the defilement on 17th January, 2014 with the medical examination report, P3 form and the treatment card. The conclusion by the doctor who filled the P.3 form was that there was evidence of penetration of the complainant's genitalia. He observed that the hymen was not intact and there was white discharge with foul smell. The trial magistrate properly directed himself to the law and facts before him.

12. The fact of penetration was proved by the evidence of the complainant which was corroborated by medical evidence. The prosecution called the doctor who filled the P.3 form P.W. IX. The prosecution proved that penetration was caused through sexual intercourse. This fact is not in dispute. There is allegation that the penetration was not through sexual assault. The prosecution discharged the burden to the required standards.

13. The Appellant submits that the P. 3 form was not signed at the appropriate section. My view is that failure to sign at the appropriate section does not invalidate the P. 3 form. Firstly the Appellant did not suffer any prejudice as the person who filled the P. 3 form did testify in Court as P.W. IX. The Appellant did not challenge the document on that issue. Indeed when the Appellant was given an opportunity to cross-examine P.W. IX he had no question on the issue. The issue being raised at this stage is clearly an afterthought. Second, the P. 3 was signed at page -2-. All what is required under Section -C- is that the P. 3 form be completed in alleged sexual offences after completion of sections A and B. Section –C- was duly completed and has no section requiring a signature. However the person filling the P. 3 form signed and testified in Court. The submission is in my view a sham. The trial magistrate properly directed himself by relying on the P. 3 form produced by P.W. IX to corroborate the testimony of the complainant. The Court had the benefit of receiving the oral evidence by P.W. IX and the medical record in the P. 3 form. This is best evidence which was tendered to prove the fact that the young girl was defiled.

14. The Appellant states that his defence was not considered. The Appellant gave a statutory statement as he opted to give unsworn statement. The defence was nevertheless considered and the Court found that it had to believe the complainant who gave details of how the Appellant defiled her and her testimony was corroborated by P.W. II F.M. The allegation is far from the truth. In any case the law allows the Court to rely on the evidence of the complainant in cases of this nature.

> **Section 124 of the Evidence Act** provides:
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> ***"Not withstanding the provisions of Section 19 ofOaths and Statutory Declarations Actwhere the evidence of alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him provided that where in a criminal case involving sexual offence the only evidence is that of the alleged victim of the offence the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."***

The trial magistrate believed the complainant and gave reason that her testimony was corroborated by an

eye witness P.W.II and medical evidence. That is what the trial magistrate had to do. The defence was not believed. A minor aged ten (10) year would know nothing and would have nothing to do with issues of buying and selling land. She was believable and her testimony was corroborated by independent witnesses. I am of the view that the Court considered the defence of the Appellant which he found he could not believe and properly relied on the evidence of the complainant to convict.

15. On the issue of the sentence the Appellant submits that the sentence of twenty (20) years was inappropriate. Under **Section 8 (1) (2)** of the **Sexual Offences Act** it provides:

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

Sentencing is the discretion of the trial magistrate. However, an appellate Court will interfere with sentencing by a lower Court if material factors were overlooked, the sentence was excessive or it was founded on erroneous principles. The sentence for this offence is mandatory and the trial Court has no discretion. The Court of Appeal in a binding decision while dealing with the issue of interfering with the sentence stated:

> ***"The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1964 in the case of Ogola s/o Owuour -Vs- Republic (1954) EACA 270 wherein the predecessor of this Court stated:-***
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> ***"The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James -V- Republic (1950) 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this we should also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

The trial magistrate overlooked a material factor in sentencing by not passing the sentence which is mandatorily provided under the Act. This gives this Court reason to interfere with the sentence.

16. The Court of Appeal has held that where the appeal Court is likely to enhance the sentence the appellant ought to be cautioned in order for him to decide to proceed with the appeal on the sentence. In **Isaac Muriithi Wambui -V- R (2016) eKLR C.A**., it was stated:

> ***"Although the learned Judge had good cause for enhancement in view of the age of the victim, nonetheless as observed by the Court in the above cited cases, the adverse change in the resulting sentence called for a warning to be given to the appellant to make an election. There has been no suggestion to us that this notorious practice of fore warning is not good practice and in the interests of justice to both sides. It should have been adopted by the learned Judge."***

The Appellant was served with the submission by the State. The State was seeking an enhancement of the sentence as the one passed was illegal for failing as the mandatory sentence provided was life imprisonment. In his submissions, the Appellant submitted on grounds 1-5. He did not make any submissions on ground No. 6 which had raised the issue of sentence. My view is that this ground was abandoned. In view of the binding authority of ***Isaac Muriithi Wambui***(supra) where the Court stated that it is good practice to caution the Appellant and the Judge should have adopted the practice, my view is that since Appellant was not cautioned that sentence was likely to be enhanced, I will not interfere with the sentence. It is also my considered view that the ground was abandoned.

17. The Appellant submits that the case was not proved beyond any reasonable doubts. Looking at the

entire evidence adduced, I am of the view that the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt as the trial court found, that the appellant defiled P.W. 1 in the manner described. The evidence of P.W. 1 was corroborated by P.W. 2 and P.W. IX. P.W. IX who was the clinical officer at Baricho Health Centre produced her treatment notes and P. 3 form which indicated that her hymen was not intact and there was whitish vaginal discharge that was foul smelling.

18. In Conclusion

There was overwhelming evidence which leaves no shred of doubt that the Appellant was the perpetrator of this crime. This crime was discovered by teachers of the school where the complainant was a student and investigations led to the Appellant. In his submission the Appellant has stated that he was positively identified. It was proved that the complainant was at the time aged ten (10) years as proved by age assessment report exhibit 5. Her age is not in dispute. The fact that the complainant was defiled by the person she positively identified was corroborated in all material particulars by the testimony of a witness P.W. IIand medical evidence byP.W. IX and supporting evidence. The charge was proved beyond any reasonable doubts. The appeal is without merits. I dismiss it. The conviction and sentence by the trial magistrate is upheld.

Dated and delivered at Kerugoya this 13th day of April 2018.

L. W. GITARI

JUDGE

Read out in open Court, Appellant present, Mr. D. Sitati for the State, C/A

Kinyua

L. W. GITARI

JUDGE