REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 5 OF 2019

ELIAS MWENDA KIRUO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment dated 30th October,2019 by Hon. S, M. Nyaga, Senior Resident Magistrate at Marimanti SRM's Criminal Case No. 35 of 2019)

J U D G M E N T

INTRODUCTION

1. **Elias Mwenda Kiruo** the appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No.3 of 2006.The particulars are that the appellant on the 28th day of May, 2019 in Marimanti location, Tharaka South Sub –County within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 15 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.And further, that the accused person on the same date, place and time as above intentionally touched the vagina of MM with his penis.

3. He denied the charges and the case proceeded to full hearing after which he was found guilty and was convicted. The trial magistrate then proceeded to sentence him to 20 years imprisonment.

4. He was aggrieved by the judgment and filed this appeal raising the following amended grounds: -

(i). That the learned trial magistrate grossly erred in both matters of law and facts by failing to note that the behavior of the complainant was wanting.

ii). That the certified copy of the proceeding does not indicate the sentence meted to the appellant and his mitigation.

(iii) That the learned trial magistrate erred in both matters of law by failing to note that the sentence was harsh and excessive in the circumstances.

(iv) That the learned trial magistrate erred in both matters of law and facts by failing to take into account the defence of the appellant.

5. On the 18th .2.2020 the court granted the appellant leave to appeal out of time.

Summary of Evidence for the prosecution Before the Trial Court

6. At the trial, the prosecution called five witnesses. The first witness for the prosecution who testified as PW1 was the complainant **MM**.

7. She narrated that on the material date being the 28th .5.2019, the appellant herein who had kept seducing her went to their home where she was alone and asked her to escort him. They left in a motor cycle commonly known as *boda boda* where on the way, the accused person took the victim to a bush and there defiled her.

8. PW 2 being the mother of PW1; upon getting information that PW1 was missing, went on to search for her and upon finding her, took her to the Marimanti police station.

9. That the victim was thus escorted for medical examination and care at Marimanti Level 4 hospital after which she was processed in court as a child in need of care and protection.

10. PW4 was Mutiria Mugambi, a clinical officer at Level 4 Marimanti Hospital. According to him, he attended the victim and further examined her. He reports that the victim had her hymen broken although not freshly; he went ahead to fill the P3 form.

11. Accordingly, the PW4 produced the Medical report which indicated that the victim had a foul smelly discharge.

12. **PC No.118536 Emmaculate Kilonzi** of Marimanti Police Station and the investigation officer herein testified as PW5. According to her, she escorted PW1 for medical examination.

13. She recorded the statements of the complainant who identified the appellant and PW4 arrested him; she then charged the appellant.

Evidence for the Defence

14. At the close of the prosecution case the appellant was put on his defence. Section 211 of the CPC was explained to the appellant herein; in his sworn evidence, the appellant indicated that he had no witnesses to call.

15. DW1 in his sworn statement, indicated that he was 23 years of age and on the material day, he had gone to pick his bull from his relatives at a far location namely [Particulars Withheld].That he left on the 29th .5.2019 at around 8.00 a.m. in the morning.

16. He further stated that he is not even a friend to PW1 so he wondered how the victim could even follow him. He alleged that he was being framed since PW1 had demanded a bribe from him and he refused to comply because he is innocent.

17. That the OCS and the investigating officer had ganged up to frame him since the duo come from the same community.

18. The appellant herein also claimed that there were personal differences between him and the investigating officer over poor pay in regard to the bodaboda services he normally offers to the officer.

19. In his judgement, the Learned Trial Magistrate found that the age of the complainant was proved and that she was a dhild aged 15 years. As regards penetration, it was the Court's finding that from both the evidence of the complainant and the medical examination documents, it was proved that the complainant was sexually assaulted.

20. It was further found that the testimony of the complainant was truthful and it was therefore found that the appellant had intentionally caused his penis to penetrate the minor and that the minor and the appellant knew each other well.

21. The Court therefore found that the prosecution had proved the charge beyond reasonable doubt and found the appellant guilty of the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No.3 of 2006.

Appellant's Submissions

22. It was submitted by the appellant that the medical evidence produced by PW4 indicated that PW1's hymen was not freshly broken and if the complainant had been defiled on the date stated in the charge sheet, then the examination would have revealed that the hymen was freshly broken.

23. According to the appellant if there is a variance on the place of the defilement, then the court has no reason to believe such evidence as it creates doubts as to whether or not there was any defilement.

24. That the trial court relied on evidence not on record.

25. That the trial court did not give any consideration of the appellant's defence of alibi; and further that the burden of proving the falsity if at all, of an accused defence of alibi was on the prosecution.

26. He denied being at the scene where the offence took place in that there was another Mwenda who had been mentioned in connection with the complainant.

27. It was further submitted that any doubts arising in criminal trial must go to the benefit of the accused.

28. He thus urged the court to allow the appeal, quash the conviction and set aside the sentence.

29. The appellant relied on the case of **Kiilu & Another v R (2005) eKLR 174**; and further **Domenic Mwilaria v Republic HC Criminal Appeal no. 52 of 2017**.

Respondent's Submissions

30. The respondent in opposing the appeal submitted that the charge against the appellant was proved beyond reasonable doubt based on the

evidence of the four prosecution witnesses especially PW1 and PW3. As regards the evidence of sexual assault, reliance was placed on the evidence of PW4.

31. According to the respondent, the defence of alibi by the appellant was an afterthought since the appellant could not explain his alibi when he was cross examined on the same.

32. Further, the respondent submitted that the appellant was positively identified and placed at the scene of crime.

33. The prosecution thus believe that the court was satisfied the prosecution proved it's case beyond any reasonable doubt and the conviction ought to be upheld.

34. The Prosecution highlighted the now celebrated Supreme Court case of **Muruatetu** in regard to sentencing and thereby faulted the court that the sentence meted out to the appellant was thus harsh.

35. The Respondent relied in the case of ***AML v Republic (2012) eKLR and further, Kassim Ali v Republic, Mombasa Criminal Appeal No. 84 of 2005.***

ANALYSIS AND DETERMINATION

36. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

37. This Court in determining this appeal ought to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law; beyond any reasonable doubt. The key ingredients of the offence of defilement include the proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

38. I will proceed to consider whether the ingredients of the charge were proved.

i).Age of the Complainant:

39. Age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances.

40. **In Francis Omuroni Vs. Uganda, CR. A 2/200 it was held:**

> *"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. …."*

41. The complainant testified that she was 15 years old when she was defiled by the appellant. That she was born on the 27 th .12.2003 and a birth certificate S/No. [Particulars Withheld] MF1 was produced before the court.PW2 the complainant mother also testified that the complainant was her daughter and she was in class 6.

42. In law, in any matter concerning a child, the best interest of the child is what is of paramount importance as provided for under **Article 53(2)** of the **Constitution** and amplified by **section 4(3)** of the **Children Act No. 8 of 2001**.

43. In close reference to the United Nations General Assembly in its resolution 44/25 of 20 November 1989 under the Convention on the Rights of the Child in which State parties were required to: **"take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence including defilement and sexual abuse"**, Kenya enacted the Sexual Offenses Act in 2006.

44. It is against this backdrop that the court should turn to consider the merits of this appeal, in which the appellant has challenged the decision of the Learned Trial Magistrate (S.M. Nyaga.)

45. In the instant case, the trial magistrate who had the advantage of seeing the complainant as she testified properly notes his Judgement from lines 2 on page 7 - 8 - that with regard to (PEX 1) the victim was born on the 27th .12.2003.

46. She was defiled on the 28th .5.2019; therefore, this translates to the fact that at the time of defilement, the victim was exactly 15 years and five months old.

47. The trial magistrate was satisfied that the victim herein was aged 15 years old based on her testimony, that of PW2 and the birth certificate.

48. The trial magistrate found that age of the complainant was proved beyond any reasonable doubts.

49. The appellant never contested the age of the complainant. The prosecution discharged the burden to prove that the complainant was a child aged 15 years.

ii). Whether there was penetration

50. The **Sexual Offences Act at Section 2** defines '**penetration**' as:

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

In **Mark Oiruri Mose vs R (2013) eKLR** the Court of Appeal stated thus:

> **"Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"**

51. Further, the same court differently constituted, in the case of **Erick Onyango Ondeng vs Republic (2014) eKLR** in this respect noted: -

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "**

52. In this instant case penetration is not contested by the appellant, the contestation is on the identity of the person who committed the offence. The appellant in his submissions has denied the charge. The appellant claims that it was another Mwenda who defile the victim herein hence he is being framed.

53. Penetration of the complainant is in dispute. Penetration is proved by the evidence of the victim. In this case the complainant gave evidence that the appellant penetrated her. PW4 testified that he examined the complainant on allegation of defilement

iii).Identity of the Perpetrator

54. With respect to the evidence on recognition of the perpetrator, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim. This position is fortified by the holding of the Court of Appeal in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga& A. K. Murgor JJA** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

55. The appellant argues that since the conviction was secured on the evidence of only one witness and further that there is variance on the place of the defilement, the same is not safe and urged this court to give the benefit of doubt to the appellant. It is trite that the evidence of a single witness can be used to secure a conviction in sexual offences. See **Kassim Ali vs Republic [2006] eKLR** supra.

56. PW1 clearly tells the court that she knows the appellant herein and further that the appellant had severally seduced her and on the material day, he came home where he asked the victim to escort him and on their way, he asked her to alight; there upon they entered a bush where the appellant started caressing her breasts and thereafter removed her clothes and they had sex.

57. It is not enough to say the appellant herein was positively identified but also properly placed at the scene of crime.

58. In the case of **George Kioji vs R Nyeri Criminal Appeal No. 270 of 2012 (unreported) as cited S C N v Republic [2018] eKLR –**

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person.**
>
> **Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

59. Considering the above holding, the court can convict based on the evidence of the complainant. She did give evidence of what transpired beginning from the moment she left home to escort the appellant which was 10.00 p.m. or thereabouts, the way they went to a bushy area whereupon the appellant told her to alight he stared caressing her and finally defiling her.

60. Her evidence of recognition of the appellant stand unchallenged, and therefore in the circumstances the appellant was not only positively identified but also placed at the scene of crime by his victim.

61. However as was held in **John Mutua Munyoki vs. Republic** (supra)

> "What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"

62. In this instant case, the court had cogent reasons to believe the victim. In this case, the Learned Trial Magistrate expressed herself as hereunder:

''Basically, there was no one who saw the two lovebirds having sex. Accused denied it but the victim whom I found mature and conversant with matters sex confirmed that it was the accused she had sex with. She actually confirmed the appellant had seduced her for a long time accordingly the two had a history of an intimate relation. This was the most proper identification of accused to the offence.

I noted that PW1 was very consistent both during the time she made the report of the incidence (as told by PW4) and in court. She was very firm and still looked traumatized during trial, and I believed her line of story''.

63. It is therefore clear that not only did the court find that the complainant was truthful but also recorded the reasons for the said belief. The testimony of the complainant sufficiently proved that the appellant was the perpetrator.

On The Appellant's Alibi

On the Appellant's defence of alibi, the appellant complained that his defence of alibi was not considered by the trial magistrate.

The mere fact that the prosecution's case is believable does not mean that the defence was not considered. The South African case of **Ricky Ganda vs. The State, [2012] ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held: -

> "The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…
>
> The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

In the case of **Charles Anjare Mwamusi V. R CRA No. 226 of 2002** the Court of Appeal stated:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."**

I thus take cognizance of the principle that by setting up an alibi, the appellant need not assume the burden of proving it.

The appellant did inform the court that on the very material day, he had gone to pick his bull from his relatives at a far location.

However, this defence ought to have been raised at the earliest opportune time as was held in the case of **R VS SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6EACA 145 that:**

> **" if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

The Court of Appeal in the case of **Wangombe vs. Republic [1980] KLR 149** held *inter alia* as follows:

> ""…in *Ssentale vs. Uganda [1968] EA 365, 368* [Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution.
>
> We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."

The appellant had an opportunity during the cross examination for to put up his defence however, the appellant could not properly explain his

alibi. He instead claimed that the other 'Mwenda' could be the culprit and instead, he was being framed.

In the case of **Victor Mwendwa Mulinge vs Republic,** the Court of Appeal rendered itself on the issue of alibi thus: -

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs Republic, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"**

In the instant case, what would be the option available to the prosecution where the appellant plead alibi at the time of his defense? Section 212 of the ***Criminal Procedure Code*** states as follows:

> ***If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.***

The manner in which the defence of alibi was raised by the appellant clearly suggest that it was an afterthought after realizing the burden unfolding before him.

It would have been prudent for the appellant herein to have notified the prosecution at the earliest possible opportunity and more so when cross-examining the witnesses and especially the complainant who placed him at the scene as the one who committed the offence.

Accordingly, I find and hold that the complainant positively identified by recognizing the appellant as the person who defiled her. The defence is not plausible and the ground must fail.

SENTENCING

64. As regards the sentence, Section 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment for any person convicted of defiling a child aged between twelve (12) and fifteen (15) years. The trial court noted that the issue of mandatory minimum sentences in the Sexual Offence Act had been outlawed by various decisions by superior courts following the Supreme Court decision in ***Francis Karioko Muruatetu& another vs Republic [2017] eKLR*** **(See Christopher Ochieng vs R [2018] eKLR** and **Jared KoitaInjiri vs R [2019] eKLR).**

65. Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the sentence to be imposed on conviction (*see Gilbert Miriti K Vs. R [2013] eKLR*.

66. The appellant has urged this court to exercise its discretion and review the appellant's sentence.

67. In **BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, the Court of Appeal has considered the constitutionality of mandatory minimum sentences under the Act; *and* adopted what the Supreme Court decision held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

68. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislature position that offences of defilement are serious offences and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

69. In **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

> **"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.**
>
> **On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**
>
> **70. The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."**

71. In the case of **Wanjema vs Republic (1971) EA 493** the court laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

72. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

CONCLUSION

73. In this case the trial magistrate stated that the minimum sentence provided is 20 years. It is apparent that the trial magistrate proceeded on the footing that his hands were tied by the minimum sentence and failed to exercise discretion in sentencing. On this finding the appeal on sentence must succeed.

I order as follows:-

i. **The sentence of 20 years is set aside and substituted with a sentence of 14 years which will run from the date of conviction.**

I otherwise find that the appeal on conviction lacks merits and is dismissed.

Dated, signed and delivered at Chuka this 4th day of March 2021.

L.W. GITARI

JUDGE

4/3/2021

The Judgment has been read out in open court.

L.W GITARI

JUDGE

4/3/2021