**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 38 OF 2018**

**OL.....APPELANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence in Kakuma Senior Resident Magistrates Court Criminal*

*Case No. SO 1 of 2017)*

**JUDGEMENT**

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 2018 the particulars of which were that on 9th January, 2018 at [particulars withheld] in Turkana West Sub-county within Turkana County intentionally caused his penis to penetrate the vagina of OA a child aged 12 years.

2. He faced an alternative charge of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

3. He pleaded not guilty to the said charges, was tried, convicted and sentenced to serve 30 years' imprisonment on the count of defilement.

4. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal: -

a. The trial court erred in law and fact in convicting the appellant without the production of the medical report.

b. The proceedings were not translated to him in the language which he understood, thereby violating his right to fair trial under the provisions of Article 50 (e) of the Constitution, including the right to be given adequate time to prepare for his defence

c. The age of the complainant was not proved.

d. The prosecution case was full of contradictions and hearsay evidence.

**SUBMISSIONS**

5. Directions were given that the appeal be heard by way of written submissions. On behalf of the appellant, it was submitted that the matter should be referred back for re-trial, under the provisions of Section 200(4) of the Criminal Procedure Code for the reason that the interpreters availed were not conversant with his Lotuko language.

6. It was submitted further that he was occasioned injustice since the interpreter availed was not conversant with the lyrics of Lotuko dialect and that he was further denied witness statements. He further contended that he was not availed the use of sign language as he is partially deaf and stammers.

7. It was submitted that he was assaulted at Kakuma Police station upon his arrest and that he had not fully recovered as at the time of trial and therefore could not effectively cross examine the witnesses. He contended further that by reason of his inability to understand the proceedings, the conviction and sentence should be quashed and set aside and the matter referred for re-trial under the provisions of Section 200(4) of CPC.

8. On behalf of the Respondent it was submitted that the case against the Appellant was proved to the required standard. It was the Respondent's case that penetration was established through the medical report from IRC General Hospital as corroborated through the evidence of PW1, Whose age was ascertained through age assessment report. It was submitted that the Appellant was properly identified

through the aid of light from a torch (spotlight).

9. On the ground of violation of his right to fair trial, it was submitted that there was no miscarriage of justice during the trial and that the court ensured that the plea was taken in a language which the appellant understood, with the whole trial being conducted in the presence of the same interpreter in a language he understood. It was contended that the Appellant chose to remain silent and await the judgment of the court, when given a choice to put up a defence.

10. It was submitted that the evidence tendered was sufficient to sustain a conviction based on the provisions of Section 124 of the Evidence Act, the evidence of the complainant (PW1) was enough to prove the offence as charged. I support thereof, the following cases were submitted: -

**a. BENJAMIN MBUGUA GITAU v REPUBLIC [2011] eKLR** to the effect that there is no particular number of witnesses who are required for proof of any facts.

**b. MOHAMED v REPUBLIC [2006] 2KLR 138** to the effect that there is no requirement of corroboration when the victim of sexual offence is a child of tender years if it is satisfied that the child is truthful.

**c. JWA v Republic [2014] eKLR** under section 124 of Evidence Act - corroboration is not mandatory for a charge of sexual offence.

11. On the ground of contradiction of prosecution witnesses it was submitted that the appellant did not point out any specific contradiction that minor discrepancies were inconsequential and immaterial.

12. On the prayer for re-trial, it was submitted that principles upon which the court can order a re-trial were well settled by the Court of Appeal in **AHMED SYMAR v REPUBLIC [1964] EARL 483** to only when the original trial was illegal or defective. This position was restated in the case of **OPICHO v REPUBLIC [2009] KLR 369.** It was therefore submitted that the appeal lacked merit.

**PROCEEDINGS BEFORE THE TRIAL COURT**

13. This being a first appeal the court is under a duty to re-evaluate the proceedings before the trial court to come to its own conclusion thereon, through giving an allowance that unlike the trial court it did not have the advantage of seeing and hearing witnesses, as was stated in the case of **OKENO v REPUBLIC [1972] EA.**

14. **PW1 AL** a minor which was found to be capable of tendering sworn evidence, stated that she was 12 years old, a pupil in class two at [particulars withheld] primary school. She testified that the appellant's house was near to theirs and that he had two wives. He had asked one of his wives to go away then called the complainant to take to him some water to drink and when she did so, he grabbed her by head and dragged her into the house where he was alone, he then removed her underwear and put his penis inside her vagina, she felt pain and a lot of blood came out of her vagina.

15. It was her evidence that the Appellant thereafter let her to go and she started to cry, attracting the attention of a lady called Kulan, who went to look for the appellant and found he had left the house. She was thereafter taken to the hospital for examination, where she was admitted for six days, it was her evidence that she was able to see the appellant through the aid of the light from the torch.

**16. PW2 TI** the mother of the complainant stated that she was called by a lady known as **LOREA AMELIA,** who informed her that PW1 had been defiled by O. The following morning, she found the complainant at the hospital where the doctor had stitched her raptured vagina. She then told her that the Appellant had lured her into taking water to her in his room before turning against hers. She stated that the Appellant was married to her sister.

**17. PW3 MG** a sister of (PW2) stated the one **AMELIA KUNYANG** went to her house and informed her that the appellant had defiled her sister's daughter. She went to the Appellant's house and found the complainant who had defected in the house and there was blood in the room. She was able to see the Appellant using light from a torch and the complainant who was lying helpless on the ground mentioned the name "O"

18. **PW4 CALLEN ONDARI** police woman was assigned the case against the appellant who had been booked in by the night guard Officers and established that neighbour to the complainant, staying in the same compound. On the night of 9th January, 2018, the complainant's mother had visited a relative at Kalobeyee leaving her alone, when the Appellant called her by name and asked her to take to him some drinking water in a jug inside his house, before grabbing her and defiling her. He then left the house and ran away. He was later on found hiding in his mother's house, with his trouser full of blood stains. He produced in evidence the age assessment report and P3 form on the complainant.

19. **PW5 GRACE WANJIKU WAINAINA** produced P3 form on behalf of Dr. Obala and confirmed that the victim was dressed in blood stained school uniform. It was confirmed that there were perennial first degree pennial tear, deep laceration about 8 cm on the left lateral vagina wall, perforation on the vagina wall and as a result of the examination considered that there was forceful vaginal penetration. The age of the victim was assessed to be 12 years.

20. When put on his defence, the appellant states that he chooses to remain silent and await for court's verdict.

**DETERMINATION**

21. From the proceedings herein, the record of appeal and the submissions, I have identified the following issues for determination: -

a. Whether the proceedings were conducted in a language which the appellant understood.

b. Whether the appellant has made out a case for re-trial.

c. Whether the prosecution case against the appellant was proved to the required degree.

***Whether the proceedings were conducted in a language which the appellant understood.***

22. From the record of the proceedings herein, the appellant first appeared in court on 16/1/2018 when the court made the following orders

"Court: Given that the accused person is a Sudanese, Plea is hereby deferred to 24/1/2018.

24/1/2018:

State Counsel: Matter is for plea but accused understands only Lotuko language.

COURT: plea differed to 25/1/2018 due to lack of Lotuko interpreter, RCK to endeavor to avail a Lotuko interpreter.

25/1/2018

State Counsel: Matter is for plea. The Lotuko Interpreter is under oath already.

COURT: Plea deferred to 31/1/2018 to enable the accused think it over because he wants to admit to the charge yet they are serious in nature.

31/3/2018

Lotuko interpreter male adult duly sworn in English to interpret the truth.

Charges read to the accused in Lotukio the language he understands, translated in English to which he replies

Main charge: It is not true.

Alternative charge: It is not true.

COURT: Plea of not guilty entered in both the main and alternative charge against the accused."

23. When the matter was set down for hearing on 5/7/2018, the court record shows that a Lotuko interpreter was duly sworn and the Appellant opted not to ask any question in cross examination to the witnesses. From the record of the proceedings, there is no evidence that the appellant complained that he could not understand the proceedings, as I have noted that on 5/6/2018, the same complained to the trial court that he had been beaten upon and his chest was bad from which the court made an order that he be taken to the hospital. if he did not understand the language as he now alleges the same should have raised it with the court.

24. It is therefore clear to my mind that the appellant understood the nature of the proceedings and fully participated thereon and therefore his submission to the effect that the did not understand the language of the interpreter is of no merit and was an afterthought upon being convicted.

***Whether the appellant had made out a case for re-trial.***

25. In the case of **OPICHO v REPUBLIC (2009) KLR 309**, the Court of Appeal stated the general principles upon which the court may order a re-trial as follows: -

***"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial h0ould be ordered. Each case must depend on its own acts and |circumstances and an order of re-trial should only be made where the interest of justice requires it."***

26. The Court in **PHN v REPUBLIC [2016] eKLR** quoted with approval Khamoni J in **LABAN KIMONDO KARANJA v REPUBLIC** as: -

***"Discussing the grounds for ordering a re-trial – Reviewed several Court of Appeal decisions on the subject and concluded as follows: -***

***"At the end- the principle an appellate court should apply in determining whether to order a re-trial are as follows: -***

***i. A retrial maybe ordered only when the original trial was illegal or defective.***

***ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice requires it and where it is not likely to cause an injustice to an accused person.***

***iii. A retrial should not be ordered unless the appellant court is of the opinion that on a proper consideration of admissible evidence or potentially admissible evidence conviction might result." (Emphasis added)***

27. In this case the only reason for seeking re-trial is that the appellant did not understand the proceedings but as stated herein the record is clear that he had the aid of an interpreter and fully participated in the trial but opted not to cross examined the witnesses. To order a re-trial at this stage is be akin to give the Appellant a second bite at the Cherry pie which will not be in the best interest of justice as no prejudice was suffered by the same during the trial. I have further taken into account that this was a sexual offence and to subject the complainant to a second trial will be akin to opening old wounds.

***Whether the prosecution case was proved to the required degree***

28. From the record of the proceedings, it is clear to my mind that the Appellant was afforded fair trial which is the main object of the criminal proceedings and having exercised his constitutional right to remain silent the same cannot now be heard to say that he want retrial knowing very well that the prosecution witnesses are not available having been relocated through the UNHCR programme.

29. From the evidence tendered before the trial court, it is clear that penetration was proved through the evidence of PW1 the minor, PW2 her mother, PW3 her aunt, PW4 the investigating officer and PW5 the medical officer through the P.3 form. The age of the complainant was further proved through her evidence and the age assessment report. The Appellant was positively identified through recognition. PW9, knew him as O. She knew that he had two wives and he was an uncle having married the sister of the complainant mother.

30. The appellant was further placed at the scene through the evidence of PW3 MG and the said evidence was corroborated by PW4 who stated that when he was arrested, his trouser was found full of blood stains which confirmed that he indeed defiled the complainant.

31. I am therefore satisfied that the Appellant's conviction was safe and free from error and hereby dismiss his appeal on conviction.

32. On sentence, the Appellant court will only interfere with the sentence of the trial court as was stated in the case of **AHAMAD ABOLFATHI MOHAMMED & ANOTHER v REPUBLIC [2018] eKLR.**

***"As a principle this court will normally not interfere with the exercise of discretion by the Court appealed from unless it is demonstrated that the court acted on wrong principles, ignored material actors took not account, irrelevant consideration or on the whole that the sentence is manifestly excessive."***

In **BERNARD KIMANI GACHERU v REPUBLIC CR. APPEAL NO. 188 OF 2000** this court stated thus: -

***"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 sentence unless, that sentence is manifestly excessive in the circumstances of the case or 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 hereby that the Appellant court might itself not have passed that sentence, these alone are not sufficient grounds from interfering with the discretion of the trial court on sentence unless any one of the matter already stated is shown to exist."***

33. I agree with the stated principle of law and have nothing more useful to say thereon save that sentencing remains at the discretion of the trial court guided by the law, judicial pronouncements and the judiciary sentencing policy guidelines.

34. In sentencing the appellant, the trial court has this to say: -

***"Although he is a first offender, the offence against him is serious in nature and the victim herein is a child of tender age who is under protection of the law. The victim herein suffered serious injuries as a result of the inhumane acts done on her by the accused herein. The injuries were assessed as grievous. Her cervix was completely destroyed. That may impact negative on life as a woman in future as she is likely to be rendered barren. If this happens she is likely to suffer scour and ridicule from the society, all just because of the accused's thoughtless acts. Her life will never be the same again and she will suffer trauma due to the painful acts done on her by accused."***

35. The offence herein under Section 8(3) of the Sexual Offences Act, attracts an imprisonment for a term of not less than twenty years. The Appellant was sentenced to a term of thirty (30) years which was within the court's discretion.

36. I have taken into account the age of the complainant which was twelve at the time. The fact that she was related to the Appellant who was married to her Aunt and the breach of trust and arising out of the said relationship and further the fact that the Appellant sent one of his wives

away so as to have an opportunity to commit the act, and the fact that he was married to two women at the time and therefore could not have been starved of sex. I have further noted the damage caused to the complainant as captured by the trial court, and is satisfied that the sentence was not excessive in the circumstances.

37. In the final analysis, I find no merit on the Appeal herein both on conviction and sentence which I hereby dismiss and affirm the convict and sentence by the lower court.

38. The appellant is entitled to right of appeal on both sentence and conviction and it is ordered.

**SIGNED, DATED AND DELIVERED AT LODWAR THIS 7TH DAY OF JULY, 2021**

**……**

**J. WAKIAGA**

**JUDGE**