REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 105 OF 2019

EKM.....APPELLANT

VERSUS

STATE.....RESPONDENT

(Being an appeal from the sentence of Hon N. Wairimu, SRM at the Chief Magistrate's Court at Kisii in

Criminal Case No. 818 of 2010 delivered on 1St March 2016)

JUDGEMENT

1. The appellant, EKM, was charged with the offence of **defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual offences Act No. 3 of 2006** and an alternative charge of **committing an indecent Act with a child Contrary to Section 11 (1) of the Sexual offences Act No 3 of 2006.** The trial court convicted the appellant on the alternative charge and sentenced him to 10 years imprisonment.

2. The particulars of the offence were that on the 25th August 2007 in Gucha District within Nyanza Province intentionally touched the vagina of RNE a child aged 9 years.

3. The prosecution marshaled 5 witnessed before the subordinate court who testified as follows.

4. RNE (Pw1) recalled that on 25th August 2007 she woke up early as her mother, DM (Pw2), was not home because the appellant had beaten her the previous afternoon. Her brother, D, was also awake and the appellant sent him to the river to get water. Pw1 testified that when D left for the river, the appellant who found her sweeping told her to put the broom down and carried her to the bedroom and put her on his bed. Pw1 in her evidence described the ordeal as follows;

> *"He told me to remove all my clothes. I was wearing a dress, I was not wearing shoes. I was wearing a panty. I removed my clothes and father started doing things to me. He was standing when I undressed, he told me to lie on the bed, he removed his trouser and underwear then he did things to me at the place where feaces come from. He was using his thing for urinating. He put it into my anus 3 times. I was feeling pain….When he stopped he told me not to tell anyone."*

5. Pw1 testified that when Pw2 came home she told her of the ordeal and Pw2 started screaming. Pw2 testified that she took Pw1 to hospital and at the police and recorded statements. The accused was arrested by the village elder. Wycliff Atambo (Pw4) testified that he was not the officer who examined Pw1 but his colleague Joseph Mokua Nyangau who had since been transferred. He testified that Pw1 had the history of being defiled by a person well known to her. He testified that Pw1 had laceration with blood stains on the labia majora and labia minora. It was concluded that Pw1 had been defiled.

6. Charles Matundura Mugaka (Pw3) testified that on 30th August 2007 he received an order to arrest the appellant who had been accused of defiling Pw1. Pw3 arrested the appellant and took him to Ogembo police station. PC Julius Musingi No 71357 (Pw5) testified that he took over the matter from the initial investigating officer who was transferred to Mandera. He testified that the incident took place on the material day when the appellant was home with Pw1 who was 9 years old. The appellant then warned her not to tell anyone but when Pw2 got home, Pw1 told her what had transpired.

7. After the close of the prosecution case, the trial magistrate put the appellant on his defence. The appellant elected to give unsworn testimony and denied the charges. He testified that he had a disagreement with Pw2 who wanted to defame his name.

8. After the hearing the trial magistrate found the appellant guilty of the offence of committing indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No 3 of 2006**. The trial magistrate stated;

"…from the observation of her demeanour it was clear that she recalled every detail of what had been done to her. For the offence of defilement to be said to have taken place there has to be proof of penetration which in my considered view is lacking in this case. What causes confusion is why the clinician did not give a report concerning actual state of the complainant especially since the treatment notes are clear that there was no penetration although the PRC and P3 forms suggest there was. In the circumstances I wuld find that the evidence is insufficient to conclude that the complainant was defiled."

9. The appellant appeal contained in his petition of appeal is only against the sentence. The appellant contends that the 10 years sentence meted by the trial magistrate was manifestly excessive.

10. At the hearing of the appeal the appellant argued that the prosecution case was marred with contradictions and argued that he was set up by his wife whom he had disagreed with. He seeks that the court considers his mitigation and reduce his sentence.

11. Ms Kibungi, state counsel, submitted that the 10 years imprisonment meted by the trial court was lenient and urged the court to dismiss the appeal.

12. It is well settled that sentence rests within the discretion of the trial court. The Court of Appeal in **Bernard Kimani Gacheru Vs Republic [2002] eKLR** held 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 the 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.....

13. At the sentence hearing the appellant stated that he had nothing to say in his mitigation. According to the presentence report, the probation officer had recommended that the appellant should serve a probation sentence for reasons that he was he has a young family, he was hardworking and that he had been remorseful as he had sought for the court's leniency. The trial court in its ruling on sentence considered the probation officer's report, mitigation by the accused before sentencing the appellant to 10 years imprisonment as required by the law.

14. Following the Supreme Court decision in the Francis Muruatetu case courts have the discretion to impose suitable penalties based on the circumstances of each case and the court ought not to be restricted by the mandatory sentence imposed by statute. In **Samwel Nyasimi Gwako v Republic [2021] eKLR,CRIMINAL APPEAL NO. 31 OF 2019,** I observed that;

"26. … the trial court merely applied the minimum sentences prescribed by the Sexual Offences Act on the first and second counts, without exercising its discretion on sentencing. The court was required to weigh the aggravating factors against the mitigating factors in imposing the sentence. It was also required to meet the following objectives of sentences as listed in the Sentencing Policy Guidelines, 2016:

a. Retribution: To punish the offender for his/her criminal conduct in a just manner.

b. Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

d. Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

e. Community protection: To protect the community by incapacitating the offender.

f. Denunciation: To communicate the community's condemnation of the criminal conduct."

15. The offence committed by the appellant was a serious offence considering that he was the father of Pw1 and had the responsibility to protect the minor who was under his care, instead, the appellant sexually assaulted the minor. No basis at all has been laid to warrant this court's interference with the exercise of discretion by the trial court in sentencing the appellant.

16. With the result that the appeal herein fails and is dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE, 2021.

A. K. NDUNG'U

JUDGE