



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 28 OF 2017**

**JILLO ALI YAHYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the*

*Principal Magistrate Court at Hola MCSO No. 362 of 2015 by*

*Hon. M.D. Kiprono (RM) dated 6<sup>th</sup> April 2016)*

**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 on 19<sup>th</sup> December 2015 in Tana River Sub-County within Tana River County intentionally caused his penis to penetrate the vagina of **HB** 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 on 19<sup>th</sup> December 2015 in Tana River Sub-County within Tana River County intentionally touched the vagina of **HB** a child aged 13 years old with his penis.

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 law and fact by failing to consider no original or certified copy of the age, P3 and treatment notes were produced in evidence in compliance with section 66 and 64 of the Evidence Act.**
- 2) That the learned trial Magistrate erred in law and fact by failing to subject the mother of the complainant (PW2) to testifying and cross-examination on behalf of the complainant and that there was no sufficient reason to declare the victim a vulnerable witness after the victim failed to identify the appellants as the perpetrator.**
- 3) That the learned trial magistrate erred in law and fact by amending the charge sheet without invoking the provisions of section 214 of the CPC cap 75.**
- 4) That the learned trial Magistrate erred in law and fact by failing to consider that the legal provisions providing for the mandatory minimum sentence under section 8(3) of the Sexual Offences Act No. 3 of 2006 conflict contradicts the provisions of section 216 and 329 of the CPC Cap 75 which denies judicial officers to exercise discretion in sentencing not to impose an appropriate sentence based on the scope of the evidence adduced and recorded which is unconstitutional in breach of Article 27 (1) (2) (4) of the Constitution of Kenya.**

## Background

(PW1) Dr. Mohamed Bilal of Hola Hospital produced the medical evidence on behalf of Dr. Rahma who was on leave. He produced the P3 (P.Ex1) and the treatment notes (P.Ex2) which indicated that the complainant was examined on 20<sup>th</sup> December 2015. The medical examination revealed that the complainant had an injury on her private parts, her hymen was freshly broken, she had discharge which was queried as sperms and her urine had an infection. It was further revealed that the complainant had a history of epilepsy and that she was examined in January on the same and it was concluded that she had a mental challenge.

He also produced the age assessment report (P.Ex3) on behalf of Madubi, a clinical officer that indicated the complainant was 13 years old.

(PW1) further produced the treatment notes (P.Ex4) of the Appellant that indicated that he had an infection in his urine. An age assessment report (P.Ex5) indicated that the appellant was 20 years old.

(PW2) DGB the mother of the victim stated that the complainant was 13 years old. It was her evidence that on 19<sup>th</sup> December 2015 at 9.00 am, the appellant greeted her and left. She saw the appellant at around 10am at the back of her house. Later at around 11 am (PW2) noticed that the complainant was missing. Fearing that the complainant had a bout of epilepsy, she went with A, her younger daughter, to look for the complainant.

It was (PW2's) testimony that at around 1:00pm she found the appellant with his shorts lowered on top of the complainant in a bush. She caught the appellant and screamed. The appellant managed to free himself and escape before the sub-chief (PW3) and Berhe (PW4) arrived. They gave chase but they did not catch him. (PW3) called the chief of Chewani who arrested the appellant.

(PW2) testified that the complainant had a blue and white lessso. She told the court that she knew the appellant as he was the son of her cousin and knew where he lived.

(PW3) Mohamed Dhidha was the assistant chief Chewani. He stated that on 19<sup>th</sup> December 2015 at around 1:00pm he was with (PW4) when they heard (PW2) shouting for help. They rushed and saw (PW2) struggling with the appellant whose trousers were suspended at the knees. They also saw a girl who had no clothes. (PW3) stated that the appellant managed to run away and they could not catch him.

Mr. Dhidha testified that he knew the appellant and his relatives. He called Habib, the chief, and gave the name of the appellant and asked him to arrest the appellant. The appellant was arrested and handed over to the police.

(PW4) Omar Berhe Jillo testified that on 19<sup>th</sup> December 2015 he was at Harambee with (PW3) when they heard screams in the bush. He reiterated the evidence of (PW3). He stated that they were about 10 meters from the Appellant when he escaped. He told the court that he did not know the Appellant.

(PW5) Habib Maro, was the Chief Laini Location. He stated that on 19<sup>th</sup> December 2015 (PW3) called and informed him that a girl had been defiled by appellant who lived in his area. He mobilised KPR who searched and arrested the appellant. (PW5) confirmed that the appellant was from his village and he vetted him for purposes of obtaining a National Identification Card.

The complainant's evidence was dispensed with by the court after it found that she could not communicate meaningfully during voire dire.

(PW6) No. 93411 was the investigating officer. He recorded the witness statements and recorded the complainant and the appellant to hospital for examination. She produced the lessso of the complainant as P.Exh 6.

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.

The Appellant stated that on 17<sup>th</sup> December 2015 he took his phone to afundi, Gachoka, to repair it. That when he went to collect the phone the next day the fundi refused to give it to him. (PW2) intervened and they got into an argument with (PW2) and the complainant and they refused to give him his phone back. He stated that (PW2) changed the report after their quarrel and claimed that he had defile the complainant. The appellant was arrested at his home.

## Submissions

### Appellant's written submissions

The appellant relied on his written submissions filed on the 10<sup>th</sup> July 2020. The appellant submitted that the prosecution failed to prove its case to the required standard. He stated that the prosecution relied on a photocopy of the age assessment report, the P3 form and treatment

notes which were not certified contrary to section 64 and 66 of the Evidence. It was his contention that the documents could not be relied on to prove penetration and the age of the complainant. He cited the case of **Hadson Ali Mwachongo v R (2016) eKLR, Cr. App No. 203 of 2009 Alfayo Gombe Okello v R** and; **Eliud Waweru Wambua v R (2019) eKLR**.

It was the appellant's further submission that the prosecution failed that he was the perpetrator of the offence. He contended that the complainant stated that she did not know the appellant while **(PW2)** stated that he was the one who defile the complainant. He stated that the contradiction created doubt as to who committed the offence He quoted the case of **Denkeri Ram Kisham v R EACA 93** and **Kazungu Mramba Mweni v R Cr . App. No. 220 of 2007**.

The appellant further faulted the appellant for declaring the complainant a vulnerable witness arguing that epilepsy was not a mental illness. He further contended that **(PW1)** failed to provide any treatment notes on the allegation of epilepsy to prove the assertion and cited **Muiruri Njoroge v R Cr. App no. 115 of 1982**.

The appellant further submitted that the trial Magistrate failed to comply with the requirements of section 214 of the CPC when he allowed the charge sheet to be amended.

On the issue of sentence, it was the appellant's submission that section 8(3) of the SOA provided for a mandatory minimum sentence that denied the trial Magistrate the exercise of his judicial discretion in considering the mitigation for purposes of passing an appropriate sentence contrary to section 216 and 329 of the CPC. He argued that the mandatory minimum sentences were unconstitutional as it discriminated and subjected convicts to unequal sentences contrary to Article 27(1)(2)(4) of the Constitution. He placed reliance on **Amedi Omurunga v DPP (2019) eKLR** and; **Rofas Furaha Mwangi v R (2019) eKLR**.

### **Respondent's submissions**

**Mr. Okaka** for the respondent filed his written submissions dated 4<sup>th</sup> March 2021 on the 5<sup>th</sup> March 2021. It was his submission that the documents produced by the prosecution were original documents and that the appellant misdirected himself. On age of the complainant, he submitted it could be proved by the victim, the parents or medical evidence as held in **Hillary Nyongesa v R High Court Appeal No. 123 of 2009**. He stated that the age of the complainant was satisfactorily proved by the evidence of **(PW1)** and **(PW2)** and further the complainant was subjected to age assessment. produced an age assessment report.

On the issue of penetration, it was counsel submission that the medical evidence was corroborated by the evidence of **(PW2)** who caught the Appellant in the act. Additionally, **(PW3)** and **(PW4)** testimony supported the assertions of **(PW2)**. He contended that the appellant's defence did not did not contravene the evidence of **(PW2)** in any respect.

On whether the complainant was a vulnerable witness, **Mr. Okaka** submitted that medical evidence indicated that the complainant was mentally retarded and could not express herself. The prosecution made an application under section 31 of the SOA to have **(PW2)** be the witness of the complainant. He contended that the trial Magistrate correctly applied the provisions of the SOA in declaring the complainant a vulnerable witness. He relied on **Augustus Mugo Kamunya v R Cr. App No. 10 of 2015; Raphael Kavoi Kiilu v R (2010) eKLR** and **Erick Onyango Odeng v R (2014) eKLR** in support of his submissions.

Counsel further submitted that even without the testimony of the complainant, the appellant was identified through the evidence of **(PW2)**, **(PW3)** and **(PW4)** all who placed the appellant at the scene of crime. Additionally, the incident took place at 1:00pm hence he was perfectly visible as the perpetrator. He cited **R v Turnbull & others (1976) 3 ALL ER 549** on factors to be considered in the evidence of a single witness in identification. He also submitted that the witnesses had seen the Appellant previously and there was no mistaken identity as stated in **Anjononi & others v R (1980) KLR 59** and **Peter Musau Mwanzia v R (2008) eKLR**.

With respect to amendment of the charge sheet, **Mr. Okara** submitted that the amendment were done in accordance to the provisions of section 214 of the CPC before the close of the prosecution case. He stated that the application was not opposed by the appellant and that the charges were read afresh to the appellant. He further contended that the appellant was informed of his right to recall any witnesses under section 214(1)(ii) of the CPC and that the appellant did not wish to recall any witnesses. Additionally, he submitted that there was no material variance to the charge and the evidence and that the charge sheet was amended to include the name **Kajey** which name came up during hearing.

On sentencing, counsel cited **Wanjema v R (1971) EA 493** where the court laid down the general principles that an appellate court could only interfere with a sentence imposed by a trial court if it was satisfied that the trial court did not consider a relevant fact or, took into account an irrelevant fact in arriving at the sentence or; that the sentence was harsh and excessive. Counsel submitted that after considering all the factors in the case, the sentence imposed was fair and just according to the law.

### **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**.

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....”

The Court of Appeal different constituted in **Joseph Kazungu Kasena v R [2021] eKLR** 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, **(PW2)**, the mother of the complainant, testified that the complainant was 13 years old at the time. Her evidence was corroborated by **(PW1)**, the clinical officer, who produced the age assessment report of the complainant that showed that she 13 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 present case instant case, the complainant was found not to be able to communicate properly with the court and appeared disoriented. The trial magistrate declared her a vulnerable witness in accordance with section 31 of the SOA and dispensed with her evidence. Despite the complainant being unable to testify, there was still cogent evidence in support of the prosecution case.

The medical evidence was produced by **(PW1)**. He stated that an examination of the complainant revealed that the complainant had injuries on her private parts and her hymen was freshly torn. Further, her urine sample had an infection and she had a whitish discharge from the vagina which was queried as sperms. The medical evidence proved that there was penetration. .

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, **(PW2)** stated that she knew the appellant, his father and mother and that the appellant was related to her by virtue of the fact that her husband and his father were cousins. **(PW3)** the assistant chief also stated that he knew the appellant and that his nickname was **Kajey**. The appellant in his testimony stated that the case was brought against him after he had been involved in an argument with **(PW2)** and the complainant. It is clear that the appellant knew the complainant and **(PW2)** and this was a case of recognition and there was no chance of mistaken identity.

The only question is whether the appellant was the one who defiled the complainant. I have evaluated the evidence on record. **(PW2)**, the complainant’s mother, testified that at around 11:00am on the day of the offence she realised that the complainant was missing. Afraid that the complainant might be attacked with a bout of epilepsy, she went out in search of her. It was her evidence that she came across the appellant and the complainant in the bush. The appellant had lowered his trousers and was lying on top of the complainant who was naked. She screamed and tried to capture the appellant but he managed to run away as **(PW3)** and **(PW4)** were coming to assist her.

Further, it was the evidence of **(PW3)** and **(PW4)** that at around 1:00pm as they were walking they heard a scream. They rushed in the direction of the scream where they found **(PW2)** struggling with the appellant. The appellant had his trousers hanging on his knees while the complainant lay on the ground naked. The appellant managed to escape from **(PW2)**. They gave chase but were unable to catch him. **(PW3)**.

The appellant was caught red handed by **(PW2)** with his trousers down lying on top of the complainant who was naked. **(PW3)** and **(PW4)** saw him struggling with **(PW2)** with his trousers at his knees before he escaped. They gave chase but they did not manage to catch him. The medical evidence established that the hymen tear was fresh. There was nobody else who was seen with the complainant on the said day. It was at 1:00pm, there was no possibility of mistaken identity.

Additionally, the trial Magistrate weighed the evidence of the prosecution against the appellant’s defence. It was his defence the charge was fabricated due to an argument he had with **(PW2)** and the complainant over a phone. The trial Magistrate found the defence to be “*cock and bull story that does not add up*”. He found that the evidence against him was watertight and overwhelming.

I agree with the trial Magistrate, the appellant defence did not add up. He never explained why **(PW2)** and the complainant would enter into

an argument over his phone which he left with a fundi for repairs. The appellant never raised the issue of the argument to (PW2) in cross-examination. Further, he did not give a reason why (PW3), an assistant chief would want to assist (PW2) in framing him. Additionally, (PW4) testified that he did not know the appellant well, what would he gain from framing the appellant? The defence was merely an afterthought meant trying to paint a picture of an ulterior motive by (PW2) against him. I find that the appellant's defence did not shake the prosecution case.

The appellant further submitted that the trial court failed to inform him of his right to call witnesses after the prosecution amended the charge sheet in accordance to Section 214 of the CPC. The section provides that:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

*Provided that—*

(i) *where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

(ii) *where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*

(2) *Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*

(3) *Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."*

In the instant case, the prosecution sort to amend the charge sheet to add the name **Kajey** in reference to the appellant. The appellant did not oppose the application. After the amendment, the trial court called on the appellant to plead again. However, there was no evidence that the appellant was informed of his right to recall witnesses.

The Court of Appeal facing a similar issue in **Josphat Karanja Muna v R [2009] eKLR** pronounced thus:

*"On non compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29<sup>th</sup> September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."*

The same principles apply to the current case before the court. The amendment by the prosecution sought to add the appellant alias that came up in the course of the hearing. It did not introduce a fresh element or make any substantial changes to the charge. The provision of section 214 of the CPC did not to be invoked as there was no injustice suffered. For this reason that ground fails.

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 in its recent Judgment 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**, it was apparent that mandatory minimum sentences were not per se 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. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial Court took into a consideration both aggravating and mitigating factors and arrived at the correct conclusion. 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.”

The appellant took advantage of a vulnerable witness and defiled her. The sentence was and was neither harsh no excessive and this ground must fail.

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**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. The appellant
2. Mr. Mwangi for the DPP