REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 12 OF 2019

ASSER JILLO MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Hola Criminal Case No. 268 of 2016 by Hon. A. P. Ndege (PM) dated 10th July 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGEMENT

The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offences were that between 1st and 2nd February 2016 and 8th September 2016 at [Particulars Withheld] Village in Chewani Location in Tana River Sub-County within Tana River County intentionally caused his penis to penetrate the vagina of **EHH** a child aged 14 years old.

He was charge with an alternative count of committing an indecent act with a child contrary to Section 11(1) if the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 1st and 2nd February 2016 and 8th September 2016 at [Particulars Withheld] Village in Chewani Location in Tana River Sub-County within Tana river County he intentionally touched the vagina of **EHH** a child aged 14 years old with his penis.

At the end of the trial, the appellant was convicted and sentenced to 25 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following amended grounds:

> **1. That the learned trial Magistrate erred in law and fact by failing to consider that section 8(1)(3) of the Sexual Offence Act fetters the discretion of the juriscrats that are magistrates and judges in regards to sentencing.**
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> **2. That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution did not prove the case to the required standard of the law.**
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> **3. That the learned trial Magistrate erred in law and fact by not considering my defence evidence.**

Background

The matter was part heard on 17th November 2016 with 4 witnesses having already testified when the trial magistrate was transferred. On 23rd February 2017 the appellant chose to have the case started *de novo* with the succeeding trial Magistrate.

(PW2) ECH, the complainant stated that on Thursday, 1st February 2016 as she was going back to school after lunch she met with the appellant at a thicket. The appellant asked for a shot and removed his clothes. He also requested **(PW2)** to remove her underpants and to lie down. The appellant wore a condom and lay on top of her. He then inserted his penis in her vagina and had sex. When they finished the

appellant gave the complainant Ksh.20 and they went their separate ways. **(PW2)** stated that she met with the appellant again in the thicket the next Wednesday.

The complainant further testified that on 8th September 2016 while outside near the police station the appellant called her and they went to a thicket. The appellant asked for another shot but before they could have sex they were interrupted by her brothers H and B and M. They took **(PW2)** and the appellant home and they called the headman, the school chairman and Kenya Police Reservist (KPR) and she took them to the thicket. The police were called and they came and arrested the appellant and took him to the police station. The complainant was taken to hospital where she was examined and her age assessed. She told the court that she was related to the appellant.

(PW3) AH the complainant's mother testified that **(PW2)** was 14 years old. She testified that the appellant used to have sex with **(PW2)** severally and that she informed the appellant's brother but he continued. On 8th August 2016, **(PW2)** did not go to school claiming she was unwell. When **(PW3)** came back and looked for the complainant, she was informed that the **(PW2)** had gone to relieve herself. **(PW3)** stated that while she was preparing food, **M** and **B** returned with the complainant and the appellant and informed them that they had been arrested at a [Particulars Withheld].

(PW3) called teachers from the complainant's school and the headman who came with KPR. They went to the thicket and the police were called. The police took the complainant to the hospital. **(PW3)** stated that she knew the appellant and considered him to be a like a son. She further stated that she knew that the Appellant was in a relationship with the complainant.

(PW4) BHH the complainant's brother stated that on 8th September 2016 while playing draft he was informed by **M**, his cousin that the complainant was in the bush with the appellant. He informed his father. He went to the bush where he found the appellant and the complainant standing with the appellant holding the complainant's chest. Together with **M** they took both of them to their home where the complainant's teachers and the headman were called. That the police were later called. **(PW4)** stated that they punished the complainant. He further told the court that the appellant was his uncle.

(PW5) No. P5636 PC Sarah Barnei was the Investigating Officer at the time. She stated that on 8th September 2016 the OCS assigned her the present case. She recorded the complainant's statement and took her to hospital where she was examined and her age assessed.

(PW6) Arthur Steven Bayaya was the clinical officer at Hola County Referral Hospital. He gave the evidence on behalf of **Dr. Haidham** who had gone to pursue further studies. He stated that the examination revealed that the complainant's hymen was broken but it was not fresh and he produced the treatment notes and P3. He also produced the age assessment report that showed that the complainant was 14 years old at the time.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence. The appellant elected to give an unsworn.

(DW1) the Appellant denied the charges and stated that he was arrested on 8th September 2016 at 6:30pm in the village. He claimed he did not know the charges he was facing.

Submissions

Appellant's written submissions

The appellant relied on his written submissions filed on the 17th March 2021. The appellant submitted that the mandatory minimum sentence under section 8(1)(3) of the SOA denied the court exercise of judicial discretion and mitigation had no evidential value. He stated that for these reason, the courts had declared mandatory minimum sentences to be unconstitutional and he placed reliance on **Francis Karioko Muruatetu & Another v R [2017] eKLR; Dismas Wafula Kilwake v R (2019) eKLR** and; **Madaraka Hariri Dzaya v R Cr. App No. 73 of 2019.**

It was the appellant's submission that the prosecution's case was riddled with contradictions and inconsistencies. He stated that the medical evidence did not indicate the age of injuries and that it did corroborate defilement. He cited the case of **Arthur Mshila Manga v Rep (2016) eKLR.** He further submitted that the evidence of **(PW4)** and the complainant that they were caught standing did not support the charge of defilement as indicated on the charge sheet. He relied on **Joan Chebichi Sawe v Rep (2003) eKLR.**

Lastly, the appellant submitted that the complainant behaved like an adult and chose to engage in a sexual relationship and in the circumstance, the court should have considered the defence under section 8 (5) SOA. In support of his argument he cited the case of **Martin Charo v R (2016) eKLR.**

Respondent's submissions

Mr. Sirima for the respondent filed his written submissions dated 5th February 2021 on 22nd February 2021. It was his submission that all the witnesses gave consistent, coherent and logical evidence in support of the prosecution's case. He stated that the medical evidence produced by **(PW6)** supported the testimony of **(PW2)** that she engaged in intercourse with the appellant. That the age of the complainant was similarly proved by age assessment report and; that the appellant was well known to **(PW2), (PW3)** and **(PW4).** According to counsel, even in the absence of corroborative evidence the appellant could be convicted on their sole evidence based on section 124 of the Evidence Act as was held in **Michael Maweru v R Criminal Appeal No. 133 of 2014.**

On the appellant defence, **Mr. Sirima** submitted that the appellant's denial was general and that he did not address the issue of defilement. It was his submission that the defence did not controvert the prosecution's case and that the ground on appeal was an afterthought.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the appellant.

In a charge of defilement, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. R, Criminal Appeal No. 72 of 2013.**

On the element of age, the Court of Appeal in **Thomas Mwambu Wenyi v R [2017] eKLR** cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."**

In **Joseph Kazungu Kasena v R [2021] eKLR the Court of Appeal** different constituted stated that:

> **"As for the age of MJ, both herself and her mother testified that she was 12 years old at the time of the defilement. There was therefore credible evidence on the victim's age. And we find no rational basis for discounting the evidence of a mother as regards the age of her child. Indeed, the evidence of parents has been relied upon to prove the age of their children. (See Hadson Ali Mwachongo v. Republic [2016] eKLR) and Basil Okaroni v. Republic [2016] eKLR)."**

In the present case, the complainant and **(PW3),** the mother of the complainant, testified that the complainant was 14 years old at the time. Her evidence was corroborated by **(PW6),** the clinical officer, who produced the age assessment report of the complainant that showed that she 14 years old. The age of the complainant was satisfactorily proved.

On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in Dominic Kibet Mwareng vs. R [2013] eKLR where the court stated that:-

> "…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."

In the instant case, the complainant recounted to the court her first sexual encounter with the appellant. She had left school over lunch break when she met the appellant near a thicket. The appellant asked for a *shot,* meaning to have sex, and he proceeded to undress her and had sex with her while wearing a condom. When he had finished he gave her Ksh. 20/-. The complainant testified that they engaged in sexual intercourse on a number of occasions before they were caught. The medical evidence found that she had an old hymen tear and that she was not virgin which corroborates the evidence of the complainant that she had being engaging in sexual intercourse for a number of months. I hold that penetration was proved.

On identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- R [2014] eKLR** and **Wamunga –vs- R, [1989] KLR**

In the instant case, the complainant testified that she was related to the appellant**, (PW4)** on his part testified that the appellant was their uncle, while **(PW3)** stated that the appellant was like a son to her. While it is not clear whether the appellant is a relative of the complainant and her family, what is clear is that the appellant was well known to them, a fact he did not deny. From the evidence, it is clear that the complainant and the appellant knew each other and there is no chance of mistaken identity.

On the appellant's defence he chose to give an unsworn defence. He denied committing the offence and that on the day of his arrest he was not with the complainant. The appellant never testified on any of the allegations of defilement. He never denied that he knew the complainant or that he gave her any money. He never raised any issues in cross-examination but focused on the day of his arrest. The trial Magistrate considered the appellant defence and found that it did not displace the prosecution's case. Similarly, I find that the appellant's defence did not shake the prosecution case.

The appellant has also sought refuge under the defence in Section 8(5) of the SOA which provides:

> **"It is a defence to a charge under this section if –**
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> **a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at**

the time of the alleged commission of the offence; and

b) the accused reasonably believed that the child was over the age of eighteen years."

However, this defence was not raised in the trial court to give the prosecution an opportunity to weigh the defence and an opportunity to respond to the claims. He has instead decided to raise it at the appeal stage at which point it cannot be interrogated by the respondent. The only conclusion that he court can reach is that it was an afterthought. Even if the court was to consider the defence, there is nothing to show that the appellant was deceived into thinking or reasonably believed that the complainant was over the age of eighteen. Indeed the Court of Appeal in **Eliud Waweru Wambui v R [2019] eKLR** pronounced itself thus:

> "We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years."

In this case, the complainant testified that the first time she encountered the appellant she was home from school over lunch break meaning that she was in her school uniform and a clear indication that she was a school going child. Furthermore, the evidence indicated that the appellant knew the complainant and her family which was not disputed which meant the appellant was wholly aware that the complainant was a minor. In the end the defence having being raised at the appeal stage and the evidence not supporting this fact, this ground must fail.

On the mandatory nature of sentences under the SOA has come under scrutiny following the decision of the Supreme Court in **Francis Karioko Muruatetu & another v R [2017] eKLR.** Many decisions from the Court of Appeal have adopted the decision of the Supreme Court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing.

However, the Supreme Court recently in **Francis Karioko Muruatetu & another v R; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** clarified its decision and held that its judgment was only in respect to the offence of murder. It thus stated:

> **"*[10]* It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;**
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> **"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right".**
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> **Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".**
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> ***[11]* The ratio decidendi in the decision was summarized as follows;**
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> **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**
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> **We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute."*(Emphasis added)***

The Supreme Court in its recent judgment has clarified that mandatory minimum sentences are not unconstitutional but are valid and constitute the law.

Offences under the Sexual Offences Act are serious having long lasting effects on the victims physically, psychologically and emotionally especially where the victim is a minor. This creates a need to protect the victims and the vulnerable in the society and; further act as a deterrence to other would be perpetrators by providing stiff penalties. **Gikonyo J** in **Republic v Jeremiah Koilel [2021] eKLR** stated:

> "[6] Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person's dignity and person; and, an indelible corrosive hurt of the victim's life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences."

In the matter before me, the record of the trial court shows that the appellant was not remorseful in his mitigation but stated that he was not guilty. The trial Magistrate in sentencing the appellant to 25 years imprisonment considered the circumstances of the case and stated that the appellant had persistently engaged in sexual relations with the complainant despite warnings from the complainant's relatives. In the circumstance I find that the sentence was neither harsh no excessive and this ground must fail.

In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the appellant was the culprit. I find that the both the conviction and the sentence was well founded on law. I find no merit in the appeal and consequently dismiss it forthwith.

Orders accordingly.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for DPP