REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. 11 OF 2020

PATRICK MUGAMBI GISURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment dated 12th February,2020 by Hon. P. N. Maina,

Senior Principal Magistrate at Marimanti SPM's S.O. No. 8 of 2019).

J U D G M E N T

INTRODUCTION

1. **Patrick Mugambi** the appellant herein, was charged with the offence of defilement contrary to **section 8(1) (4) of the Sexual Offences Act No.3 of 2006**.The particulars were that the appellant on the month of October,2018 at [particulars withheld] area in Imenti South within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of LK a child aged 16 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**. And further, that the accused person on the same date, place and time as above intentionally caused his penis to touch the vagina of LK a child aged 16 years.

3. He denied the charges and the case proceeded to full hearing after which he was found guilty, convicted and sentenced to 15 years' imprisonment.

The appellant and filed or petition dated 24/2/2020 which was later amended and raises the following grounds:-

i. **THAT** the appellant does not dispute conviction of the trial court.

ii. **THAT** the learned trial magistrate erred in law and fact by failing to invoke Muruatetu case during sentencing in this instant matter and prefer a definite sentence to the appellant.

iii. **THAT** may this court be duty bound to put into consideration the appellant's mitigations and review the sentence.

iv. **THAT** the sentence is harsh in the circumstances of this case.

4. On the 30th.07.2020, the appeal was admitted to hearing **Section 352 of the Criminal Procedure Code.**

5. On the 22nd.10.2020, the matter came up before the court for direction and the court directed that the appeal be disposed off by way of written submissions.

6. On the 20th.05.2021, both parties confirmed compliance and a judgment date was fixed.

The Brief Facts of the Case:

The complainant LK (PW1) is a child who was aged sixteen (16) years old at the time the offence was committed. She was born on

27/7/2002 as per the birth certificate. She testified that she was a student in class eight (8) but left school due to pregnancy. She told the court that some times in 2016 and 2017 she was living with her grandmother one M where the appellant in this case also used to live.

7. It was the appellant testimony that sometimes in the year 2017 the appellant started befriending by giving her money and requesting her for sex. She told the court that she refused the money and the advances by the appellant as she was in school but the appellant told her he would marry her.

8. Sometimes in the month of October, the complainant went to pick clothes from a cloth line at her grandmother's compound and when she finished she met the appellant. The appellant who had been in the compound went and grabbed her by the hand and led her to his house. The appellant locked her inside the house and threatened to kill her if she screamed or told anyone. The appellant gagged her mouth then had sex with her for about thirty minutes. She did not report the incident to anyone due to the threats by the appellant.

9. Later in January 2019 when she returned to school pregnancy test was done to all the girls and she was found to be pregnant. Her parents were summoned and when they went, she told them what the appellant had done to her.

10. The matter was reported to the police at Tunyai Police Post and she was referred to Tunyai Hospital where further tests were done. Later on 27/3/2019 she gave birth to a baby girl at Consolata Mission Hospital Nkubu.

11. The report of the complainant's pregnancy was reported to the Chief of Tunyai Location vide a letter addressed to him by the head teacher of the Primary School where the complaint was schooling. The letter stated that one of the pupils, LK was pregnant and the person responsible was the appellant in this case. The Chief Julius Mburio (PW3) proceeded to the home of the appellant and he was identified by the are Assistant Chief. PW3 arrested the appellant and took him to Tunyai Police Post. The complainant was summoned to the Police Post. She identified the appellant as the perpetrator. The complainant was escorted to Tunyai Hospital where a pregnancy test was done and it was confirmed that she was pregnant by David Nyaga a Clinical Officer at Marimanti Level 4 Hospital who produced a P3 form and treatment notes in court as exhibit 2 and 5. A D.N.A test was done on the complaint's child and it confirmed that the appellant was the biological father of the child. The report was produced as exhibits 8.

12. The appellant was then charged with this offence.

13. The appellant gave a sworn defence and stated that he was framed.

SUMMARY OF THE EVIDENCE

The court conducted a *voir dire* examination for the complainant whereupon the court satisfied itself that the complainant who was a child aged sixteen (16) years knew the value of telling the truth and equally appreciated the solemnity of the occasion; however, she knew not the value of an oath and so she gave an unsworn evidence.

PW1, the complainant herein narrated that it was sometimes in the year 2018 while she was living with her grandmother who had also housed the appellant herein; that the appellant grabbed her and had a sexual intercourse with her for a period running into thirty minutes or so. Thereafter, the appellant threatened to kill her if she screamed or told anyone about it. That upon returning to school sometime in January,2019, a random pregnancy test was done at school and the complainant was found pregnant. Her parents were summoned to school after which; she was then taken to Tunyai Police Post to report and thereafter escorted to the hospital for further checkups. That on the 27th.03.2019, she gave birth to a baby girl at Consolata Mission Hospital.

14. PW2, JMG, PW1's mother narrated to court how she was summoned by the Deputy Head teacher at (name withheld) Primary School in regard to a random pregnancy test that had been carried out at school which showed that PW1 was pregnant. That she confronted PW1 who refused to tell her the person responsible for her pregnancy but later received a call from the area chief who gave her the appellant's name and thereafter, she was advised to visit Tunyai Police Post. Upon visiting the police post, she found PW1 together with the appellant and further to that, she did sweet talk PW1 who told her that the appellant was responsible for her pregnancy.

15. PW3, Julius Mburio, the Senior Chief Tunyai location, stated before court that, on the 29th.01.2019, the head teacher (name withheld) Primary School came to his office and handed him a letter. The letter was equally produced before court as Exhibit– 6. In the letter, the head teacher had reported that the appellant had defiled PW1.He thereafter, proceeded to the appellant's home whereupon the appellant was arrested and then taken to Tunyai Police Post.

16. PW4, No.2013038038 APC Moses Kiprono informed court that he is stationed at the Tunyai AP Post and that on the 25th.01.2019 – while on duty - at about 5.00 a.m., he was requested to go assist in arresting a defilement suspect. They arrested the appellant herein and then went and picked PW1 from the school and took her to Tunyai AP Post where she identified the appellant as the one who had defiled her.

17. PW5, No. 105523 Police Constable Alice Waithera –the Investigation officer - from Tunyai Police Post informed court that, on the 25th.01.2019, while on duty, PW3 and PW4 brought the appellant and PW1 to the Police Post. They reported that the appellant had impregnated PW1 who was a minor. She thereafter booked the appellant and PW1 and then later escorted PW1 to Tunyai Hospital to verify the report upon examination, it was confirmed that PW1 was indeed pregnant. She further interviewed PW1 who informed her that it is the appellant who had defiled and further threatened her with *dire* consequences if she told anyone. She then charged the appellant with the offence of defilement.

18. PW6, David Nyaga, a clinical Officer at Marimanti Level 4 Hospital who produced the P3 and Treatment notes on behalf of Lilian Wahu who was on maternity leave. He informed court that indeed PW1 was treated at Marimanti Level 4 Hospital and the results turned out that she was in fact pregnant at 28 weeks pregnant and that this was evidence that there was penetration.

19. On the 11th.09.2019, the prosecutor sought leave to recall PW5 to come and produce the D.N.A. report which was ready. The appellant as appears from the record had consented to have a blood sample taken for D.N.A profiling and did not oppose the production of the report.

20. On the 28th.10.2019, PW5 produced the D.N.A. report dated 04th.06.2019 which was signed by Okworo E.K, a Government Analyst. The report did show that the D.N.A. profiles generated from the samples showed 99.99+ % that the appellant was the father of PW1's child.

21. The court gave its ruling on 13th.11.2019 and found that the appellant had a case to answer. The appellant was then called upon to give his defence in compliance with Section **211 of the Criminal Procedure Code**.

DEFENSE EVIDENCE

The appellant gave a sworn defence and stated that he lives in Kathwana and that he is a farmer. He further told the court that he was framed and that he did not father PW1's baby.

JUDGEMENT

In his judgement, the Learned Trial Magistrate found that the age of the complainant was proved with the production of her birth certificate showing that she was 16 years old at the time the offence was committed. As regards penetration, it was the Court's finding that from the evidence of the complainant, the medical examination documents and of course the fact of pregnancy it was proved that the complainant was sexually assaulted. The trial magistrate held that penetration was proved as required under the Act.

The Court proceeded to hold the prosecution had proved the charge of defilement against the appellant beyond any reasonable doubt and found the appellant guilty of the offence of defilement contrary to **section 8(1) (3) of the Sexual Offences Act No.3 of 2006**. The trial magistrate proceeded and sentenced the appellant to imprisonment for fifteen years.

APELLANT'S SUBMISSIONS

It was submitted by the appellant that he does not dispute his conviction as held by the trial court. He submitted that the sentence awarded by the trial court was very harsh in relation to the circumstances of the case.

That in sentencing him, the court did not guide itself in relation to the Supreme Court of Kenya's finding of the case of **Francis Karioko Muruateteu and Another v Republic eKLR [2017}.**

He thus urged the court to put into consideration his mitigations and then if possible, review his sentence.

The appellant relied on the case of **Evans Wanjala Wanyonyi v Republic; Gideon Majau Gitire alias Kombo Meru CR Appeal No.131 of 2018;Mithu v State of Punjab CR Appeal No. 745 of 1980;Eversly Thompson v St. Vincent Communication No.806/1998 U.N. Doc.**

Reasons wherefore the appellant prays for a punishment that is appropriate.

RESPONDENT'S SUBMISSIONS

The respondent in opposing the appeal submitted that the charge against the appellant was proved beyond any reasonable doubt

It was the respondent's submission that the court did consider the mitigation by the appellant. While passing the sentence. That the trial magistrate found that the appellant was not remorseful and deserved the punishment meted out.

It was the respondent's submission that the court did consider the time spent by the appellant in remand/prison. That the trial magistrate stated that he took period into account. He however concedes that, it ought to be deducted from the sentence meted out.

The appellant has not challenged the conviction by the trial magistrate. The issue for determination is whether this court should interfere with the sentence meted out by the trial magistrate.

ANALYSIS AND DETERMINATION

This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I however note that the appellant was satisfied with the conviction and I need not make a determination on the evidence. I must however state that I have analyzed and evaluated the evidence tendered before the trial court and I am satisfied that the conviction was safe.

In the case of **Wanjema vs Republic (1971) EA 493** the court laid down the general principles upon which the first appellate court may act when dealing with an appeal on sentence. An appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

Similarly, the court in ***R vs Dhlumayo & Another*** **1948 (2) SA 677 (A)** made a similar holding. The principle was also restated in ***S v***

Mlumbi **1991 (1) SACR 235(SCA) at 247g** that, an appellate court will not interfere with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law. These principles are well established as the ones which the court has to take into consideration when dealing with an appeal on the sentence.

However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

The contention by the appellant is that the trial magistrate erred in both matters of law and fact by failing to invoke the now famous **Muruatetu's case** in sentencing.

Section 8(1) (4) of the Sexual Offences Act provides:

> ***1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

The Act therefore prescribes a Statutory minimum sentence for the offence. The Court of Appeal has in various decision considered the legality of the minimum mandatory sentences under the Sexual Offences Act. See ***Christopher Ochieng- v- Republic (2018) eKLR, Kisumu Criminal Appeal No. 202/2011 and Jared Koita Injiri -v- Republic Kisumu Criminal Appeal No.93/2014.***

The Court of Appeal stated that pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & Another -v- Republic Petition 16/2015**. If the reasoning is applied, the sentence stipulated by **section 8(1)** of the **Sexual Offences Act** which is a mandatory minimum, it too should be considered unconstitutional on the same basis. The reasoning for the holding by the Supreme Court and the Court of Appeal is that the mandatory minimum or maximum sentence deprives the court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence fails to confirm to the tenants of fair trial which an in-alienable right provided under **Article 50 of Article 25 of the Constitution.**

The appellate court is therefore bound to consider and re-examine the sentence by the trial magistrate and determine whether he or she exercised discretion in sentencing. This in the light of the legislative position that offences of defilement are serious and merit stiff sentences and there has to be a good reason to depart from sentence prescribed.

In **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

> **"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.**
>
> **On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."**

Section 8(3) of the Sexual Offences Act provides for a minimum sentence of fifteen (15) years imprisonment for any person convicted of defiling a child aged between sixteen (16) and eighteen (18) years.

It follows that proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the sentence to be imposed on conviction (*see Gilbert Miriti K Vs. R [2013] eKLR*.

The appellant has urged this court to exercise its discretion and review the sentence awarded by the trial court.

It is not lost to the court that the appellant herein is a grown up man aged 51 but at the commission of the offence, was 49 whilst the complainant was a 16-year-old whom he not only threatened while defiling but also impregnated.

The trial court at page 41, of the record from Line No.4 states as follows:-

> ''I take into account the nature and circumstances of the offence plus the accused's mien and demeanour. I also take into account the accused's mitigation.'' The court proceeds to note that,
>
> ''Accused is not remorseful. I also take into account the period accused has been in remand….''

In **Joseph Muerithi Kanyita v Republic [2017] eKLR** where the Court of Appeal stated:

> "In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It

> has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low….

In the instant matter, I am convinced that the court did address itself to the issues currently raised by the appellant and the same were equally determined.

In my view it would be indeed an unfortunate exercise to reason that other punishments save for the minimum 15 years imprisonment - as enunciated in the Sexual Offences Act - escaped the mind of the trial court. The trial magistrate never indicated that her hands were tied by the minimum sentence. He properly exercised his discretion in sentencing.

I am inclined to believe that the case at hand, given the nature and circumstances of the offence, the sentence meted against the appellant is neither harsh nor excessive.

The victim of the appellant's heinous conduct was only 16 years old and from the trauma she underwent, the sentence prescribed for the offence does match the crime. Not only did the appellant defile her under threats but also ended up impregnating her.

In the circumstances, I am of the considered view that the sentence of 15 years imprisonment which is the bare minimum under **Section 8(4) of the Sexual Offences Act**, though seen as punitive and excessive from an eye of the appellant, is a legal and valid sentence for the offence.

The sentence in my humble view is commensurate to the criminal/moral blameworthiness of the appellant herein.

Accordingly, I find no merit in this appeal.

But on the flipside, the sentence ought to run from the time the appellant was remanded in custody. The record shows that he was in custody for one year and one month. The sentence shall therefore be reduced by one year and one month. The appeal is dismissed for lack of merits.

Dated, signed and delivered at Chuka this 5th day of July 2021.

L. W. GITARI

JUDGE

5/7/2021

The Judgment has been read out through virtual proceedings with appellant present from Meru G. K. Prison.

L.W. GITARI

JUDGE

5/7/2021