REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 40 OF 2020

JOHN MUTABARI..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. P.M Wechuli R.M

in Tigania S.O No. 1398 of 2016 on 09/03/2020)

JUDGMENT

1. John Mutabari**(henceforth the appellant')** was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006 as the main charge with an alternative charge being an indecent act with a minor, contrary to 11(1) of the same Act. The main count and the alternative, alleged that on diverse dates between the month of April and June 2016 at [particulars withheld] Village, Kianjai Location in Tigania Sub-County within Meru County, he intentionally; caused his penis to penetrate the vagina; and in the alternative, touched the buttocks, breasts and vagina of the complainant**,** a child aged 14 years old.

2. He denied the charges and at the trial in which the prosecution paraded 5 witnesses in support of their case, the gave an unsworn statement and in a reserved judgment he was convicted on the main charge of defilement and sentenced to 20 years' imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant lodged the instant appeal setting out seven grounds of appeal which in reality amount to just four grounds of appeal, to wit;

> **a. The trial court erred in law and fact by failing to find that the prosecution failed to prove its case beyond reasonable when regard is taken of the inconsistent evidence, failure to call the investigating officer as a witness, that medical report did not implicate the appellant and that the hymen was not freshly broken.**
>
> **b. The trial court erred in law in meting out the maximum sentence which was too harsh.**
>
> **c. The trial court erred in law and fact by failing to order the sentence to start from the date of arrest in line with the provisions of section 333(2) of the CPC.**
>
> **d. The court erred in disregarding the evidence by the appellant without a cogent reason.**

4. The evidence given before the trial court by the complainant, PW1, was that, in April 2016, PW1, she left her home and went in search of the appellant, first Mariatati where the appellant worked but missed him. On 15/06/2016 she again went to the appellant's work place but was informed that he was absent and she decided to go to his home in kianjai. She had been to a farm called Emburi where she stayed there for three days feeding on carrots before she set of for Kianjai via Meru on the 4th day at 6.00 pm. Since she arrived at Kianjai in the night, could not trace the appellant and was forced to sleep in a farm. The following, she called the appellant, through the mobile phone of a lady namely Karambu, and the appellant surfaced at 4.00 pm and both proceeded to the home of the accused. Because the appellant was married, counselled the complainant that she would have to lie to the wife that she(complainant) was a daughter to the appellant's brother on her way to school. Having lied to the wife as planned, they slept and they woke up the following day morning and after appellant's wife had gone to the market, the appellant told her to have sex with him and she did not refuse so they had sex. She went on to say that the appellant had promised to take her to school since she did not have school fees at home. She had refused to have sex with him while she was at home but when she came to Kianjai, she had no otherwise. According to her, the appellant knew she was below 18 years old. The following day, the chief came and she was taken to hospital and police. She knew the appellant well as she used to visit him where he was working near their home. When they had sex, she removed her trouser and pant and the appellant removed his trouser and boxer as well. The appellant wore a condom on his penis and inserted it in her vagina.

5. During cross examination, she stated that the appellant left her behind while going to Kianjai, did not call her but she went because they had agreed she goes to Kianjai. On why she did not tell her people because the appellant had asked her not to tell them. During re-examination, she maintained that the offence had taken place at the appellant's home who had told her that he would take her to school.

6. PW2 was Mr David Nabea, the chief of Kianjai Location. His evidence was that on 26/06/2016 he was at Kigabari when he was called by an anonymous person and informed that the appellant was with a minor. He called the assistant chief of Kianjai and upon arrival to the appellant's home, they found both PW1 and the appellant there. PW1, whom he did not remember, was not the appellant's child because he knew him and had even lived with him. They went to Tigania police station where they were told that the child had been defiled. She was taken to Miathene Hospital and the appellant was arrested. The appellant had stayed with PW1,who was around 14 years and a student in form 2, for 3 days. During cross examination, he stated that the complainant had parents and could not tell if the matter had been reported to the authorities at Timau

7. PW3 Geoffrey Muthomi, a clinician at Miathene produced the P3 forms being the medical examination report on the complainant and the appellant on the 23/6/2016. He also produced the treatment notes for both the complainant and the appellant. He stated that the complainant was found in a man's house where they were living as husband and wife. The examination revealed that the labia *minora* and *majora* were intact but the hymen was torn even though there was no discharge or spermatozoa detected on the complainant. He noted that the appellant had no injuries in his private parts. in cross examination, he denied knowing who had committed the offence and confirmed that there was no spermatozoa seen.

8. PW4 was Bernard Gikunda, the assistant chief of Kianjai sub- location, who testified that in June 2016, a girl called to say that the appellant was with a minor. He and PW2 rushed to the appellant's home where they found a young girl whom the appellant said was his wife. They arrested him and took him to Tigania police station.

9. During cross examination, he denied that he had been called by Karimi Mwarabui, who was his neighbour, over pigeon peas and maintained that the call was over defilement. He also denied knowing about the girl's parents but stated that the investigating officer was to find out about the same.

10. The 5th witness was P.C Petronila Mwara of Tigania Police Station whose task was to produce the birth certificate in respect of the complainant having not been the investigating officer.

11. In his defence, the appellant, a construction worker, denied any knowledge of the defilement charges and maintained that the same were all lies. He stated that he was tiling Mukaria's farm and in the process, the pigeon peas, which had been planted there, were damaged. As he went home, the owner of the cow peas namely Karimi came and said he had damaged the cow peas. They quarreled and she called the chief and the assistant chief.

12. In its reserved judgment, the trial court in convicting the appellant after determining what ingredients the prosecution was bound to prove said: -

> "**<u>Since there were no eyewitness to the offence, the proper procedure is to determine whether the victim was being truthful when she said that it is the accused who defiled her. This is per section 124 of the Evidence Act.</u> I have analyzed the evidence of the minor, whom I also observed in court, and I have no doubt that she was speaking the truth. She narrated how she commenced her search for the accused at his work place after he promised to take her to his home at Kianjai and further take her to school….She eventually found her way at the accused's home in Kianjai. He was married but <u>they conspired to lie to his wife, that she was his niece. In terms of Section 124 of the Evidence Act, the victim evidence was sufficient to prove that it was the accused who defiled her since she was speaking the truth.</u>** (emphasis added)

13. That decision provoked the current appeal which was argued and canvassed by written submission by both parties on 25/03/2021 and 03/005/2021 respectively.

14. In the submissions the appellant's position was to the effect that the complainant's evidence, whose behavior was wanting, failed to connect the appellant with the case. He submitted that the torn hymen was insufficient evidence to link the appellant with the offence since the medical report did not indicate presence of any blood or bruises in the complainant's genitalia. The trial court is faulted for its failure to factor in the 3 years and 9 months the appellant had spent in custody in line with the provisions of section 333(2) of the CPC. The trial court is further faulted for meting out to the appellant the mandatory sentence of 20 years imprisonment which was clearly unlawful and legally excessive. He submitted that the mandatory sentence disregarded his mitigation and hence it deprived him of an opportunity for an individualized sentence and a right to fair trial. The court is urged to quash the conviction and set aside the sentence on the appellant and set him at liberty. He relied on **<u>Ahamad Abolfathi Mohammed & Anor v R(2018) eKLR and Bethwel Wilson Kibor v R (2009) eKLR</u>,** for the proposition that the time spent in custody ought to be taken into account during sentencing. He also cited **<u>Mithu v State of Punjab, Denis Kinyua vs R (2017) eKLR and Evans Wanjala Wanyonyi vs R (2016) eKLR</u>** for proposition that the maximum sentence was not an appropriate one for a first offender and that every accused person is entitled to the right to mitigate.

15. On their part, the prosecution submitted that the charges in the charge sheet as well as the particulars laid out thereon were sufficiently corroborated by the witnesses and exhibited and maintained that the appellant had been positively identified by the complainant. According to them, the ingredients of the offence were proved through both oral and documentary evidence. It was submitted that the trial court had considered the appellant's defence which it found to be implausible. It was concluded that the prosecution proved their case beyond reasonable doubt and urged the court to dismiss the appeal in its entirety. The prosecution relied on **<u>Kiriungi v R (2009) eKLR, Bernard Kimani Gacheru v R (2002) eKLR, Denis Kinyua vs R (2017) eKLR and Francis Muruatetu & anor v R(2017) eKLR</u>** in support of their position.

16. In determining this appeal, the court, being a first appellate court, is alive to and bound by the enduring principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa reiterated the mandate of a first appellate to be that: -

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 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 findings and conclusions; 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 V Sunday Post 1978) E.A. 424)."**

17. The key ingredients of the offence of defilement are; proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.

18. The complainant testified that she was aged 14 years as at the date of the offence and her birth certificate was produced by PW5 as PEx 3 which showed that she was born on 10/06/2002. I am therefore satisfied that the complainant at the time of commission of the alleged offence was 14 years old and thus a child with no capacity to consent to a sexual act and any intercourse with her was indeed defilement.

19. On penetration, apart from the evidence of the complainant, there was the evidence of the medical examination by PW3, which made a conclusion that there had been defilement owing to the torn hymen. I have analyzed the complainant's P3 form and noted with a great deal of concern that the portions requiring answers particularly on the appropriate age of injuries, the probable type of weapon causing the injury, the treatment, if any, received prior to examination and the degree of injury were left blank but the witness still formed the opinion that she had been defiled simply because her hymen was torn despite the fact that there was no discharge or spermatozoa seen. The medical report produced in respect of the appellant indicated that he did not have any injuries on his private parts. The P3 form in respect of the complainant equally had glaring gaps which PW3 did not seek to fill when he testified.

20. However, it is not a requirement of the law that the evidence of a sexual offence victim be corroborated. What the court need to do is to be satisfied that the witness is honest and truthful. That the trial did when he said that the complainants account of the incident was never impeached. Having been the trier of fact, who observed the demeanour of the witness while taking her evidence, I have found no compelling material to help me fault the finding that the witness was truthful and steadfast. I thus find that there was proved beyond reasonable double that the appellant had sexual intercourse with the complainant on the material day which on account of her age constituted the offence of defilement.

21. In **<u>Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995</u>** where the Supreme Court held that:

> **"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, <u>such evidence must be such that is sufficient to prove the case beyond reasonable doubt</u>."**

22. On who was the perpetrator, PW1 gave a long account of her pursuit of the appellant, spanning many days and culminating into their joint arrest at the home of the appellant. The evidence was adequately corroborated by the evidence of the chief and his assistant. When he took the stand to offer his defence, all he could say was that all the evidence was fabrications and that he was arrested for having destroyed some cow peas in a farm be was weeding. He gave a wide berth to the relationship with the complainant not even a mention that they had met yet in his cross examination of the complainant and other witnesses, he had alluded to the fact that the complainant had pursued him without invitation. I find that evidence to be an afterthought and lacks credibility as to cast a reasonable doubt over the prosecution's case which I have found to have been cogent and meeting the standards of proof beyond reasonable doubt.

23. In the judgment, the trial court relied on section 124 of the Evidence Act to found his conviction based on the uncorroborated evidence of PW1 but without setting out the words of the statute. I wish to point out that the substantive provision in fact demand corroboration as a basis to premise a conviction but it is the proviso thereof which exempt sexual offence cases from the need of corroboration. The statute provides: -

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth**."

24. My analysis of both evidence and the judgment is that the trial court was acutely seized of its mandated and duly and properly executed same. His application of the proviso to section 124 of the evidence act is beyond reproach and fault. I find no error as to merit interference by this court. For the reasons I have set out hereinabove, I find that the appellant's conviction was indeed safe and warrants no disturbance. The appeal on conviction lacks merit and the same is hereby dismissed

25. On prescribed maximum sentence imposed, I am reminded of the emerging jurisprudence since the decision of ***Francis Karioko Muruatetu & anor v R(2017)Eklr*** to be that court's hands should no longer be tied by the mandatory prescriptive nature of a sentence. It is now trite that consideration of mitigating factors constitutes an element of fair trial as enshrined under **articles 25 and 50 of the Constitution**. It is therefore ostensive that if courts were to continue being bound by the prescriptive nature of minimum sentences, mitigation would be rendered unessential because at the end of the day, it would matter less if a convicted person spends 4 hours giving mitigating circumstances or just 5 seconds to simply pray for leniency. The trial court recorded the mitigating circumstances and still handed the appellant the prescribed mandatory sentence. In such circumstances the trial court erred in feeling bound and remaining bound by

the prescribed sentence and thus let go its judicial discretion in sentencing which is a critical tenet of judicial independence. Such an error call for intervention by the court to restate the law.

26. In addition, the mandate of the court pursuant to section 333 (2) of the Criminal Procedure Code is to take into account the period served in custody as the trial proceeded. Here the trial court merely set the prison term without stating a commencement date. the sentence lets itself as amenable to the interpretation and construction that it commences from the date it was imposed and thus regardless of the dictates of the law. I consider it an improper and unlawful sentence for being too harsh and in so far as it does not accord with the statute and stare decisis. It is on that basis set aside and this court must now impose a sentence that is commensurate with the crime committed.

27. Being inclined by dictates of the law to set aside the sentence, I do take into account the gravity of the offence of defilement and its impact on the complainant and society at large, the fact that the appellant lured the complainant with a promise to pay her school fees together with the established fact that the complainant indeed went for the appellant many kilometers away, without invitation, and I consider that a jail term of 10 year would serve the justice of the case to discourage the crime while affording the appellant an opportunity to reform while in prison and be a useful Kenyan once out of prison.

28. This sentence that commence on the 26.06.2016 being the date of his arrest from when he remained in custody for the entire duration the trial lasted.

29. In conclusion, the appeal on conviction is dismissed but the sentence is set aside and substituted with a sentence of 10 years to start running from the date of his arrest.

DATED, SIGNED AND DELIVERED AT MERU, BY MS TEAMS, THIS 4TH DAY OF JUNE 2021

PATRICK J O OTIENO

JUDGE

In presence of

Mr. Maina for the state

Appellant in person

PATRICK J O OTIENO

JUDGE