REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 34 OF 2019

DJA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate Court at Hola Criminal Case No. 3 of 2019 by

Hon. B. N Kabanga (RM) dated 18th September 2019)

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 offence were that between 3rd August 2018 and November 2018 at [Particulars Withheld] village in Tana River Sub-County within Tana River County he intentionally caused his penis to penetrate the vagina of **MMK** a child aged 13 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 3rd August 2018 and November 2018 at [Particulars Withheld] village in Tana River Sub-County within Tana River County he intentionally touched the vagina of **MMK**, a child aged 13 years old.

At the end of the trial, the appellant was convicted and sentenced to 20 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 grossly erred in both law in by failing to consider that the prosecution did not prove their case beyond reasonably established defence under section 8(5)(b) of the Sexual Offences Act No. 3 of 2006.***
>
> ***2) That the learned trial Magistrate erred in both law and fact by failing to consider no certified copies of the treatment notes as P.Exhibit MF1, P3 form dated 21/2/2019 as P.Exhibit MF2 and birth certificate as P.Exhibit MF3 produced in evidence by PW1 on page 8 line 20-22 in compliance with section 64 and 66 of the Evidence Act.***
>
> ***3) That the learned trial Magistrate erred both in law and fact by failing to consider that the mandatory minimum sentences in section 8(3) of the Sexual Offences Act contradicts the provisions of section 216 and 329 of the CPC thereby denying the judicial officers their legitimate jurisdiction to exercise of discretion in sentencing not to consider the mitigating circumstances prior to imposing and recorded on case to case basis in breach of Article 27(1)(2)(4) of the Constitution of Kenya 2010 hence the sentence imposed to the appellant is unlawful.***

Background

(PW1) MMK, the complainant informed the court that in August 2018 while at her aunt's place the appellant visited wanting to speak to her but she did not respond. On her way home, the appellant followed her and told her that he loved her. She told him that she would respond later but before she left the appellant proceeded to touch her breasts and thighs. On 3rd August 2018, the appellant sent his friend **INOS** with

a phone to **(PW1)** so that they could chat. He sent a SMS to **(PW1)** requesting her to go to his house. That evening **(PW1)** went to the appellant's house and told her that she would be his girlfriend. The appellant told PW1 that they should have sex. He took her to bed where he undressed and then proceeded to undress PW1. According to **(PW1)** the appellant *"alchukua tupu yake ya mbele akaingiza kwenye tupu yangu ya mbele"* meaning that the appellant inserted his penis in her vagina. **(PW1)** later went home.

(PW1) stated that in November 2018, she was at her mother's hotel when the appellant went and asked her to go to his house. That they went to the appellant's house where he proceeded to insert his penis in her vagina. That after one month, **(PW1)** missed her periods. She informed the appellant who suggested she waits for December to see if things would change. However, in December 2018 **(PW1)** missed her periods again and informed the appellant. The appellant advised her to inform her mother **(PW2).**

(PW2) took the complainant to hospital for a pregnancy test which turned out positive. The matter was reported to the probation officer who referred the matter to the police station.

(**PW3) Ismail Hirsi**, a clinical officer at Hola County Referral Hospital gave the medical evidence. He stated that **(PW1)** was pregnant and produced the treatment notes and the P3.

(PW4) No. 93411 P.C. Mwanaharusi Ali, based at Hola police Station was the investigating officer. He stated that he took the complainant to hospital for examination and also produced the complainant's birth certificate (P.Exhibit 3).

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 a sworn statement and called two other witnesses.

(DW1) the appellant told the court that he was summoned by the children officer who informed him that he had impregnated a girl. He dismissed it as a fabrication stating that the complainant had mentioned that another boy from upcountry who was harvesting mangoes was responsible.

(DW2) KH, the complainant's father supported the appellant's defence and stated that the complainant had indicated that someone from upcountry was responsible but did not mention his name.

(DW3) RH told the court that **(DW2)** asked the complainant who was responsible and that the complainant stated it was a boy from upcountry but did not give a name.

Submissions

Appellant's written submissions

The appellant relied on his written submissions filed on the 2nd March 2021. The appellant submitted that the defence under section 8(5)(b) of the Sexual Offences Act was available to him. He submitted that the complainant had behaved like an adult as she voluntarily went to his house and agreed to have sexual intercourse. He further stated that the complainant refused to go to school and would look for opportunities in the evening to go to his house and engage in sex. He faulted the trial court for failing to consider the defence and stated that the conduct of the minor was played a fundamental role. He relied on the case of **Martin Charo v R [2016] eKLR** and **Eliud Waweru Wambui v R (2019) eKLR.**

The appellant also submitted that the prosecution failed to prove its case to the required standard. He faulted the production of the treatment notes **(PEx2)** and the birth certificate **(PEx3)** as they were not certified contrary to Section 64 and 65 of the Evidence Act. It was his contention that failure to certify the documents meant that they could not be relied on to prove penetration and age of the complainant. He submitted that age was an important element of the offence that needed to be established beyond reasonable doubt. He placed reliance on the case of **Hadson Ali Mwachongo vs Rep (2016) eKLR; Alfayo Gombe Okello vs R; Kaingu Elias Kasomo vs R** and; **Moses Raphael Nato v R (2015) eKLR.**

Finally, the appellant submitted that the mandatory sentence was unconstitutional as it denied judicial discretion in sentencing and denied his right to mitigation as prescribed under Section 216 and 329 of the Criminal Procedure Code (CPC) and Article 50(2) of the Constitution. In support of his submission, he relied on **Medi Omurunga v DPP (2019) eKLR; Roman Baya Thoya v R (2020) eKLR; Rophas Furaha Ngombo vs R (2019) eKLR; Evans Wanjala Wanyonyi vs R (2019) eKLR** and; **Raphel Mutunga Mutinda vs R (2019) eKLR.**

Respondent's submissions

Mr. Mwangi for the respondent filed his written submissions dated 23rd February 2021 on the same date. It was his submission that the critical ingredients of the offence had been proved. He submitted that the age of the complainant had been proved by birth certificate produced by the Investigating Officer.

On penetration, counsel submitted that the evidence of the complainant was corroborated by medical evidence in the treatment and P3 form which, indicated that the complainant was pregnant. On identification, it was counsel submission that the appellant was identified by recognition as he was in a relationship with the complainant.

Lastly, on sentence, **Mr. Mwangi** submitted that the sentence was too harsh given that the complainant was in a willing relationship with the appellant and therefore it should be revised downwards.

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, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. **See Moses Nato Raphael v R [2015] eKLR**.

The age of the victim in sexual Offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. Rule 4 of the Sexual Offence Rules of Court 2014 provides that:-

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

> **In the present case, (PW5), the investigating officer produced the birth certificate (P.Exh3) of the complainant that showed that she was born on 11th January 2006. A simple calculation shows that the complainant was 12 years 7 months at the time of the offence and therefore a minor. 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 informed the court that she had sex with the appellant on different occasions. She recounted to the court how on the Appellant approached her and told her that he loves. That on 3rd August 2018, the Appellant sent his friend with a phone to the complainant where he texted requesting her to go to his house that evening. That on the said evening the complainant visited the appellant and agreed to be his girlfriend. She recounted how the appellant removed both their clothes and proceeded to have sex with her. She told the court that she visited the appellant several times in the evenings and they engaged in sex. That as a consequence of their sexual relationship, the complainant became pregnant. **(PW3),** gave the medical evidence that showed that the complainant was indeed pregnant. 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 their sexual encounters took place at the appellant's house, an indication that she knew where he lived well. Further, their relationship lasted for about four months and she testified that she was not in a relationship with any other person. The appellant also testified that **(DW2),** the complainant's father, was his uncle, meaning that the appellant and the complainant were cousins. From the evidence, it is clear that the complainant and the appellant knew each other and there is no chance of mistaken identity.

The only question is whether is the appellant was the one defiled the complainant. The appellant contended that the complainant had had mentioned another boy as being responsible before she mentioned his name, he further denied having sex with the complainant.

I have evaluated the evidence on record; the complainant accepted in cross-examination that she mentioned another boy but whose name was not given since she was afraid and reluctant to do so. She told the court that she decided to reveal that the Appellant was responsible, when she found out that her education had been destroyed. She was adamant that she had slept with the appellant and she never slept with any other person.

Additionally, the trial Magistrate weighed the evidence of the prosecution against that of the appellant and found that the evidence was watertight and did not rebut the prosecution's case.

I agree with the trial Magistrate, the appellant defence that the accusation was revenge for **(DW2)** leaving **(PW2)** was a smoke screen. There is no evidence of ill-will between **(PW2)** and **(DW2)** and that **(DW2)** never brought it up when giving his testimony. 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 –

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 defence. 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 appellant was barely 12 years old, she had just hit puberty. It would be a stretch of the mind to believe that the appellant did not have an iota of doubt that the complainant was just a child. In the end the defence having being raised at the appeal stage, this ground must fail.

On sentence, 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;

"[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".

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".

[11] The ratio decidendi in the decision was summarized as follows;

"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".

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 further stated:

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.`

The recent ruling has clarified that mandatory minimum sentences are not unconstitutional but are valid and constitute the law. Even before the Supreme Court issued directions in the **Muruatetu case**, mandatory minimum sentences were not abolished and could be meted out to offenders. The Court of Appeal in **Samson Mumbaa Murigi v R [2020] eKLR** held that:-

"In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty of 20 years imprisonment which was the prescribed sentence for the offence of defilement under Section 8(3) of the Sexual

> ***Offences Act. <u>The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report.</u> The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. <u>The trial Court took into a consideration both aggravating and mitigating factors and arrived at the correct conclusion.</u> Consequently, the appeal against sentence fails."(****Emphasis added****).***

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 **R 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 clearly displays that the trial Magistrate considered the mitigation by the appellant and found that the defilement was weighty having serious effects on the victim and society. 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

<u>In the presence of:</u>

1. The Appellant

2. Mr. Mwangi for DPP