



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 06 OF 2020

BETWEEN

STEPHEN RUMBI KITHARIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court Criminal SO Number 02 of 2016 by Hon. P.M.Wechuli (RM) on 07<sup>th</sup> November, 2017)

JUDGMENT

### **Background**

1. **STEPHEN RUMBI KITHARIA** (*Appellant*) has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed between 4<sup>th</sup> May, 2016 and 15<sup>th</sup> July, 2016 against **RMM** a child aged 15 years.

2. The prosecution called 5 (five) witnesses in support of the charges. **PW1 RMM**, the complainant stated that she was 15 years having been born on 22.06.2001 as shown by a certificate of birth PEXH. 9. She recalled that on 4<sup>th</sup> May, 2016 on her way from school, he met Appellant who asked her to go to his house which she did and they engaged in sexual intercourse. It was her evidence that this became a routine and she'd pass by Appellant's house for breakfast, every day on her way to school and later in the evening on her way from school where they engaged in sexual intercourse. This would have gone unnoticed until when Appellant gave the complainant sweet potatoes, razor blade and eggs which she took home attracting her mother's attention.

3. **PW2 RML**, complainant's mother upon seeing complainant with sweet potatoes, razor blade and eggs which she said were given to her by Appellant went to Appellant's house to return the said items and it was while there that complainant reported that Appellant had defiled her and she reported the matter to police. It was also her evidence that Appellant had bought school uniform for complainant and offered to marry her. **PW3 LMM**, complainant's father stated that complainant went missing on 15<sup>th</sup> July, 2016 and was the next morning found with the Appellant.

4. Complainant was examined on 27.07.2016 by **PW4 David Thurania**, a clinical officer who found that she had no injuries but her hymen was broken. It was his evidence that complainant appeared to have been sexual active. He tendered complainant's P3 form as PEXH. 9. **PW5 PC Nicholas Gakula**, the investigating officer upon investigating complainant's complaint arrested Appellant and caused him to be charged.

5. In his sworn defence, the Appellant denied the offence and stated that he was framed because of a land dispute he had with complainant's mother.

6. In a judgment dated 07.11.2017, the Appellant was convicted and sentenced to serve 20 years' imprisonment.

### **Appeal**

7. Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the ground that the sentence was harsh.

8. The state submitted that the sentence was lawful and urged that the appeal be dismissed.

### **Analysis and determination**

9. The Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] eKLR** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms: -

**“...As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect.....”.**

10. In the case **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

**In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).**

11. Appellant was sentenced to serve 20 years’ imprisonment which is the mandatory minimum sentence under Section 8(1) as read with Section 8(3) of *the Act*.

12. Mandatory minimum and maximum sentences were declared unconstitutional by gist of the Supreme Court holding in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR**.

13. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under *the Act*. It observed as follows:

**[W]e 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.**

14. Even though Appellant was a first offender, the psychological effect of the offence on the 15-year-old complainant cannot be underestimated.

15. From the foregoing, the Appeal succeeds on the issue of sentence. The 20-year sentence imposed on the Appellant is hereby set aside and substituted with the sentence of **10 years** wef from **07<sup>th</sup> November, 2016** when he was sentenced.

**DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF MAY, 2021**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Kinoti**

**Appellant - Present**

**For the State - Ms. Mbithe**