REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. 34 OF 2018

BENARD KIPROTICH BOSUBEN.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence by Hon. B. K Kiptoo (RM) in Principal Magistrate's Court Sotik Criminal Case Number 5 of 2018)

JUDGEMENT

1. 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 No. 3 of 2006, Laws of Kenya. The particulars of the charge were that on 1st May 2018, at [Particulars withheld] village in Konoin Sub County, within Bomet County, he intentionally and unlawfully touched the anus of FOO a child aged 14 years with his penis. He pleaded not guilty and case went into full trial in which the prosecution called six (6) witnesses in support of its case.

2. Put to his defence, the Appellant gave an unsworn statement and did not call any witnesses to support his case. At the close of the trial, he was convicted and sentenced to ten (10) years imprisonment.

3. The Appellant has now appealed to this court against both conviction and sentence on the following amended grounds which were to the effect that:-

a) The trial magistrate erred in law and fact by imposing the minimum statutory sentence of 10 years contrary to the Supreme Court decision in **Francis Karioko Muratetu & others vs R (2017)** which held that trial courts were no longer bound by statutory minimum sentences.

b) The charge was not proved by evidence.

c) The trial magistrate failed to give the appellant's defence a fair, objective and open minded analysis.

4. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions on 3rd March 2020, while the Respondents filed on 22nd December 2020.

5. In summary, the Appellant's submissions revolved on the one issue that the case against him was not proved and that the sentence meted on him was unconstitutional and harsh. He argued that the trial magistrate sentenced him to the mandatory minimum sentence of 10 years imprisonment, which, on the authority of the Supreme Court case of **Francis Karioko Muruatetu & Another Vs Rep (2017) eKLR,** was now unconstitutional.

6. The Appellant submitted that the ingredients of the charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act were not proved. He stated that the court accepted the evidence of the victim yet the child victim did not understand the meaning of an oath; that the child (victim) admitted that he was not penetrated since he had a pair of shorts on. It was the Appellant's submission that the child victim was the only person at the scene of the purported offence and therefore his evidence required to be corroborated. He submitted that the trial magistrate did not warn himself on the dangers of convicting on the uncorroborated evidence of a single witness. He cited the cases of **Thuo Vs Rep (1988) KLR 768; Michael Odhiambo Vs Rep (2005) eKLR,** and**; Isaac Omambia Vs Rep Cr App No. 47 of 1985** to support his case. The Appellant emphasized that the unsworn evidence of PW1, which the court relied on, was of little evidential value. He cited the case of **J.M.J Vs Rep. (2014) eKLR** to support his submission.

7. On the age of the victim, the Appellant submitted that he was not a child of tender years (being 10 years) as defined under the Children's

Act 2001.

8. The Respondents on their part submitted that the evidence on record was sufficient to convict the Appellant. That there was evidence that the Appellant entered the victim's home and removed the victim's trouser and attempted to penetrate him analy. That the complainant, raised the alarm leading to the arrest of the Appellant in the complainant's house. He submitted the medical report indicated that the Appellant did not penetrate but attempted to defile the minor with his penis. The Respondent further submitted that the elements of the offence namely age, identification, penetration and identification were proved.

9. Regarding sentencing, the Respondent stated that the court adhered to the principles laid out in the **Francis Muratetu case** *(supra)*, which stated that that it was illegal to impose mandatory and minimum sentences without giving an opportunity to the accused person to mitigate and without considering the circumstances of the case. The Respondent submitted that in the instant case, the court adhered to the aforementioned principles. Finally, the Respondent urged the court to dismiss the appeal for lack of merit.

10. Being the first appellate court, this court has a duty to re-evaluate the evidence on record. This duty was succinctly explained by the Court of Appeal in the often cited case of **Okeno – Vs – Republic (1972) EA 32**, as follows:-

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

11. From my consideration of the grounds of appeal and the submissions of the parties, I find that the appeal raises three key issues for my determination:-

i. Whether the case was proved to the required legal standards.

ii. Whether the Appellant was positively identified, and;

iii. Whether the sentence was lawful and just.

12. The Appellant was charged under Section 11(1) of the Sexual Offences Act No. 3 of 2006, which provides:-

> ***11 (1) Any person who commits an indecent act with a child is guilty of an offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

13. Indecent act is defined in the Act as an unlawful intentional act which causes:-

> ***a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***b) Exposure or display of any pornographic material to any person against his or her will.***

14. The three elements to be proved are the age of the victim, the act constituting an indecent act, and the positive identification of the Accused. With regard to the age of the child, the SOA adopts the definition of a child in the Children's Act (Act No. 8 of 2001) which defines a child as any human under the age of eighteen years. In this case, PW1 testified that he was 14 years old and the same was not contested by the accused person. PW6 who was the investigating officer produced a birth certificate **(P-Exhibit 2)** which showed that the complainant was aged 14 years. It is my finding therefore that the complainant was aged 14 years and therefore a child within the meaning of the law. The first element of the offence was therefore proved beyond reasonable doubt. The Appellant's submission that the victim was not a child of tender years is of no relevance and must be dismissed.

15. The second element to be proved was the indecent act. In this case the victim (PW1) testified that he was sleeping in his home when he suddenly felt someone lying on him and something touch his anus. He pushed the person who was lying on top of him and switched on the lights. He did not recognise the person who was naked. PW1 testified that he ran through the door and locked it from outside. It is at this point that PW1 informed PW2 who then came to the complainant's home with other neighbours. They found the Appellant in the house who at that time had worn the complainant's trouser and promptly arrested him when he failed to explain why he was in that house. The complainant further testified that the accused person lay on top of him and he felt his penis touch his anus but that he did not penetrate him as he had his shorts on.

16. PW2 testified that he heard PW1 screaming as he called PW2's name, saying that there was someone in their house. PW2 testified that he together with other neighbours proceeded to the complainant's house and found the accused person seated in the sitting room. He could not explain why he was there.

17. PW4 who was a security guard at the tea estate testified that upon being alerted of the situation, he found the Appellant seated in the complainant's house. The Appellant was wearing the complainant's trouser and the jacket was on the floor. PW4 testified that he took the exhibits to the guardroom and called the security vehicle which took the intruder to Maramara Police Post.

18. The evidence above clearly shows that there was no eye witness to the offence. However, the complainant gave testimony which was received by the court as allowed by Section 124 of the Evidence Act which provides:-

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15) where the evidence of the 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 a 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 recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

19. The Appellant's complaint with regard to the complainant's (PW1) evidence is that it was evidence of a child and which was neither sworn nor corroborated. The record however shows that the court conducted a voir dire examination and proceeded to direct the complainant to give unsworn evidence. The court further went on to indicate that the Appellant could cross-examine PW1 and that such cross-examination would be regulated by the court owing to the age of the witness. The record indeed shows that the Appellant did cross – examine the witness.

20. With respect to corroboration, it is true as stated by the Appellant that the medical evidence presented by George Ouma (PW5), a clinical officer attached to Kapkatet hospital did not show that the complainant had been defiled. PW5 observed in the P3 (Exhibit 1) that there were no injuries to the anus and no evidence of penetration. It is to be remembered however that the charge facing the Appellant was not one of defilement but that of committing an indecent act with a child.

21. The evidence of PW2 and PW3 shows that the Appellant was found inside the home of the complainant while seated in the sitting room and wearing the complainant's trouser. He was arrested while still inside the house and could not explain what he was doing there. The circumstances of his arrest therefore provided circumstantial evidence to corroborate the complainant's evidence. The court must ask itself why the Appellant was found in the complainant's room in the night. In the absence of an explanation, the court was entitled to conclude that he could not have been up to any good.

22. I have reviewed the evidence of identification to consider if the identification of the Appellant was free of error particularly because the incident occurred at night. As I do so, I must observe that the trial court did not warn himself with respect to the dangers of relying on such evidence as required. From the testimonies of PW1, PW2, PW3 and PW4, it is clear that none of the witnesses knew the Appellant before. The Appellant was however arrested by PW2 who was a neighbour of the complainant and PW4 who was a security guard. He was arrested while still inside the complainant's house, and while wearing the complainant's trousers. From there the Appellant was handed over to the police who put him in custody and charged him soon thereafter. There was no opportunity therefore for any mistaken identity. I am satisfied that the Appellant was positively identified following the circumstances of his arrest.

23. The Appellant was not under any duty to prove his innocence. However the circumstances under which the Appellant was arrested brought him within the provisions of **Section 111 and 119 of the Evidence Act**. What he was doing in the complainant's home in the night was a fact within his knowledge and which he was required to explain.

24. The Appellant elected to give an unsworn statement in his defence and called no witnesses. He told the court that the complainant's father was his neighbour. That sometime in January 2018, he gave the complainant's father twenty thousand shillings (Kshs.20,000/=), a sum that he was yet to refund. As a result, they had a strained relationship. He recollected that one day the complainant's father bought him a lot of beer and he found himself in a place he could not recognize. He also stated that the complainant's father had been threatening him for a while.

25. I have considered the Appellant's defence as stated above. It offers no explanation as to any relationship between him and the minor victim. It offers no explanation as to why he was in that house at night or why he put on the victim's trousers. The Appellant instead alleges that he was owed Kshs. 20,000/= by the victim's father who had avowed to teach him a lesson.

26. I observe that the Appellant gave an unsworn statement thereby denying the prosecution an opportunity to test the veracity of his allegations in cross-examination. However, as stated by the Court of Appeal in **May Vs. The Republic (1981)KLR 129**:-

> ***"No adverse reference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by section 211(1) of the Criminal Procedure Code, Cap 75 Laws of Kenya''.***

27. I have therefore reconsidered the entire evidence to see if the Appellant's defence creates doubt in the prosecution case. In **Ouma V. Republic (1986) KLR 619,** the court had the following to say in regard to evaluation of evidence:-

> "At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person"

28. The record shows that Appellant cross- examined all the witnesses including the complainant (PW1) and his father one Richard Otieno Ayacko (PW3). At no point did he raise the issue of the bad blood between himself and PW3. The conclusion I draw is that there was no evidence of a pre-existing relationship between the Appellant and the complainant's father, PW3. I agree with the trial court that the defence was as afterthought. It does not ring true and neither does it cast doubt on the prosecution case which I find proved to the required legal standard. I consequently uphold the conviction.

29. With respect to the sentence, the Appellant has urged this court to reconsider the sentence in line with the principles set out in the **Muruatetu case** ***(supra)***. From my reading of the Muruatetu case and subsequent decisions from the court of appeal, it is apparent that the mandatory nature of the minimum sentences in the SOA was no longer tenable and; that in an appropriate case, the court can take into account the unique circumstances of the case and the mitigating factors in meting out sentence. **See Rophas Furaha Ngombo V Republic 2019 eKLR.** In **Murateru case** *(supra)* the Court held that:-

> "We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of its necessity and essence in the fair trail process".

30. From the record, it is clear that the Appellant stated in mitigation that he was an orphan and was taking care of his elderly grandmother. His mitigation was considered by the trial court which nonetheless proceeded to mete out the minimum sentence under section 11(1) of the SOA which provides:-

> Any person who commits an indecent act with a child is guilty of an offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

31. In this appeal therefore, and bound by the Muruatetu case, I have taken into account the mitigation offered by the Appellant and the fact that there were no aggravating circumstances. In the absence of any aggravating circumstances and the fact that the Appellant was a first offender, I consider the sentence harsh and excessive.

32. The appeal therefore succeeds only to the extent that I set aside the 10 years' prison sentence and substitute therefor imprisonment for five years which shall run from the date of conviction by the trial court being 25th July, 2018.

33. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 11TH DAY OF MARCH, 2021.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr. Mureithi for the Respondent, and Kiprotich (Court Assistant).