REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 1 OF 2018

PETER WAWERU RUO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the conviction and sentence dated 25th January, 2018 of

Hon. G. N. Opakasi, RM, in Engineer CMCR (S.O.) No. 5 of 2016)

JUDGMENT

1. The appellant, Peter Waweru Ruo, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. The particulars state that on 18th September, 2016 at [particulars withheld] Village, Nyandarua; he intentionally and unlawfully caused his penis to penetrate the vagina of LNM, a child aged 2 ½ years. He also had an alternative charge of indecent act with a girl contrary to **Section 11 (1)** of the **Sexual Offences Act**.

2. The appellant, being aggrieved, has filed this appeal premised on the following grounds:

> *1. That, the learned trial magistrate erred in law by imposing the provide maximum statutory sentence of life imprisonment but failed to note that, under the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** the courts are no longer bound by statutory mandatory sentences.*
>
> *2. That, the learned trial magistrate erred in law and in fact by awarding a sentence without the evidence of the star witness LN and erred by failure to comply with Section 31 of the Sexual Offences Act No. 33 of 2006.*
>
> *3. That, the learned trial magistrate erred in law and fact, by holding that, the offence of defilement could be proved without the evidence of the star witness: age, penetration and identification could not be proved without her evidence.*
>
> *4. That, the learned trial magistrate erred in law and fact, by holding that, the offence of defilement could in law be proved without the prosecution rebutting the alibi defence put forward by the appellant."*

3. The role of this court is to re-evaluate and analyse the entire evidence on record in the lower court and come to its own conclusions being careful to note that it did not hear the evidence or see the demeanor of witnesses. (See **Okeno v. Republic [1972] EA 32**).

4. From the grounds of appeal the issues for determination are as follows:

> 1. Whether there was proof of penetration and whether the medical evidence linked the accused to the offence.
>
> 2. Whether the trial court relied on uncorroborated evidence whilst failing to consider the defence evidence.
>
> 3. Whether the age of the complainant was proved.
>
> 4. Whether the sentence meted was appropriate.

5. The facts of the case are as follows.

6. The trial court noted that the complainant due to her tender years was incapable of testifying and could not comprehend what is happening. Her mother testified in her stead.

7. PW1 MWM is the mother of the complainant. She testified that she was in church on 11th March, 2016 at about 1.30pm when she was called by a lady, Mama E and told her that her child LNM the complainant in court, was sick. She went home and found blood oozing from LNM's vagina. Her nephew, D, told her the accused, a neighbour, had defiled LNM. He explained her that the accused had found the children playing at home; and that he sent one of them to buy a cake and then others ran away, leaving LNM behind.

8. Shortly thereafter, one of the children, WW started crying and on being asked by D what the matter was, she said LNM had fallen in a ditch. D went to check and found the accused on top of LNM in the ditch.

9. On hearing the story, PW1 called the headman who advised her to report at Haraka Police Station. She did and from there she was escorted with LNM to Engineer District Hospital in a police vehicle. LNM was treated and they went home with a police officer who arrested the accused at his house. They then went back to the police station with other witnesses.

10. In cross-examination PW1 confirmed she did not see the accused defile LNM; she denied having had a sexual relationship with the accused or that she had demanded Kshs 10,000/= from him; she confirmed that the first information came from Mama Esther who is a neighbour. She denied being his lover or having had sex with the accused the night before the incident, or having smeared semen on LNM from condoms they had used.

11. PW2 PMG, aged 10 years, is PW1's son. He gave evidence after a *voir dire* examination. He said he was in standard three; that on the material day he was playing with LNM, MW and DG when the accused who is their neighbour, came by and called him. The accused gave him Kshs 50/= to buy two cakes. He went to buy them and on retuning did not find the accused there. He was told by Daniel that the accused had taken LNM, who he identified in court, to a maize plantation and defiled her.

12. The accused had ran away when he saw D. D followed him. The accused then turned on D and chased him away. Daniel told a man nearby and people gathered and D told them what had happened. His mother, PW1, who was in church was called and came home. After looking at LNM, they went to report at Haraka Police Station, and thereafter went to Engineer Hospital. On returning home, they found the accused in his home having been beaten by members of the public. He was arrested by the police.

13. PW3, DGW is a Form 2 student at [particulars withheld] High School. He is the cousin to PW1. He had been sent home for fees on 11th September, 2016 and decided to pass by his Aunt E's house. It was a Sunday and PW1 left him with four children and went to church. He heard someone call them and, thinking it was his uncle or cousin, did not go out. After a few minutes he heard the children screaming, and thought they were playing. Shortly thereafter, two children came to him and one, WW, told him LNM had fallen in a ditch. When he went to check, he found the accused holding LNM whilst on his knees, then he lay on the child.

14. The accused saw PW3 and ran away. PW3 tried to alert people, and he gave chase for about 100 metres before the accused turned on him. Fearing the accused was armed, he ran back. Being a Sunday, there were few people around, but the child's mother (PW1) was called and told LNM was sick. PW1 came home and, after being told what had happened, they went to Haraka Police Station and thereafter to Engineer Hospital. On returning home they found a mob who had arrested the accused.

15. In cross-examination, PW3 stated he knew the accused physically, and marked his face; that he saw the accused holding LNM whilst kneeling, then he lay on her; that he did not know whether accused had a relationship with LNM's mother; that he was not told by PW1 what to say in court; that Mama E was the one who called PW1; and that the incident happened at about 1.00pm on the material day.

16. PW4 Dr. Maingi Muchiri from Engineer Hospital was the doctor who examined LNM. He produced a P3 Form for LNM filled in on 13th September, 2016 by Dr. Sankei his colleague. It was marked as P. Exhibit 1. The examination of LNM found that there was a fresh hymenal tear; the vaginal entrance was tender and inflamed (painful and swollen); and there was a whitish discharge from her vagina.

17. In cross-examination he said the child was not admitted as that is not always necessary; that the injuries pointed to forceful penile penetration, and that absence of other injuries on the body does not preclude defilement.

18. PW5 Corporal Joseph Kandie of Haraka Police Station was the Investigating Officer. He testified that on 11th September 2016, he was informed that a lady had reported a defilement case. The mother, MWM, was still at the station at about 1.00pm. The victim was LNM. He inquired as to the child's age and he was told she was 2 ½ years old.

19. He immediately called the driver and they took the child to Engineer Hospital. The child was treated and they were told to go back later and get a P3 Form. Whilst at the hospital, he was called by a member of the public who told him someone was being assaulted by a mob. PW5 therefore called the police station and asked for someone to rush to the scene.

20. On finishing at the hospital, PW5 asked his driver to rush them to the scene of the crime where he found his colleagues had already arrived. The accused was present so he put him into the police vehicle and took him to the station where he booked the accused in the Occurrence Book.

21. The next day he took the accused to Engineer Hospital where he was treated. Thereafter, PW5 recorded witness statements and proceeded with investigations. He produced the child's Clinic Card as P. Exhibit 2, and her blood stained pant and trouser as P. Exhibit 3. He also took photographs of the cake which a witness had bought on being sent by the accused.

22. In cross-examination, PW5 said that PW3 was the one who saw the accused defile the child, and PW2 was the boy whom the accused sent to buy cake.

23. The defence case was made out by DW1, the accused and DW2 David Ruo his witness.

24. The accused is his defence stated that on 11th September, 2016 he got up as usual and took his daughter to Yaanga Shopping Centre for a shave. After releasing his daughter to go back home, he went to a bar; that at 2.00pm his cousin called him and told him that he heard that he had defiled a child; that his brother too called him for the same. Accused went to his cousin's home and later went home to cut grass for his cows and then slept. That at 5.00pm he was woken up by members of the public who accused him of defiling a child. He denied the offence and was taken to police station later to the hospital. On 13th September, 2017 he was charged in court and denied the charges.

25. DW2 DWR, brother to the accused, was called by his cousin on a date he cannot recall in 2016. He was informed by his cousin that his brother (the accused) had defiled a small child. He called the accused who was at Yaanga Shopping Centre and denied committing the offence; that the accused left for his home and later in the evening members of the public went to his house and started assaulting him; that DW2 advised them to call the police and later police came and arrested the accused.

26. On cross-examination, DW2 stated that he did not have any information or evidence of the defilement of the said child as he did not witness anything.

Analysis and Determination

27. Analysing the evidence against the issues raised, I come to the following determinations.

On Penetration and proof thereof

28. The appellant's main argument was that the prosecution did not prove that the accused penetrated the complainant. Whilst he submits that even partial penetration is sufficient, he says the evidence that he held the child, knelt and lay on her is not sufficient proof of penetration. He further states that the complainant never gave evidence, that the P3 Form carried no weight because the doctor who examined the victim is not the one who testified or produced the P3 Form yet no application was made under **Section 33** of the **Evidence Act**.

29. On these points, the DPP responded that **Section 31 (7)** of the **Sexual Offences Act** deals with intermediaries to assist vulnerable witnesses. In their case the victim was a 2 ½ year old vulnerable victim. The court found that she cannot tender evidence as she was unable to comprehend what was happening in court.

30. Whilst it is true that the trial magistrate did not formally use the language of "*vulnerable witness*", it is also true that the complainant was brought to court. The court having found she could not testify directed:

> ***"<u>In the interest of the minor/complainant</u> the matter will proceed with the witnesses who are present."*** (Emphasis added)

31. I do not think the technical failure to make a formal declaration of the child as "*vulnerable*" or to refer to the child's mother as an "*intermediary*" is fatal to the prosecution's case. The purpose and intent of **Section 31** of the **Sexual Offences** is to enable a person who can speak for a victim who is vulnerable on account of age, to speak on her behalf. This is precisely what happened in court. Indeed, the language of **Section 31** is permissive in that the court ***"<u>may</u>"*** declare a witness vulnerable. The section provides:

> ***"31 (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, <u>may declare a</u> witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—***
>
> ***(a) the alleged victim in the proceedings pending before the court;***
>
> ***(b) the alleged victim in the proceedings pending before the court;***
>
> ***(c) the alleged victim in the proceedings pending before the court;***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—***
>
> ***(a) age;***
>
> ***(b) intellectual, psychological or physical impairment;***
>
> ***(c) trauma;***
>
> ***(d) cultural differences;***

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant." *(Emphasis added)*

32. With regard to the evidence in the P3 Form**, Section 77 (b)** and **Section 33 (b)** of the **Evidence Act** provide for reports such as those of a medical practitioner made in the course of business to be admissible. The sections provide as follows:

> ***"77 (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."***

Section 33 of the **Evidence Act** provides

"33 Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(*a*) ***……;***

(b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

(c) ……;

(d) ……;

(e) ……;

(f) ……;

(g) ……;

(h) ……."

33. Authorities of the Court of Appeal on **Section 77** of the **Evidence Act** are pertinent here. **Ogeto v Republic [2004] 2 KLR 14, 17** and **Soki v Republic [2004] 2 KLR 21, 27** Muriithi J, in **Republic v Teresia Wairimu Thuo [2019] eKLR** and referring to those cases stated:

"12. Similarly, the Court of Appeal (Omolo, Githinji & Onyango Otieno, JJA.) in two decisions delivered by the same Bench on the same date the 26th March 2004, Ogeto v. R (2004) 2 KLR 14, 17 and Soki v. R (2004) 2 KLR 21, 27 <u>***settled the issue of section 77***</u> ***of the Evidence Act as follows:***

Ogeto's case

"The postmortem on the body of the deceased was done by Dr. Ondingo Steven. The postmortem report was produced as exhibit

at the trial by corporal Ambani under section 77 of the Evidence Act. One of the grounds of appeal is that the trial Court erred in receiving the postmortem report which was inadmissible. Mr Gichaba, learned counsel for appellant, submitted before us that postmortem report does not have probative value as it is hearsay evidence since Dr Ondingo Steven was not called as a witness. Section 77 (1) of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the Act and the Court did not see it fit to summon Dr Ondingo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law."

Soki's case

"Before we allow this appeal, as we must do, we need to comment on the manner P3 (Exhibit 1) was produced and the way it was dealt with by the trial Court and the superior Court. Section 77 (1) allows any document purporting to be report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved."

13. It is clear that a document such a report by a government analyst or medical practitioner etc., in this case a post-mortem report, may be produced in evidence by a person other than the maker but if the accused wishes and the Court finds it fit, the maker may be called for cross-examination. (Emphasis added)

34. In the present case, when PW4 began his testimony he indicated that the P3 Form was made by Dr. Sankei of Engineer Hospital who is well known to him but was on leave. The accused clearly stated:

"Accused - I do not have an objection if this Doctor testifies."

Further, the accused cross-examined PW4 who presented the P3 Form on behalf of his medical colleague.

35. Accordingly there is no reason for rejection of the evidence provided through the P3 Form.

36. As far as actual penetration is concerned, PW2 testified that he saw the accused holding the child and he then lay on her. The accused ran away when he realized he was seen by PW2. The medical evidence shows that subsequent to that act LNM's hymen was torn and her vaginal entrance tender and inflamed and was also swollen and painful.

37. The sequence of events was that PW2 saw the accused lying on the child at about 1.30pm on 11th September 2017. He then chased after the accused when he ran away. Eventually, the accused was arrested by a mob. LNM was taken to the police station right away, and it was PW5 the Investigating Officer who took her to Engineer Hospital. The P3 Form shows that LNM was "*sent to hospital on the 11th September, 2016*."

38. Thus, there was no break in the sequence of events linking the accused to the defilement, from the time the accused lay on LNM to the time she was examined, to enable any credible suggestion that the hymenal tear and vaginal tenderness occurred from some other event or circumstance faced by LNM. I agree with the trial court that there was penile penetration evidenced by the torn hymen.

Age of the Complainant

39. The appellant argued that PW1 did not give the age of the victim in her evidence-in-chief. However, he admits that PW1 was recalled to give evidence and produced LNM's Clinic Card. He objects to the use of the Clinic Card as evidence since she was not its author.

40. The Clinic Card produced as P. Exhibit 1 shows the date of birth of the child as 28th August, 2013. New mothers are routinely given such Clinic Cards after delivery of a new born to trace growth, health and treatment of the new born. The mother's name is indicated in the card as MW. The card shows a series of vaccinations given between 10th September, 2013 and 8th May, 2014; it shows the tabulated record of LNM's weight over her first 1 ½ years of life, from her birth weight of 3.1 Kilogrammes. Further, the trial magistrate saw the child in court. She formed an opinion that the child is of tender years and incapable of comprehending what was happening. That is why she allowed the mother (PW1) to testify "*in the interest of the minor*."

41. I have no doubt from the evidence that the child was a minor of less than five years. In any event, the aspect of age is relevant essentially for purposes of determining the nature of sentence to impose.

Corroboration of Evidence and failure to consider Defence Evidence

42. The appellant argues that there was no corroborating evidence sufficient to prove the offence. The DPP argued that **Section 33** of the

Sexual Offence Act enable the court to rely on Evidence of surrounding circumstances. **Section 33** of the **Sexual Offences Act** provides:

> ***"Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—***
>
> ***(a) whether a sexual offence is likely to have been committed—***
>
> ***(i) towards or in connection with the person concerned;***
>
> ***(ii) under coercive circumstances referred to in section 43; and***
>
> ***(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."***

43. I agree that in the circumstances here, where the victim who would be the key witness is too young to testify, but there is other eyewitness evidence, it is not possible to argue that there was no corroborating evidence. The DPP cited **M.M. v. Republic [2014] eKLR** where the Court of Appeal dealt with a case with similar circumstances, and the court relied on independent evidence. There, the Court of Appeal stated:

> ***"Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, section 33 of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both.***
>
> ***In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.***
>
> ***Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.***
>
> ***In the circumstances of the present appeal and contrary to the demands of the appellant, it was unnecessary to conduct forensic examination in order to link the appellant with the complainant's defilement. He was found lying on the complainant with his trousers down. On examination, a few hours later, the complainant was found to have been defiled. That was sufficient evidence linking the appellant with the offence."***

44. I fully agree with the superior court's position and therefore find no basis to interfere with the trial court's finding.

Defence Evidence

45. The appellant argued that his defence of alibi was not considered. I have perused the proceedings and judgment and note that the trial magistrate dealt with the defence evidence at length in pages 22 to 24 of her judgment. She concluded that the defence evidence of alibi was an afterthought as the accused did not raise it at any other stage of the trial. I agree with the trial magistrate based on my perusal of the proceeding and evidence on record.

46. In addition, there was the evidence of PW2 and PW3 who, as stated by the trial court, placed the accused at the scene, with PW2 who saw the accused lying on the complainant. This limb of the defence argument is unpersuasive.

Sentence

47. On this issue, the appellant impugned the sentence as harsh and inappropriate. The DPP conceded that at the time of sentencing, although the trial court considered the accused's mitigation, she did not exercise her discretion as to sentencing. Instead, she stated that:

> ***"……this is an offence that carries a mandatory sentence. The <u>hands of the court are tied</u>. <u>This is not a case I can exercise discretion</u>. Consequently the accused is sentenced to life imprisonment."*** (Emphasis added)

48. It is precisely against this strait-jacketed approach that the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** held that an accused person's rights are violated when a court does not exercise its discretion in sentencing. On this sole ground, the appeal succeeds.

Disposition

49. Ultimately, the grounds of appeal against conviction all fail and the appeal is dismissed.

50. However, the appeal against sentence succeeds, and the sentence meted by the trial court is hereby set aside. The appellant will be

sentenced afresh at a sentencing hearing on a date to be take upon the reading this judgment.

Administrative directions

51. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

52. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

53. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 6th Day of May, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Peter Waweru Ruo – Appellant in person in Naivasha Maximum Prison

3. Court Assistant – Quinter Ogutu