REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 128 OF 2019

JANET JEPCHIRCHIR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence by Hon. P.W. Wasike, Senior Resident Magistrate delivered on 16 July 2019 in Kapsabet Senior Principal Magistrate's Sexual Offence No. 53 of 2018)

JUDGMENT

[1] This is an appeal filed by **Janet Jepchirchir,** (hereinafter "the appellant). She was arraigned before the Senior Principal Magistrate's Court at Kapsabet in **Sexual Offence Case No. 53 of 2018**, on a charge of defilement, contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that on the 23rd day of May 2018 in Kombe Location within Nandi County, she intentionally and unlawfully caused her vagina to be penetrated by the penis of **EK** a boy aged 17 years.

[2] In the alternative, the appellant was charged with the offence of indecent act with a child**,** contrary to **Section 11(1)** of the **Sexual Offences Act.** It was alleged that on the 23rd day of May 2018 in Kombe Location within Nandi County, she intentionally and unlawfully caused her vagina to come into contact with the penis of **EK** a boy aged 17 years. The appellant denied the charges and upon trial, she was found guilty of the main charge and was consequently convicted thereof and sentenced to 15 years' imprisonment.

[3] Being aggrieved by her conviction and sentence, the appellant preferred this appeal on **29 July 2019** through the law firm of **Keter Nyolei & Company Advocates**, citing the following grounds:

> **[a]** That the learned Magistrate erred in law and fact in convicting the appellant without sufficient evidence to sustain a conviction and contrary to the evidence;
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> **[b]** That the learned Magistrate erred in law and in fact in relying on the evidence of the complainant and in failing to find that the evidence he gave was contradictory;
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> **[c]** That the learned Magistrate erred in law and in fact in finding that the appellant defiled the complainant;
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> **[d]** That the learned Magistrate erred in law and in fact in dismissing the appellant's defence;
>
> **[e]** That the learned Magistrate erred in law and in fact in failing to consider the circumstances under which the offence is alleged to have been committed;
>
> **[f]** That the learned Magistrate erred in law and in fact in failing to consider the mitigation of the appellant and sentencing her to 15 years' imprisonment; thereby imposing a harsh and excessive sentence.

[4] It was, consequently, the appellant's prayer that the Judgment, conviction and sentence be set aside and that she be acquitted.

[5] The appeal was urged by way of written submissions, pursuant to the directions given herein on **23 July 2020**. Thus, **Mr. Keter** for the appellant, relied on the written submissions file by him on **21 October 2020**, wherein he posited that there was no evidence of defilement in terms of penetration. He made reference to the P3 Forms that were filled in respect of the complainant and the appellant. He was of the view that since nothing abnormal was observed by **PW1**, the conclusion to derive therefrom is that neither the appellant nor the complainant had

recently engaged in penetrative sexual intercourse. He therefore faulted the learned trial magistrate for coming to the conclusion that all the elements of the offence of defilement had been proved to the requisite standard.

[6] In the alternative, it was the submission of **Mr. Keter** that, if at all there was penetrative sexual intercourse between the complainant and the appellant then the same was not only consensual but was also initiated by the complainant. He urged the Court to take into consideration that the complainant willingly participated in the act complained of; that he was not coerced in any way; and therefore that he behaved like an adult in proceeding to accept the offer of the appellant to have sex with her. Hence, **Mr. Keter** relied on **Section 8(5)** of the **Sexual Offences Act** and submitted that the appellant ought to have been accorded the benefit of the defence provided for therein, even though she did not raise it before the lower court. He pointed out that the appellant was unrepresented before the lower court and probably was not aware that she could raise such a defence. Thus, counsel relied on **Jane Mumbi Gichuhi vs. Republic** [2018] eKLR and **Martin Charo vs. Republic** [2016] eKLR to buttress his argument that the appellant ought to have been given the benefit of the defence provided for in **Section 8(5) and (6)** of the **Sexual Offences Act,** taking into account the circumstances of the case and the behaviour of the complainant. Consequently, **Mr. Keter** prayed that the Judgment of the lower court be set aside and that the appellant be acquitted.

[7] On behalf of the State, **Ms. Kegehi** opposed the appeal. She relied on her written submissions dated **23 February 2021**. According to her, the evidence presented before the lower court was watertight and overwhelmingly proved the ingredients of the offence of defilement against the appellant; namely, that the complainant was 17 years old at the time; that the appellant caused penetration of the complainant's genital organ with her own genital organ; and that the two were found in the act by **PW2**, in whose house the offensive act was committed. It was therefore the submission of counsel that the Prosecution sufficiently discharged its burden of proof; and that the appellant was properly convicted of the offence of defilement. She added that the since Prosecution evidence was credible, consistent, reliable and well corroborated, the appellant's conviction and sentence ought to be upheld; and so she prayed.

[8] The Court has given careful consideration to the appeal and taken into account the written submissions filed herein by learned counsel for both the appellant and the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court, and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa made this point thus:

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

[9] I have consequently perused the record of the lower court and given consideration to the evidence presented by the Prosecution. A total of 4 witnesses were called; and the sum total of their evidence was that the complainant, a 17-year-old boy, was cutting grass in a tea plantation near the house of **PW2** when the appellant went there and asked him for some water to drink. The complainant then went to the house of **PW2** to get some drinking water and was followed into the house by the appellant. According to the complainant, the complainant then demanded that they engage in sexual intercourse and proceeded to remove her clothes before asking him to do likewise. The complainant told the lower court that he fully understood what the appellant was after; and that he obliged her and proceeded to engage in sexual intercourse with the appellant on the sofa before **PW2** interrupted them and pulled him away.

[10] The matter was reported by **PW2** to the complainant's mother as well as his uncle. Subsequently, the Police were notified and the appellant was arrested. Both the appellant and the complainant were then taken to Kapsabet Hospital for examination. There, **PW4,** examined them and filled their respective P3 Forms. His evidence was that there was nothing abnormal or evidence of forced sex noted on the genitalia of the appellant or the complainant. The appellant was thereafter charged as aforestated.

[11] In her defence the appellant told the lower court that she was selling vegetables from home to home when she encountered the complainant, a person hitherto unknown to her. She further stated that the complainant was armed with a panga and that he threatened her with it, thereby causing her to flee. She further stated that she was surprised to be approached the following day by a person by the name **Robson**, who introduced himself as the complainant's uncle and alleged that she had defiled the boy. The appellant further stated that, on denying those allegations and giving her side of the story, she was apprehended and taken to the police station where a formal complaint was made. She also conceded that they were both taken to the hospital for examination and that nothing was detected to connect her with the alleged offence of defilement.

[12] Section 8 of the **Sexual Offences Act** pursuant to which the charges were laid provides as follows:

> **(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.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[13] Accordingly, as the grounds of appeal relied on by the appellant largely impugned the quality of the evidence presented against her before the lower court, it is imperative to restate that the Prosecution needed to prove the following essential ingredients of the offence of defilement, namely:

[a] That the Complainant was, at the material time, aged 17 years;

[b] That there was penetration of the appellant's vagina; and, whether the appellant caused her vagina to be penetrated by the complainant's penis.

[a] <u>On the age of the Complainant:</u>

[14] There appears to be no serious contention that the complainant was then a 17-year-old boy at the material time. Although he was unable to recall his date of birth when called to the witness stand, he produced his Certificate of Birth before the lower court as the **Prosecution's Exhibit 1.** That document certifies that the complainant was born on **31 December 2001**. Thus, by **23 May 2018** when the offence is alleged to have taken place, he was 16 years and about 5 months. Needless to say that the months following the last birthday, if any, do not count for purposes of determining the age of a child so long as they are less than one year. This was well explained by the Court of Appeal in **<u>Hadson Ali Mwachongo vs. Republic [2016] eKLR</u>** as hereunder:

> **"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."**

[15] Accordingly, credible evidence was adduced before the lower court to prove beyond reasonable doubt that the Complainant was below 18 years, and therefore a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**. Indeed, **Rule 4** of the **Sexual Offences Rules of Court Rules** is explicit that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

Hence, the Prosecution availed the best evidence before the lower court in proof of the complainant's age. That evidence cannot be faulted and was not controverted.

[b] <u>On whether Penetration involving the Complainant Occurred and whether it was caused by the appellant:</u>

[16] In this regard, the complainant narrated to the lower court what befell him on the **23 May 2018** at the home of **PW2**. He said he was slashing grass at the tea plantation near the home of **PW2** when the appellant approached him and asked for drinking water; that the appellant followed him into the house of **PW2** and seduced him into having sex with her. Although the appellant denied this, there is the eyewitness account by **PW2** in whose house the incident happened. She told the lower court that she had gone to fetch some vegetables and on return, she opened her door and found the appellant and the complainant in the act of having sexual intercourse on her sofa. She further told the lower court that after reprimanding them she had the incident reported to both the mother of the complainant and his uncle, who took action by involving the police. Thus, the evidence of **PW1,** as corroborated by the evidence of **PW2,** is sufficient proof of penetration, noting that in **Section 2** of the **Sexual Offences Act**, penetration is defined as complete or partial insertion of a person's genital organ into the genital organ of another person.

[17] It is therefore of little consequence that when the appellant and the complainant were examined the following day there was no visible indication that could be observed by **PW4.** It is not in every case that medical evidence supports the allegation of defilement. The Court of Appeal made this clear ***<u>Geoffrey Kionji vs Republic</u>* Cr. Appeal No 270 of 2010,** as follows:

> ***"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 the 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."***

[18] It is significant too that the appellant also alleged to **PW4** that she had been raped by the complainant; an acknowledgement of the truthfulness of the evidence of **PW2** who told the lower court that she found the two in the act of having sexual intercourse on her sofa. I therefore find no reason for faulting the learned trial magistrate's finding in this regard. The incident occurred in broad daylight at about 4.00 p.m. and therefore the identity of the appellant is not in dispute. **PW2** pointed out that after the complainant walked out of the house, he used the opportunity to give the appellant a tongue-lashing for her despicable behaviour. She mentioned that the appellant was a person well-known to her and, in her evidence, she referred to her by her name.

[19] In the circumstances the learned trial magistrate rightly believed the account presented by the complainant and **PW2** and rightly found that the incident was instigated by the appellant herself. Having reconsidered the evidence, I have no reason to fault the trial magistrate in this regard. The complainant's version was simple, straightforward and consistent, while that of the appellant kept changing. For instance, she alleged that the complainant confronted her for no reason and threatened to cut her with a slasher before she ran away. She later alleged, upon arrest, that the complainant raped her, yet she neither raised alarm nor reported the incident to the authorities or any person for that matter. Consequently, the appellant's defence was justifiably dismissed as an afterthought by the lower court.

[20] As was pointed out by counsel for the appellant, she did not allude to the defence afforded by **Section 8(5) and (6)** of the **Sexual Offences Act;** and understandably so, seeing that she was unrepresented before the lower court. Nevertheless, counsel was of the view that the lower court ought to have taken that defence into account and found that the complainant misled the appellant into thinking that he was an adult. He relied on the cases of **<u>Jane Mumbi Gichuhi vs. Republic</u>** (supra) and **<u>Martin Charo vs. Republic</u>** (supra) to support this

posturing; both of which are merely of persuasive value. On the other hand, counsel for the State submitted that it was not open for the appellant to raise a new defence on appeal without leave; and that this line of argument is misplaced and ought, therefore, to be disregarded by the Court.

[21] Subsections (5) and (6) of **Section 8** of the **Sexual Offences Act** provides that:

> **(5) It is a defence to a charge under this section if—**
>
> **(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
>
> **(b) the accused reasonably believed that the child was over the age of eighteen years.**
>
> **(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."**

[22] A perusal of the Judgment of the lower court reveals that, although the defence under **Section 8(5)** of the **Sexual Offences Act** was not raised by the appellant, the learned trial magistrate had it in mind as an issue for determination. Thus, at paragraph 3 on page 39 of the Judgment he stated thus:

> **"The basic issues for determination are age of the complainant, the proof of penetration and the positive link of the accused to the penetration of the minor complainant (PW1) and that the penetration was unlawful (i.e. not covered under section 8(5) of the Act."**

[23] And, in the last paragraph of the Judgment, he came to the conclusion that:

> **"The accused intentionally made PW1 to penetrate her vagina using his penis. She never said she believed he was an adult or that he misled her to believe he was an adult. The main charge is proved beyond reasonable doubt. The accused is found guilty and is hereby convicted pursuant to section 215 Criminal 33] Procedure Code…"**

[24] In the premises, it cannot be said, as did counsel for the appellant, that no consideration at all was given by the trial court as to the applicability of **Section 8(5)** of the **Sexual Offences Act**. The truth of the matter is that the learned magistrate addressed his mind to it but found no evidence to attract the application of the defence to the appellant's situation. It is noteworthy that, whereas in the typed version of the proceedings, **PW4** is recorded to have told the lower court that the complainant was 19 years, the handwritten version has 14 years; which is what is stated at Section of the P3 Form filled by **PW4**. It was therefore in error that counsel made heavy weather of that aspect of the evidence of **PW4** in urging the Court to find that the circumstances were such that anybody could be deceived about the complainant's actual age.

[25] Moreover, **Subsection (5)** is explicit that the deception must emanate from the child; and that it must be satisfactorily proved that the minor deceived the accused person as to his/her age. As pointed out by the Court of Appeal in **Eliud Waweru Wambui vs. Republic [2019] eKLR,** the burden of proving deception for purposes of **Subsection (5)** is on the accused person, though the standard is on a balance of probabilities, and on the basis of the accused's subjective view of the facts.

[26] From the evidence of **PW1**, no overtures were made by him. The appellant initiated the conversation and overawed him into action; and therefore the learned magistrate cannot be faulted for coming the conclusion that there was no evidence of any such deception from the complainant. Moreover, for purposes of the **Sexual Offences Act**, for a person to give consent, he or she must agree by choice, and must have both the freedom and capacity to make that choice. It is for this reason that a person under 18 years is presumed by law to be incapable of giving consent. Hence, **Section 43(4)(f)** of the **Sexual Offences Act** stipulates that:

> **"The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act … a child."**

[27] Accordingly, I am not persuaded by the cases of **Jane Mumbi Gichuhi vs. Republic** (supra) and **Martin Charo vs. Republic** (supra). Instead, in complete agreement with the position taken by **Hon. Korir-Lagat** in **Luka Waithaka Ndegwa vs. Republic [2017] eKLR,** thus:

> ***"In the offence of defilement, the law presumes that a child being one who is below the age of 18 years is incapable of giving consent to sex. I do not agree with the Martin Charo case that the conduct of the child is relevant to the offence of defilement. Children are among the vulnerable members of our society by reason of their age, their inability to protect and provide for themselves and also are unable to appreciate dangerous situations. It is for these reasons that the law presumes that they are incapable of consenting to sexual intercourse. In enacting this provision, the legislature was only discharging its duty to act in the best interest of the child.***
>
> ***Therefore once it is proved that the complainant was below the age of 18 years the offence is completed and it is immaterial that she or he consented to sex. The defence afforded by section 8 (5) of the Sexual Offences Act does not refer to consent, but rather to reasonable belief that the complainant was above the age of majority…That she consented to the sexual intercourse is not sufficient to exonerate the appellant of the offence. It is not the consent of the child that exonerates the appellant from the offence but the reasonable belief that she was above the age of majority therefore capable of consenting, and the evidence of steps taken to establish this fact. There was no evidence of any steps that the appellant took to ascertain the age of the***

complainant. This ground of appeal must fail.

[28] *A similar stance was taken by* ***Hon. Mwongo, J.*** *in* ***Peter Charago vs. Republic*** *[2019] eKLR, that:*

> **"Unless there is proof that the complainant deceived the appellant, any sexual act between the two is treated as non-consensual sex and therefore amounted to defilement, as the complainant was a child under the age of 18 years and incapable of giving consent in law. Even where a minor behaves like an adult, the law still recognizes that person as a child."**

[29] Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act,** were proved against the appellant beyond reasonable doubt; and that the appellant's defence was well-considered and justifiably dismissed by the learned trial magistrate. It is also manifest that the lower court gave due consideration to the circumstances under which the offence was alleged to have occurred, including the relevance of **Section 8(5)** of the **Sexual Offences Act** to those circumstances, even though the appellant did not raise such a defence.

[30] Turning now to the last ground of appeal, namely that the learned magistrate erred in law and in fact in failing to consider the mitigation of the accused and in sentencing her to 15 years' imprisonment; and whether the sentence is harsh and excessive, it is manifest from the record of the lower court that the appellant was, indeed, given an opportunity to express herself in mitigation. It is also manifest that the lower court took into account the mitigating factors, including the fact that she had been in custody from **25 May 2018** when she was charged. He however appears not to have taken into consideration that the appellant had no previous record of criminal conduct; and the question that then arises is whether the sentence is so excessive as to warrant interference.

[31] There is no gainsaying that sentence is a matter within the discretion of the trial court; and an appellate court ought not to interfere simply because it would have meted a lesser or stiffer sentence. In **Bernard Kimani Gacheru vs. Republic** [2002] eKLR, the Court of Appeal expressed itself on this matter and restated that:

> ***It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***

[32] And, whereas **Section 8(4)** of the **Sexual Offences Act** still reads that:

> **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years." the reality is that a trial court has the discretion to pass such sentence as would serve the ends of justice in the particular case before it.**

[33] **In** ***Dismas Wafula Kilwake vs. Republic*** *[2018] eKLR* the Court of Appeal applied expressed itself as follows in the light of the decision of the Supreme Court in **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR:

> ***"…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."***

[34] Thus, what is suggested per **Paragraph 23.9** of the **Judiciary Sentencing Guidelines,** for purposes of objectivity and uniformity in sentencing, is as hereunder:

> **"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."**

[35] In the premises, and taking the mid-point of 15 years at 7 years, the trial court ought to have then factored in the fact that the appellant was a first offender as well as the other mitigating factors mentioned by her; and then weighed that against the seriousness of the offence. It becomes manifest therefore that the sentence imposed on the appellant was excessive and that the trial court did not take into account pertinent principles in arriving at that sentence. Having taken into account the foregoing principles, I would consider imprisonment for 8 years to be appropriate in the circumstances.

[36] In the result therefore, whereas I am satisfied that the conviction of the appellant for the offence of defilement contrary to **Section 8(1)**

as read with **Section 8(4)** of the **Sexual Offences Act** was based on sound evidence, the sentence of 15 years imposed by the lower court is unwarranted in the circumstances. The same is hereby reduced to 8 years' imprisonment, to be reckoned from **25 May 2018** as ordered by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY, 2021

OLGA SEWE

JUDGE