REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 15 OF 2020

SIFA KATANA LUNGWE.....APPELLANT

VERSUS

REPUBLIC.....APPELLANT

(Being an appeal from the original conviction and sentence in Malindi CMCCRC No. 271 of 2016

delivered by Hon. Olga Onalo (RM) on 10th January, 2020)

Coram: Justice Reuben Nyakundi

Mr. Alenga for State

Appellant in person

JUDGEMENT

The appellant was charged tried, convicted and sentenced to serve life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter the act). He also faced an alternative charge of committing an Indecent Act with a Child contrary to Section 11(1) of the Act. The particulars of the offence disclosed that on the 2nd of April 2016 at [Particulars Withheld] Village of Watamu location of Malindi Sub-County of Kilifi County in Coast province within the Republic of Kenya, intentionally and unlawfully caused his manhood to penetrate the anal orifice of the complainant, a boy aged 7 years.

In the alternative charge, the charge sheet alleged that on the same date, time and place, the appellant intentionally and unlawfully touched the anal orifice of the complainant. The appellant vehemently denied the charges levelled against him. As a result, he was dissatisfied by the learned magistrate findings. He timeously filed his appeal based on the following grounds:

1. **That,** ***the learned trial magistrate grossly erred in both law and fact by failing to consider that no certified copied of the treatment notes marked P. Exhibit MFI-1, a copy of a P3 form as PExh. MFI-2, the original birth certificate marked MFI-3 and photocopy marked MFI-4 were produced as part of evidence in compliance to section 64 and 66 of the Evidence Act.***

2. **That,** ***the learned trial magistrate erred in both law and facts by failing to consider that the legal provision providing for a mandatory minimum sentence under section 8 in this case section 8(4) of the Act conflicts, contradicts and violates Section 216 and 329 of the CPC.***

Facts

The complainant testified as **PW1**. He asserted that he was grazing goats with his younger brother at [Particulars Withheld] on the material date when the appellant forcefully grabbed him into the bush after complainant had declined his call to accompany him into the bush. The appellant undressed the complainant. The complainant was facing down with his stomach on the ground. The appellant inserted his manhood into his anal orifice which caused considerable pain to the complainant. The complainant told the court that the appellant threatened to kill him in case he screamed. The appellant finished committing the act and left. The minor went home, told his grandmother and grandfather what had transpired. His father took him to Malindi General Hospital where he was treated. He was later accompanied by his father to Watamu Police to report the matter.

PW2 is the father to the complainant. He corroborated that the incident indeed transpired on the material date. He also told the court that his

son was 7 years old at the time the offence was committed. He produced a certified copy of the complainant's birth certificate, herein marked as MFI-3. The Birth certificate indicates that the minor was born on 7/2/2009. The testimony of **PW3** basically corroborates that of PW1 and PW2.

The Clinical Officer, **Mr Ibrahimi Abdullahi** based at Malindi Sub-County Hospital testified as **PW4**. He filled the P3 form. He testified that the complainant brought a blood stained trouser. The complainant was alleged to have been sodomized and threated not to disclose the incident. The P3 form was filled 10 days after the incident. Upon examination of the minor, he had bruises on the anal orifices, tenderness to touch and on examination by finger. PW4 produced the treatment notes, the P3 form and original birth certificate before the trial court as part of exhibits. The same was marked as PExh.1, PExh. 2 and PExh.3, respectively. The Investigating officer testified as PW5 and he basically stated what the other witness asserted in their testimonies.

The appellant was found with a case to answer after the close of the prosecution case he was placed on his defence. To his defence, he denied the charges. He told the court that he did not commit the alleged offence.

Submissions

In his submission in support of the appeal, the appellant argued that the exhibits produced before the trial court were not certified by the commissioner for oaths hence they ought not to have been taken into account. The same violated section 64 and 66 of the evidence act hence they are invalid and not admissible as evidence in a court of law.

The appellant also argues that the age and penetration of the complainant was not proved to the required standard of proof beyond reasonable doubt. He cited the cases of **Hadson Mwachongo v R (2016) eKLR, Alfayo Gombe Okello V R Cr. Appeal No. 203 of 2009 at Kisumu; Kaingu Elias Kasomo v R Cr. Appeal No. 504 Of 2010; Rbg v R (2015) eKLR** to demonstrate the importance of proof of age in a defilement matter. He argues that the evidence adduced before the trial court was not enough and neither was it admissible in proving the question of age.

On the second ground, the appellant contends that his sentence was based on a section providing for a mandatory minimum sentence which denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentencing not to impose an appropriate sentence based on the scope of the evidence adduced and recorded on case to case basis. He cited the case of **Eliud Waweru Wambui v R Cr. Appeal No. 102 of 2016** where the Lord Judges stated inter-alia that:-

> ***"This appeal epitomizes for the umpteenth time, the unfair consequences that are of the sexual offence Act No 3 of 2006. The Act and the unquestioning imposition of some of its penal provisions which easily lead to a state backed purveyance of harm, prejudice and injustice quit apart from the noble intention of the legislation. The case poses one more time where it is proper for court to enforce with mindless zeal that which offends all notions of rationality and proportionality."***

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. **(**See **OKENO v R (1972) EA 32).**

Analysis and Determination

I have carefully considered the appeal, the submissions, the authorities cited and the law. ***Sections 8(1) and 8(2) of the Sexual Offences Act*** provide that:

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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."***

To prove the offence of defilement, the prosecution must establish penetration of the victim's genital organs, that the victim is a minor or under the age of 18 years and that the appellant was positively identified as the perpetrator of the defilement.

In my ponderous evaluation, the issues arising for determination in this appeal are:

> **a) Whether the elements of penetration and identification were proved to the required standard; and**
>
> **b) Whether it is in the interests of justice for this Court to interfere with the sentence meted on the appellant.**

On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. PW4 the Clinical officer who examined the complainant confirmed that the complainant's anal orifice had bruises and tenderness to touch on examination by finger. He confirmed that the nature of the offence was defilement. Therefore, on this limb, the trial court cannot be faulted for relying on the medical evidence that was put forward to ascertain that there was penetration.

As regards the question of identification, the complainant identified the appellant as the person as the perpetrator of the offence. It was a case of identification by recognition. The appellant was a person well known to him as they live in the same community. It was also the complainant's evidence that prior to the commission of the offence on the material date, he had a conversation with the appellant at close

range. The complainant testified that the appellant asked if he could accompany into the bush, which approach the complainant denied. He went on to forcefully grab him into the bush, undressed, and made him to face down with his stomach on the ground, inserted his manhood into his anal orifice which caused considerable pain to the complainant. The complainant told the court that the appellant threatened to kill him in case he screams.

In light of the foregoing, the trial court believed and accepted the complainant's testimony as truthful. This court is also satisfied that the complainant's identification of the appellant as the perpetrator was proper. The appellant's defence herein is nothing more than an afterthought. The proviso to **Section 124 of the Evidence Act** provides as follows:

> ***"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 to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** In the circumstances, I am satisfied with the findings of the trial court regarding the appellant's positive identification and I am not inclined to interfere.

There was no dispute regarding the age of the complainant. I find the same to have been proved by the production of the complainant's birth certificate that shows that he was born on 7/2/2009 which entails that he was 7 years at the time the offence was perpetrated by the appellant. PW2, the complainant's father also testified before the trial court and confirmed that the complainant was 7 years old when he was sodomized by the appellant. The Clinical Officer, indicated on the P3 Form that the complainant was aged 7 years. I am satisfied that all the ingredients of the offence of defilement were established to the required standard and that the findings of the trial court were based on credible evidence.

On sentence, the appellant was handed down life imprisonment which was a minimum mandatory sentence. The trial court sentenced him after considering his mitigation. The sentence is still lawful and I find that the same is merited in light of the circumstances of the instant matter which involves an adult that is incapable of controlling his sexual desires to the extent of sodomizing a boy child.

However, since the appellant was sentenced under the mandatory minimum sentence regime. It is noteworthy that our jurisprudence has since moved from the said regime by dint of the Supreme Court Landmark decision in **Francis Karioko Muruatetu & Another v R**, I therefore exercise discretion conferred by the said decision and re-sentence him to serve 25 years' imprisonment to be calculated from the date of his arrest.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Alenga for State

Appellant