REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.35 OF 2020

DAVID LANGAT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal on sentence from the Judgment and/or Decree of Honourable R. Yator (PM) dated at Molo Chief Magistrate's Court Sexual Offence Case No.6 of 2019 on 13th August 2020).

JUDGMENT

1. The Appellant 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**. The particulars being that on the 29th day of December 2018 at [particulars withheld] Centre in Kuresoi South Sub- County within Nakuru County, intentionally and unlawfully committed an act by inserting his male genital organ namely penis into the genital organ namely vagina of **LK** a child aged 14 years which caused penetration.

2. The Appellant was also charged with 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 particulars being that on the 29th day of December 2018 at [particulars withheld] Centre in Kuresoi South Sub- County within Nakuru County, the Appellant intentionally touched the vagina of **LK** a child aged 14 years with his penis.

3. The Appellant denied the charges and the case proceeded for full trial with the prosecution calling 5 witnesses in support of their case and accused gave a sworn statement and also availed one witness. By the judgment delivered on 13th October 2020, the lower Court found the Appellant guilty of the main charge, convicted and sentenced him to 20 years' imprisonment.

4. The Appellant being aggrieved and dissatisfied with the conviction and sentence, through his advocates on record, filed this appeal by Petition of Appeal dated 27th August 2020 challenging conviction and sentence on the following grounds: -

i. THAT the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence yet the same was cogent, plausible and strong enough to water down the prosecution case.

ii. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the nature of the appellant's arrest was consistent with innocence.

iii. THAT the learned trial magistrate erred in law and in fact by relying on the evidence of a single witness without cautioning herself on the dangers of relying on such evidence.

iv. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradictions which greatly vitiated the credibility of the prosecution evidence.

v. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the glaring discrepancies in the witness statement on the date that the same were recorded.

vi. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the case was a mere fabrication in that there were no formidable reasons given as to why the case was reported on a later date.

vii. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the case was a mere fabrication in that there were no formidable reasons given as to why the case was reported on a later date.

viii. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced on pregnancy was not subjected to further analysis (DNA) despite the appellant's request in order to substantiate the PW1 claim.

ix. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that prosecution case was in totality not proved beyond any reasonable doubt as required by law..

5. The Appellant also filed supplementary grounds of appeal as follows: -

i. THAT the learned magistrate erred both in law and fact by relying on extraneous matters to convict the appellant.

ii. THAT the learned magistrate erred both in law and fact by failing to afford the Appellant an opportunity to mitigate before sentencing the appellant.

iii. THAT the learned magistrate erred both in law and fact by failing to enquire from the prosecution regarding the Appellant's past criminal record.

iv. THAT the learned magistrate erred both in law and fact by failing to order that the appellant be furnished with all witness statements and all other exhibits relevant to the appellant's trial and by proceeding with the accused's trial without ensuring that the appellant had been furnished with all of the said exhibits and statements.

v. THAT the learned magistrate erred both in law and fact by according undue weight to the purported evidence of the prosecution, convicting the appellant harshly while it is conspicuous that the prosecution's case was full of glaring gaps, inconsistencies, contradictions, uncorroborated evidence and the same was not proved beyond reasonable doubt.

vi. THAT the learned magistrate erred both in law and in fact by convicting the appellant on the strength of the prosecution case which was evidently full of glaring gaps.

vii. THAT the learned magistrate erred both in law and in fact by failing to note that the accused person had not been positively identified by both the complainant.

viii. THAT the learned magistrate erred both in law and in fact by in finding that the prosecution evidence to be 'quite overwhelming,' notwithstanding the glaring contradictions between prosecution witnesses.

ix. THAT the learned magistrate erred both in law and in fact by disregarding the appellant's defence and by shifting the onus of proof on the appellant.

x. THAT in view of the circumstances, life imprisonment sentence does not capture the mitigation adduced by the Appellant.

6. The defence counsel filed written submissions while the state counsel opted to make oral submissions.

APPELLANT'S SUBMISSIONS

7. The Appellant narrowed down their 19 grounds of appeal as follows: -

i. That the learned Magistrate erred in law and in fact by convicting the appellant on the basis of insufficient, contradictory, utterly false, uncorroborated and unsubstantiated evidence.

ii. That the learned Magistrate erred in law and in fact by convicting the appellant on a charge sheet that was evidently defective.

iii. The learned magistrate erred in law and in fact by Failing to accord the appellant a fair hearing.

iv. That the Hon. Magistrate erred in law and in fact by harshly imposing a severe penalty on the appellant and yet the court had a discretion to pass a more lenient sentence.

8. On the ground that the Court relied on insufficient, inconsistent, un-corroborated, contradictory and downright false evidence, the Appellant submitted that it is clear from the trial court's proceedings that PW1 was a pathological liar because she lied to her foster parents (PW2 and PW3) that she had spent the night of 29th December 2018 at a lady's place since she lacked fare and further stated that she had received Kshs. 600/= before she left her mother's place in Kisii to travel to Keringet and a further Kshs. 200 upon reaching Molo and neither PW2 nor PW3 mentioned that the reason why PW1 did not travel to their Bararget home that evening was due to lack of fare.

9. The Appellant further submitted that PW1 lied on more than one occasion that the he was the one who impregnated her 29th December, 2018 and stated that the clinical officer (PW4) testified that when she examined PW1 on 11th January 2019, she was already 8 weeks (2 months) pregnant; and added that from the calculation from 29th December 2018 to 11th January 2019, PW1 ought to have been 2 weeks pregnant and further submitted that PW1 did not allege or give evidence that she had any sexual contact with the Appellant prior to the alleged defilement.

10. The Appellant submitted that PW1 in her evidence stated that the Appellant did not use protection when they allegedly had sex on the material date but PW5 testified that when she interrogated PW1, she stated that she was unsure whether the Appellant had used protection.

11. The Appellant submitted that PW2 in her evidence stated that PW1 confessed to her that she had previously had sex with the teacher at the school's staffroom but the court proceedings as well the police statement of PW1 does not talk of PW1 having sexual intercourse with accused at the school staffroom as alleged by PW2.

12. The Appellant further submitted that PW2's allegations were outright false fashioned to frame and fix him for an offence that was clearly committed by someone else. He added that from evidence tendered in Court that there was a close relationship between PW1 and PW3 who was not her biological father.

13. Appellant submitted that the police statement of PW1 does not reveal or mention a visit to the lodging by PW3, PW1, the accused, the police and the children's officer as earlier alleged by the PW3 in his evidence; and further allegations by PW3 were not corroborated by the evidence of PW1 and or any of

the other witnesses.

14. The Appellant submitted that the investigating officer (PW5) in his investigation dairy and evidence did not mention the alleged visitation of the lodging and particularly the pointing out of room 14 by PW1 as the scene of crime.

15. The Appellant further submitted that at no point in her evidence in Court as well as in her police statement did PW1 state that he touched her "**private parts**", "**breasts**" and the "**entire body**" as alleged by PW5.

16. The Appellant submitted that the prosecution failed to call three (3) prosecution witnesses who included **DK** (the complainant's biological mother), **CB** (Children Officer Kuresoi South) and the **Report Duty Officer** who issued a P3 form to the complainant on date 11th January 2018.

17. Further that there was failure to disclose the phone numbers used for alleged communication between the Appellant and PW1, between PW1 and DK and between PW3 and DK.

18. The Appellant submitted on penetration, the prosecution ought to have not only proved that there was penetration of the complainant's vagina but also the fact that the same was done by the accused person.

19. The Appellant submitted that he was convicted on a charge sheet that was evidently defective. That the said charge sheet bore the name **David Langat** while PW2 in her evidence identified the person who allegedly defiled the complainant as DK and that the person she referred to as DK is **David Langat** the accused person before the trial Court.

20. The Appellant submitted that the trail Court failed to grant orders for DNA to be conducted on the baby and the Appellant as requested by both the prosecution and the defence; that at paragraph 21 of the Court proceedings the prosecutor made an application for DNA analysis as the child had been born and the Appellant brought up the issue of DNA again in his defence but the trial magistrate at page 46 of the proceedings indicated that the application for DNA test was not necessary because the minor complainant identified the Appellant who was known to her as the person who sexually violated her.

21. The Appellant submitted that the learned trial magistrate got it all wrong as it was imperative that a DNA test be conducted on the complainant's baby for purposes of matching the same will the Appellant's DNA samples as the Complainant's evidence in as far as the date of her conception is concerned, is contradictory and uncertain.

22. The Appellant submitted there was failure to accord the Appellant a fair hearing in that his application for adjournment of the defence hearing was denied, thus denying him an opportunity to prepare his defence; that on 6th July 2020 when the matter came up for defence hearing after being adjourned due covid 19 pandemic, the Appellant informed the Court that he was not ready to proceed as he had been granted a very short notice of the trial date but the Court disallowed his application for adjournment and directed that he proceeds with his defence within an hour's time.

23. The Appellant submitted while unrepresented by counsel, he hastily gave his defence, which ultimately prejudiced him and submitted that denied of the adjournment violated his right to a fair trial and in particular the right to be granted sufficient time to prepare his defence.

24. The Appellant further submitted that he was not accorded an opportunity on whether a prima facie case had been established and cited the provisions of **Section 211 (1)** of the **Criminal Procedure Code** as follows:-

> **"At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a**

right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any) (emphasis ours).”

25. The Appellant further submitted that on 29th July 2020, the Appellant closed his defence, he was not afforded opportunity to make his final submissions or capture the same in its final judgement which resulted in his conviction and life imprisonment.

26. The Appellant submitted that a harsh penalty was imposed on him and yet the Court had a discretion to pass a more lenient sentence. That on 13th August 2012, he was convicted **under section 8 (1) and (3) of the Sexual Offences Act, of the offence of defilement of a minor** who was, on the date of the offence, aged 14 years.

27. Further, that the trial Court disregarded his mitigation and further failed to call for his criminal records from the prosecution which would have informed that the Appellant was a first-time offender and thus merited a lenient sentence.

28. He cited the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** (as cited in **Simon Kipkurui Kimori v Republic [2019] eKLR**), in which the Supreme Court of Kenya held that;

> “**Failure to individualize the circumstances of an offence or offender may result in the undesirable effect of ‘over punishing’ the convict.”**

29. He also relied on the High Court decision in **Simon Kipkurui Kimori v Republic [2019] eKLR,** in which the learned **Odunga. J,** while reiterating that the view of the Supreme Court with regard to mandatory sentence, held as follows:

> **“In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that: Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for Juvenile offenders**.”

30. The Appellant urged this Court to allow this appeal, set aside in its entirety the court's judgement and sentence in the Chief Magistrate’s Court at Molo, **Sexual Offence Case No. 6 of 2019** and he be acquitted of all the charges that were preferred against him.

SUBMISSIONS BY RESPONDENT

31. The state counsel **Ms. Rita Rotich** submitted that the Complainant was 14 years old at the time of the incident and the evidence of the Complainant was corroborated by the guardian PW2 and the investigating officer who produced in Court the birth certificate marked Pexh 1.

32. In respect to identification, she submitted that PW1 stated that she knew the Accused/Appellant as her teacher in class 7, 8 and taught her CRE and Sciences.

33. She submitted that PW1 stated that Accused/Appellant on several occasions called her to staff room and offered her money, bought her a school sweater and told her that he loved her. Further, that the guardian (PW2) stated that he often called the Accused/Appellant to confirm progress of complainant in school and he knew the accused as a teacher. In addition, PW3 stated that the accused was a teacher at [particulars withheld] Primary School and PW2 was a guardian to Complainant and identified Accused as **David Langat** a teacher to Complainant.

34. On the issue of penetration, she submitted that the Complainant testified that the accused took her to a lodging, defiled her and after a few months she became unwell and was later found to be pregnant. That PW3 the guardian to the minor noted the minor was sick and took her to hospital and found the minor to be pregnant after lab test. Further, that PW4 the clinician who examined the minor observed she had a broken hymen and pregnancy of 8 weeks, P3 was produced in Court as PEXB 2.

35. The state counsel finally submitted that at defence hearing, the Accused/Appellant stated that on the material night he was with the minor and during the day he had called her to pick result slip from him; and at defence hearing the Accused/Appellant person failed to raise sufficient alibi as he called DW2 who stated he didn't know the whereabouts of Accused/Appellant person on the material night.

36. She submitted further that the Accused/Appellant was given an opportunity to mitigate and he stated that he was 60 years old and bread winner and prayed for lenient sentence.

37. Further, that the Accused/Appellant was given statement, confirmed receipt on 10th April, 2019 and in the face of proceedings, he didn't raise any issue of lack of documents and submitted that the same was an afterthought and urged the Court to dismiss the appeal.

38. In a rejoinder **Mr. Bore** for the Appellant submitted that there was failure by prosecution to prove two critical ingredients being prove of penetration as it is alleged that the accused committed the offence on 29th December, 2018 and there was evidence tendered by medical officer PW4, who said he examined complainant on 11th January, 2019. He submitted that the period between 29th December, 2018 to 11th January, 2019 is 14 days; and there was no allegation by Complainant that she had engaged any sexual activity with Complainant prior to 29th December, 2018

39. He submitted that if the Complainant was 8 weeks pregnant on 11th January, 2019, then who impregnated her? and that therefore there was a serious doubt as to who committed the offence. He restated that Accused/Appellant asked for DNA to be conducted but trial Court in its own wisdom did not order that the same be conducted and there was a serious error for trial Court to establish that penetration was proved beyond reasonable doubt.

ANALYSIS AND DETERMINATION

40. This being the first Appellate Court I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do while aware of the fact that unlike the trial court, I never got an opportunity to take evidence first hand and observe the demeanor of witnesses. For this I give due allowance. The duty of the 1st Appellate Court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** which stated as follows:-

> **"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."**

41. In view of the above I have perused and considered evidence adduced before the trial court together with submissions herein. There is no doubt that three ingredients need to be proved beyond reasonable doubt in respect to the offence of defilement; the ingredients being age of the minor, penetration and identification of the assailant.

42. From evidence adduced I wish to consider the following issues: -

1) Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

2) Whether the sentence imposed is harsh and excessive.

(i) Whether ingredients for the offence of defilement were proved beyond reasonable doubt

(a)**AGE**

43. A birth certificate showing that the Complainant was born on 2nd January, 2005 was produced in Court as Exhibit 1. Authenticity of the birth certificate was not challenged; this therefore confirm that the girl was 14 years old at the time of the offence.

(b)PENETRATION

44. Penetration is defined under Section 2 of **Sexual Offences Act No. 3 of 2006** defines penetration as follows: -

> **"Partial or complete insertion of a genital organ of a person into the genital organ of another person."**

45. The medical report produced confirm that the Complainant was sexually active and the hymen was broken; she further stated that that she had engaged in sexual intercourse with the Accused several times before. From medical evidence therefore, there is no doubt that there is proof of penetration; this is further corroborated by the fact that the complainant the complainant was confirmed pregnant.

(c) IDENTIFICATION OF PERPETRATOR

46. Evidence adduced before the trial court show that the Appellant was not a stranger to the Complainant and her guardians. The Complainant PW1 identified Accused as her teacher in class 7, 8 and had taught her CRE and Sciences. The guardian, PW2 stated that he often called Accused/Appellant to confirm progress of Complainant in school and he knew Accused/Appellant as a teacher; PW3 said the accused was a teacher at [particulars withheld] Primary School and PW2 was a guardian to complainant, she identified the accused as **David Langat** Complainant's teacher.

47. Further to the above, the Accused person confirmed that he was with Complainant on 28th December, 2018 and he helped her to print her result slip at a cyber at Keringet; that a day before the Complainant was defiled on 29th December, 2019. The Appellant failed to prove defence of *alibi* in respect to the date the incident is alleged to have occurred as the witness who he called could not confirm his whereabouts on that material date. In view of the above, there is no doubt that the Appellant was positively identified as the person who defiled the Complainant.

48. In respect to DNA issue raised by defence, **Section 36(1) of the Sexual Offences Act, 2006** provides as follows: -

> **"Evidence of medical, forensic and scientific nature Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

49. Further the Court of Appeal siting in Malindi in the case of **Robert Mutingi Muumbi V Republic [2015] eKLR** where the Court of Appeal stated as follows:

> **"Section 36(1) of the Act empowers Courts to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not couched in mandatory terms." Decisions of this Court abound which affirm the principle that Medical or DNA evidence are not the only evidence of which commission of a Sexual offence may be proved. "**

50. From the foregoing, it is clear that **section 36(1) of the Sexual Offences Act** is not couched in mandatory terms and the Court cannot be compelled to direct DNA analysis if there is sufficient independent evidence linking the accused to the offence.

51. As to whether the Appellant was accorded opportunity to prepare for defence, I note ruling for case to answer was delivered on 12th December, 2020 and the defence hearing was on 6th July, 2020 this approximately 5 months apart which in my view is sufficient time to prepare his defence.

52.. Further, contrary to the Appellant's contention that the trial court did not consider his mitigation before passing the sentence, the Court record demonstrates that the trial court not only considered the Appellant's mitigation but also the fact that he was a first offender.

(ii)**Whether the sentence imposed was harsh and excessive.**

53. Appellant was sentenced under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006** which provides for to a mandatory minimum sentence of 20 years, which is what he was sentenced by the trial court.

54. I note by the Supreme Court in **Petition No.115 &16 (consolidated) of 2015 Francis Karioko Muruatetu & Another Vs Republic** has today the 6th day of July 2021 given clear directions to the effect that decision in **Muruatetu** in respect to mandatory sentences is applicable to murder cases only. In view of the above, I find that the sentence imposed is legal and will not disturb.

55. **FINAL ORDERS**

1) **Appeal on conviction and sentence is hereby dismissed.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 7TH DAY OF JULY, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Mr. Bore for appellant