REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 63 OF 2017

STEPHEN NGURUKU WAGACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of A. N. Ogonda, Resident Magistrate,

in S.O. No. 788 of 2015 at Kigumo dated 25th July 2017]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1) of the **Sexual Offences Act**. He was imprisoned for *life*.

2. The particulars were that on 24th May 2015 at *[particulars withheld]* within Murang'a County, he intentionally caused his penis to penetrate the vagina of J.M.W *[particulars withheld]* a child aged *nine* years.

3. The appellant first lodged his petition of appeal in person on 12th September 2017 raising seven main grounds. On 7th May 2018 leave was granted to his counsel, *Kwew Advocates LLP*, to amend the grounds of appeal. Further leave to amend was given on 18th February 2020. The Further Amended Petition was filed on 20th February 2020.

4. There are 13 fresh grounds of appeal. The draftsmanship is inelegant resulting in overlapping and repetitive grounds. The grounds can be condensed into five: Firstly, that the evidence of the complainant was tainted and unreliable; secondly that the trial court erred by admitting medical records without calling the maker; thirdly, that the evidence of the prosecution witnesses was contradictory or inconsistent; fourthly, that the sentence was draconian; and, fifthly, that the trial court was biased and denied the appellant his right to a fair trial as decreed by Article 50 of the **Constitution**.

5. In a synopsis, the appellant contends that the key elements of the charge were not proved beyond reasonable doubt.

6. The appeal is opposed by the Republic.

7. Learned counsel for the appellant filed detailed submissions on 25th August 2020 with a list of authorities. On 3rd May 2021, I heard brief arguments from counsel for the appellant and that for the Republic.

8. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.

9. The complainant (PW1) said she could not tell her birthday. But from the evidence of PW3 and the Child Health Card (exhibit 3), I find that the complainant was born on 16th November 2008. I am thus satisfied that at the time of the offence, she was about seven years old. The point to be made is that she was a child of below 11 years.

10. The trial court conducted a *voir dire* examination. The questions posed are not recorded but there are sufficient answers which made the learned trial magistrate to conclude that the minor understood the duty to tell the truth but did not comprehend the nature of an oath. PW1 thus made an *unsworn* statement. I am satisfied that the trial court substantially complied with the procedure of taking the evidence of the minor. ***Johnson Muiruri v Republic*** [1983] KLR 445.

10. I am also satisfied that the complainant knew the appellant whom she identified as *"the husband to Wa Chris"*. She used to visit his house in G. *[particulars withheld]* frequently to greet *Wa Chris* but she "*just got to know [the appellant] the other day"*. She said that on the material date, *Wa Chris* went out to the shops and left her with the appellant. The appellant undressed and also removed the complainant's clothes. He placed her on a bed and had sex with her twice. She said that the appellant *"put his thing that he uses to urinate"* into her vagina. PW1 said that she felt a lot of pain and raised an alarm. That is when the appellant stopped and asked her to go home in the company of her brother, J.K.K *[particulars withheld]*.

11. The complainant eventually disclosed the matter to her grandmother (PW2). She examined her privates. She told her and her grandfather (PW3) that it was the appellant who defiled her. The two took her to the police station and the hospital.

12. PW2 said that on 24th May 2015, she saw a whitish fluid in the complainant's vagina. She washed the complainant's soiled panties and clothes. When she questioned the complainant, she answered that she was defiled by *"Baba Alice"* in his bed. She told the court that *"Baba Alice"* was the appellant and she had seen him for about a year on the road when going to work. She testified that PW1 identified the appellant as they were going to M. *[particulars withheld]* Shopping Centre.

13. The defilement took place in the daylight. The complainant knew the appellant. I thus readily find from the evidence of PW1 and PW2 that the appellant was positively identified. This was evidence of *recognition*; far more reliable than simple identification. ***Wamunga v Republic*** [1989] KLR 424, ***Maitanyi v Republic*** [1986] KLR 198 at 201.

14. In cross examination, PW2 denied the suggestion that the complainant was defiled by her grandchild, J.K.K. *[particulars withheld]*. One of the grounds in this appeal is that the trial court erred by not following up on that lead. But it is not lost on me that at no time did the complainant say J.K.K. defiled her. PW2 acknowledged there were such rumours in the village. At best, it would create doubt about the culpability of the appellant. But as I shall discuss further, the evidence against him was overwhelming.

15. From the evidence of PW3 however, the child had difficulties going to the toilet on 24th May 2015. When the complaint persisted the following morning, she asked PW2 to look into the matter. That is when they discovered she had been defiled. I agree with the appellant that there are discrepancies on the dates as between PW2 and PW3, but I do not find it material. I say so in view of the evidence of PW5 and PW6. As stated by the Court of Appeal, in any trial there are bound to be such discrepancies. ***Joseph Maina Mwangi v Republic***, Criminal Appeal No. 73 of 1993.

16. I will now turn to the medical evidence. PW4, Charles Kimotho, is a clinical officer. On 23rd March 2016, the defence objected to the production of the P3 Form and other documents that had been made by his colleague. He was stood down. PW5, James Karuga, the clinical officer who examined the complainant then took to the stand on 30th August 2016. He is the one who prepared the P3 Form. It is thus not entirely true as urged by the appellant that the trial court relied on secondary medical evidence. However, there were some medical notes in exhibit 2 that were made by other persons including Dr. Karungaru who never testified.

17. The material part of PW5's evidence is that the *"genital injuries were three days old and probably caused by a body organ"*. He also saw a bruise on her mons when he conducted another genital examination on 27th May 2015. In the P3 Form he indicated that the hymen was broken and hyperemic. There was presence of pus and epithelial cells which demonstrated a *"penetrative act"*.

18. Section 2 of the **Sexual Offences Act** defines *penetration* as *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*. I find that on the totality of the evidence of PW1, PW2 and PW5 the appellant penetrated the vagina of PW1.

19. I have then juxtaposed that evidence against his defence. The appellant (DW1) admitted that the complainant visited his house at the material time. He said-

> *[PW1] stayed with my family for that week then she went back to school. I left 4 children and my wife at the house when I left at 3:00 pm to go to K. [particulars withheld] Shopping Centre on 24/5/15. There was no man within the compound when I left home that day. I am a member of the Catholic Men Association…..*

20. One of his witnesses, DW5, confirmed that she and her daughter walked together with the appellant to the said shopping centre at 2:45 p.m. They then parted ways. She saw the appellant again at about 6:00 p.m. She admitted in cross examination that she could not account for the appellant's movements between that period. Another witness for the appellant, DW6, confirmed that he saw the appellant at the shopping centre at 4:00 p.m and they stayed together until 6:15 p.m.

21. The last witness for the defence was Francis Njoroge. He claimed that on 27th May 2015, the complainant was escorted to the shops by the appellant's wife and asked to repeat her allegations. It is instructive that at that time, the appellant had been arrested and was in police custody. The witness claimed that the complainant said *"it is not Nguruku [appellant] who had slept with me. It was J.K. [particulars withheld]"*

22. The appellant's wife (DW2) confirmed that she never left the house on 24th May 2015 as she was sick. She said that PW1 visited them and went out to play with other children and that the appellant did not defile her. She said PW1 left between 5:00 and 6:00 p.m. in the company of her brother J.K.

23. DW3, a cousin of the complainant said they were together at the appellant's house from 12:30 p.m. to about 4:00 p.m. and left the complainant playing with other children in an incomplete building in the compound. DW4's evidence was largely along the same lines.

24. Counsel for the appellant submitted that the trial court disregarded the defence by the appellant and the evidence of the appellant's seven

witnesses. But the totality of all that evidence was trying to paint a picture that the appellant did not have an opportunity to defile the complainant. But it masks the fact the appellant and complainant were at his home from 1:00 p.m. until he left for the shopping centre well after 2:30 p.m. It is true there were other people in the compound including his wife. But she was unwell. From the evidence of PW1, PW2 and PW5, I have no doubt that the appellant had a clear opportunity and defiled the complainant.

25. I am unable to find evidence on the record to show that the trial court was biased or that the appellant did not get a fair trial. The trial magistrate may have delved too deep in her analysis of evidence which may explain her 25-page judgment. In the end I am unable to say that the burden was shifted unfairly or that there was violation of Article 50 of the **Constitution**.

26. I thus find that the conviction for defilement was *safe*. The appeal against conviction is accordingly *dismissed*.

27. I will now turn to the sentence. The mandatory sentence provided is life imprisonment. But following the landmark decision of the supreme Court in ***Francis Karioko Muruatetu & another v Republic***, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR, the courts now frown upon *minimum* or *mandatory* sentences.

28. Specifically, the Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act**. In ***Jared Koita Injiri v Republic*** [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> *In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by* ***section 8 (1)*** *of the* ***Sexual Offences Act****, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.*
>
> *The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*

Needless to say, pursuant to the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic*** ***(supra)****, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.* [Emphasis added]

29. I accordingly *set aside* the life sentence. I have considered that the appellant is a first offender. The appellant shall now serve a term of *10 years imprisonment*. For the avoidance of doubt, the new sentence shall run from 25th July 2017, the date of the original conviction

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 6th day of July 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. Kiongera for the appellant instructed by Kwew LLP Advocates.

Ms. Adera for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.