**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 58 OF 2018**

**ABIJAH MATEKWA MUSENYI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction and sentence of Hon. Martha Mutuku, Senior Principal Magistrate, in Criminal Case No. 1189 of 2015, at the Chief Magistrate's Magistrate, dated 21st February, 2018)***

**JUDGEMENT**

1. On the 13th day of July 2015, the appellant was arrested and arraigned before the Chief Magistrate's Courts, at Milimani charged with the offences of; defilement of a girl contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006, in count 1 and committing indecent act with a child contrary to Section 11(1) of the said Act, in alternative charge.

2. He was charged vide; Sexual Offence Criminal Case No. 17 of 2017, (Originally Criminal Case No. 1189 of 2015), and pleaded not guilty to both counts. The case proceeded to a full hearing. At the conclusion of the hearing, the trial court delivered the judgment dated 21st February 2018 and found the appellant guilty of defilement and convicted him accordingly under; section 215 of the Criminal Procedure Code. The prosecution treated him as a first offender and after offering his mitigation, the trial court sentenced him to serve twenty (20) years imprisonment.

3. Being aggrieved by the conviction and sentence, on 5th April 2018, the appellant filed a petition of appeal dated; 6th March 2018. It is supported by the grounds attached thereto, which states as follows:

*a) That, the learned trial magistrate erred in law and fact when she convicted the appellant in the present case;*

*b) That, the learned trial magistrate erred in law and fact by relying on evidence which was contradictory;*

*c) That, the learned trial magistrate erred in law and fact by failing to appreciate that the identification did not pass the test of the judge' rules;*

*d) That, the learned trial magistrate erred in law and fact for failure to summon essential witnesses for the determination of appellant's case;*

*e) That, the learned trial magistrate erred in law and facts by shifting the burden of proof to the Appellant;*

*f) That, the learned trial magistrate erred in law and fact by failing to find that, the investigation officer did not conduct any investigations and that if he did, the same was shoddy;*

*g) That, the learned trial magistrate erred in law and fact by failing to give the appellant's defence adequate consideration, and further failed to uphold section 169 (1) of the C.P.C, while disowning his defence;.*

*h) That, since the appellant cannot recall all that transpired in court, the Honourable Court do furnish him with court's proceedings and also allow him to be present during the hearing of the appeal.*

4. The appeal was admitted on 22nd July 2020, for hearing and on 15th December 2020, the appellant's counsel requested for leave to file a supplementary appeal. The leave was granted. Subsequently, the appellant filed supplementary grounds of appeal dated 24th December

2020, which states as follows:

*a) The learned magistrate erred in law and fact, in failing to find that; the prosecution had not proved its case against the appellant beyond reasonable doubt;*

*b) The learned magistrate erred in law and fact, in admitting the evidence of incredible witnesses namely PW1 and PW5;*

*c) The learned magistrate erred in law and fact, by failing to find that the evidence of PW1 lacked corroboration;*

*d) The learned magistrate erred in law and fact by dismissing the sound and valid defence of the appellant;*

*e) The learned magistrate erred in law and fact, by shifting the burden of proof to the appellant;*

*f) The learned magistrate erred in law and fact, when she failed to warn herself on the dangers of admitting the evidence of PW1 and PW5 who was an accomplice;*

*g) The learned magistrate erred in law and fact, when she failed to observe that. the conviction was not safe;*

*h) The learned magistrate erred in law and fact, by not finding that, the element of penetration had not proved.*

5. The Respondent did not file any formal response to the appeal. However, the appeal was disposed of by filing of submissions and subsequently highlighted by the appellant's counsel. The Respondent relied on the submissions as filed and did not highlight them.

6. I have considered the arguments advanced. However, before I deal with the merits of the appeal, I shall set the background facts for ease of understanding. The facts are that; PW1 (herein referred to as "SA") was coming from church on 12th July 2015, when she met a "certain man" who was familiar to her. He greeted her and she responded with greetings. He stopped her but she declined. He then told her, that, he knew her siblings and if she did not follow him, she would not get to see them again.

7. That she got scared and at that point, the man ordered her to board a motor cycle he had stopped. She boarded the motor cycle at; ABC place along Waiyaki Way and was taken to; Kyuna Close. Upon arrival, she saw the same man, who showed the rider where to stop and told her to alight and follow him. She followed him and he took her to a certain house.

8. That, the house was a servant's quarters and the man seems to be an employee in the homestead. He then cooked food and gave her. Thereafter, he ordered and forced her to have sex with him. After the incident, he left her in the house. He returned later in the evening at about 6.00pm, when it was getting dark and in the company of another man, unknown to her.

9. He told her to accompany the man. She followed the man to Spring Valley in the company of the rapist. She was led to a house at Spring Valley. That as she was having a headache, she told "the stranger' to bring for her pain killers. He left but did not return until the following day at around 11.00 am when he returned to collect his gumboots.

10. In the meantime, the victim's parents mounted a search for her, when she did not return home from church. Being unable to trace her, they reported the matter to Spring Valley Police Station. Upon inquiry from the boda boda riders, they learnt that, one of them had dropped a girl described at Kyuna close. The rider led the Police Officers to the appellant's house and identified him as the one who was in the company of the victim.

11. Upon being questioned, he initially denied knowledge of the girl. However, he later led the police officers to where the she was. The police officers opened the door which had been locked from outside the house and took her to Spring Valley Police Station, in the company of the two men. The appellant was then arrested and charged accordingly. In the meantime, the victim was taken to Nairobi Women's Hospital for examination.

12. However, the appellant denied committing the offences and told the court that, the victim "SA" was his cousin that is, "PW5" Cedrick's girlfriend. That, Cedrick requested him to pick her for him and take her to his place and that he would later pick her from his house. That, she spent a night at Cedrick's house, where she was rescued from. He denied having requested PW5; Cedrick to keep the victim for him as his wife was visiting and denied being married. The appellant called his father as a witness to corroborate the fact that, he does not have a wife.

13. I shall now consider the appeal on merit, the light of the material placed before the court. In that regard, I note that, the duty of the first appellate court upon hearing the appeal, was clearly stated in the case of; ***Okeno vs. Republic (1972) EA 32*** **as follows:**

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding 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, see Peters vs. Sunday Post [1958] E.A 424."***

14. In the instant case, the appellant has raised several grounds of appeal which can be summed up into, one ground that, the prosecution did

not prove its case beyond reasonable doubt, in that, the evidence adduced by the prosecution witness was contradictory, identification of the appellant did not pass the test of the "judges" rules, failure to summon essential witnesses, shifting the burden of proof to the appellant, shoddy investigation, and failure by the trial court to "uphold section" 169 (1) of the Criminal Procedure Code while disowning the defence evidence.

15. In consideration of these grounds in the light of the evidence adduced in the trial court, I find that, first and foremost, the appellant was convicted on the main count of defilement. The relevant statutory provisions of the Sexual Offences Act, No. 2 of 2006, state as follows;

> "*a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement*."

16. Thus from the aforesaid, the law is settled that, the ingredients of the offence of defilement are proof of; the age of the complainant; penetration and identification of the perpetrator.

17. As regards the element of penetration, the Sexual Offences Act, No. 2 of 2006, states that, "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

18. In the instant matter, the complaint testified as follows; in relation to the ingredient of penetration: -

> "*He then proceeded to force me to have sex with him*"

> "*I had sex with him. We both removed our clothes. He caused his penis to penetrate my vagina. After having sex, he got out locked the house and left, leaving me to the house*."

19. In addition, PW7 Dr Joseph Mwarachu testified to the effect that, on 20th July 2015, he examined PW1; the complainant; 16 years old and noted that, she no physical injuries. The external genital was normal. However, there were bruises on the labia. She had been treated at Nairobi Women's Hospital.

20. Similarly, PW6, Simon Nangu; a Clinical Officer who produced a medical report on behalf of, Dr Ndolo stated that; PW1 was examined at Nairobi Women's Hospital, on 13th July 2015, and the Doctor noted minor laceration on the low segment, vagina area. The serum was broken. The anal area was intact.

21. However, I note that, the date of the incident is not indicated in the report, but all the witnesses gave corroborated evidence that, the complainant examined on 13th July 2015. The upshot of all the evidence analyzed above is that, there is sufficient evidence to prove the ingredient of penetration.

22. I shall now consider the age of the complainant. The evidence of the complainant and the mother was that she was born in the months of; in February 2000. In the instant matter, prosecution produced a birth certificate No. [Particulars Withheld] of the complainant. It establishes that she was fifteen 15 years at the time of the offence on 12th July 2015. Hence, adequate proof of the age of the complainant.

23. I Shall then move to the issue as to whether; it is the appellant who defiled the complainant. In that regard, PW1, stated as follows in relation to the appellant: -

> "*I had seen the accused person about (5) times but he had never spoken to me"*.

She then went on to say of; Pw5 who is the appellant's cousin: -

> "*I have never got to know the name of the other person; he did not have sex with me at all"*

24. In cross examination by the appellant, she responded by saying: -

> "*The stranger is not and was never my boyfriend. I do not know his name"*.

She further said: -

> "*We have not colluded with any (my) parents, motor cyclist and the stranger to frame you up"*

25. Her evidence was corroborated by the evidence of PW5 who testified that, he found the appellant in the company of PW1, and that; "the girl was not known to me." It also suffices to note that, the complainant throughout her evidence referred to (PW5) as a stranger and not by name.

26. In cross examination by the appellant, PW5 stated that; the complainant identified the appellant as her boyfriend and responded to the appellant as follows that:

> "*The complainant was not my girlfriend but yours"*

He then added;

> *"I am not framing you at all. My religion does not allow me to lie to court or have sex with a woman who is your friend". I have not planned to frame you"*

27. It is also noteworthy that, while the appellant was cross examining PW2; Josphat Ondungi Kullundu and PW3 MAM, and the mother of PW1, he did not raise the issue of; being framed and/or collusion to frame him. He only raised it in his defence.

28. Similarly, one, No. 101105 PC Rop Jonathan, testified that, when they approached the appellant at his residence, they interrogated him and at first he declined to say where the girl was. However, when they produced handcuffs, he pleaded with the police to let him show them where the girl was. Therefore, if the appellant had not been involved in the offence, why was he hesitating to say where the girl was. Why didn't he just tell the police officers straight away, that the girl had been at his house and left with PW5 his cousin?

29. In the same vein, PW4 Christine Oguli welimo, the boda boda rider corroborated the evidence of PW1, that it is the appellant who stopped her as she was from church and told him to take the her to [Particulars Withheld] Close. That he "got suspicious, alighted from the motor cycle and pretended to go for a short call" just to see the gate where the girl was going to and he "saw the two walk into a certain gate and then he "went away".

30. On being cross examined, as to whether he knew the father of the child, he stated "I did not know the man who stayed at [Particulars Withheld] close. I offered to assist him; and take him to the gate I had seen the boy and girl walk into". That, even the appellant was not known to him. The witness denied having been compromised to frame the appellant.

31. He further, testified that, he asked for Kshs200, to ferry the girl but the appellant paid him Kshs 150. This evidence collaborates the PW1's evidence and therefore rebuts the appellant's defence that, (PW1) went to his place of work to look for Cedrick.

32. In addition, it is also noteworthy that, the appellant confirmed in his own evidence that, PW1 was in his house for one and half (1 ½) hours before she left. I find that, in itself clearly indicates that, the appellant had an opportunity to defile her and it is possible that, he defiled her. The argument that, it is only PW 5 who had an opportunity to defile her is not therefore tenable.

33. Further, it is interestingly, to note that the appellant in his evidence in chief, referred to the complainant by full names. He stated that, "it was SA who came to [Particulars Withheld] house". He also stated "when S came I was still on duty". It does therefore appear that, he may have been well known the complainant even before the incident, if the reference to her by name, is anything to go by.

34. The issue that arises is; whether the appellant is being framed. I find the answer in the negative, for the reasons that, there is no evidence that, there was bad blood between; PW1, PW4, and PW5 and the appellant and/or that, the appellant has not supported the allegation by any tangible evidence of; collusion to frame him. I find no reasons for him to have been framed.

35. I may not have had the benefit of the demeanor of the (PW1), however, the trial court made comment on her demeanor by stating that "SA" was categorical that it is the appellant who had sexual intercourse with her. That, she was consistent in her evidence and her evidence was unshaken and here was no reason to doubt her evidence.

36. Be that as it may, the conduct of the complainant, is puzzling. She had an opportunity to raise an alarm and/or escape but she did not leave. I say no more.

37. I shall now turn to the sentence; the appellant was charged with defiling a child aged fifteen years. He was sentenced to serve twenty years in custody. The relevant provisions of; section 8(4) of the Sexual Offences Act, No. 3 of 2006; states: -

> *(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.*

38. From the aforesaid, the appellant was given the minimum sentence provided for under the law. However, the Supreme Court has held in the case of; *Francis Karioko Muruatetu & another v Republic (2017) e KLR,* that; section 204 of the Penal Code, (cap 63) of the Laws of Kenya, which provide death sentence as the minimum sentence for the offence of murder, is unconstitutional on the basis that it was in contravention of Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q).

39. That, the mandatory nature of the section deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. That, it makes mitigating circumstances in sentencing cosmetic and is not in conformity with the right to fair trial under Article 50 of the Constitution and denied accused persons the right to equal treatment under Article 25 of the constitution.

*40.* Subsequently, this holding has been applied in other cases, including the sexual offences, (see *Dismus wafula Kilwake vs Republic (2018) eKLR),* The Court of appeal applied the decision aforesaid. It is also noteworthy that, the provisions of section 333(2) of the criminal procedure Code requires that, the period an accused has been in custody be considered while pronouncing the sentence.

*41.* In the instant matter, the appellant was arrested on 13th July 2015 released on bond on 24th September 2015 therefore, he was in custody for a period of about two (2) months and nine (9) days, before sentence.

*42.* The upshot of the aforesaid is that, I find that, the conviction in this matter was properly based on adequate evidence and I decline to quash it. As regards the sentence, I find that the appellant was a first offender. There is no evidence therefore, that he had been involved in

any previous criminal activity. I also note from the record of the trial court, that, the Learned Trial Magistrate, indeed acknowledged that he was a young man, but seems to have felt tied by the minimum sentences provided by the offence and pronounced the same. Taking into account the decision in Muruatetu case, and subsequent pronouncements in sexual offences cases, the courts have meted out sentences below the minimum. Taking into account the circumstances of this case, I find that a sentence of twenty years meted upon the appellant, as a first offender is rather harsh. In that regard, to punish the offender for the crime, at the same time give him an opportunity for rehabilitation, I hereby set aside the sentence of twenty years and substitute it with a sentence of ten years. With effect from the date conviction and sentence in the lower court.

Right of appeal 14 days explained.

It is so ordered

**Dated, delivered virtually and signed on this 17th day of May 2021.**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of**

**Mr Nandwa (Prof) for the Appellant**

**Ms Kimaru for the Respondent**

**Edwin Ombuna: Court Assistant**