REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 57 OF 2019

JOSEPH KITSAO KAZUNGU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Hola Criminal Case No. 4 of 2019 by Hon. B.N. Kabanga (RM) dated 1st October 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 offences were that on diverse dates between June 2018 and January 2019 at [Particulars Withheld] Village in Hola Sub-County within Tana River County intentionally and unlawfully caused his penis to penetrate the vagina of **GKK** a child aged 15 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 diverse dates between June 2018 and January 2019 at [Particulars Withheld] Village in Hola Sub-County within Tana River County intentionally and unlawfully touched the breast and buttocks of **GKK** a child aged 15 years old with his hands.

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 erred in law and fact by failing to consider no original or certified copy of the age assessment report, P3 and treatment notes were produced in evidence by PW3 in compliance with section 66 and 64 of the Evidence Act.***
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> ***2) That the learned trial Magistrate erred in law and fact by failing to consider no cogent evidence was adduced by the prosecution to connect I the Appellant to the commission of the alleged offence in that no DNA test was conducted as per the provisions of section 36(1) if the Sexual Offences Act No. 3 of 2006 rendering the conviction of the appellant unsafe and unsustainable.***
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> ***3) That the learned trial Magistrate grossly 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.***

Background

Submissions

Appellant's written submissions

The appellant relied on his written submissions filed on the 10th July 2020. The appellant submitted that the age of the complainant being a critical element of the offence was not sufficiently proved. He stated that the prosecution relied on a photocopy of the age assessment report which was not certified contrary to section 64 and 66 of the Evidence. 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 to prove that he was the perpetrator of the offence. He contended that the medical examination was conducted when the complainant was 4 months pregnant and was therefore inconclusive. It was his further contention that the prosecution should have conducted a DNA test provided for under Section 36(1) of the SOA to determine the paternity of the child and relied on **Evans Wamalwa SImiyu v R (2016) eKLR** and **Joseph Kinyua Nyagah v R Criminal App No. 42 of 2016.**

It was the appellant's submission that the trial magistrate erred in relying on section 124 of the Evidence Act as he did not record the reason that the victim was telling the truth. He further faulted the trial Magistrate for failing to record the demeanour of the witnesses during the hearing in accordance with section 199 of the CPC. He contended that the complainant was unreliable as she habitually engaged in sexual relationships and failed to report the offence the first time it happened and waited until she was pregnant.

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 Mwango v R (2019) eKLR.**

Respondent's submissions

Mr. Mwangi for the respondent filed his written submissions dated 18th February 2021 on the same date. In his submissions, counsel did not support or oppose the appeal but left it to the court to make its determination. On age of the complainant, he submitted that **(PW3)** produced an age assessment report. However, counsel submitted that the prosecution failed to explain why the maker of the age assessment report was not called to produce it before court.

Mr. Mwangi submitted that the P3 form was filled 6 months after the date of the alleged offence and had little evidentiary value. It was his contention that a DNA test would have assisted although it is not evidence of penetration. On identity of the perpetrator, it was counsel's submission that the complainant and the appellant knew each other since they attended the same church and were in a relationship.

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.2 of 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…."***

(PW3), the clinical officer produced the age assessment report **(P.Ex4)** of the complainant that showed that she 15 years old. However, the respondent in support of the appellant challenges the production of the age assessment report on the ground that there was no explanation given as to why the maker was not called to produce the same.

The Court of Appeal in **Joseph Mahende Vs. R (2019) eKLR** held thus:-

> **"*Our interpretation of* section 33 (d) *of the Evidence Act as read with* section 77(1) & (2) *of the Evidence Act, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under* Section 48 *of the* Evidence Act. However*, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under* Section 33 (d) *of the* Evidence Act and which *evidence by dint of* Section 77 (1) & (2) *of the* Evidence Act*, is admissible and presumed as genuine and authentic*.**
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> ***In* JOSEPH BAKEI KASWILI -VS- REPUBLIC [2017] eKLR*, the Court confronted with a situation where a victim had been attended to by 3 different medical practitioners but only one appeared at the trial, held inter alia as follows:-***
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> > ***"Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable. Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."***

In ANGELA -VS- REPUBLIC [2001] eKLR the Court added the following:

> ***"A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the Evidence Act. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h) may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:-***
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> ***"Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases..."***"

Section 77 of the Evidence Act allows the court the court to admit medical evidence even in circumstance where the maker is not called as a witness. However, Section 33 of the Evidence Act provides that before such a document is admissible under Section 77, a basis has to be laid out for the non-attendance of the maker. The prosecution failed to lay a basis for the production of the age assessment report by PW3.

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. The consequence of their sexual relationship was that the complainant became pregnant. **(PW3),** gave the medical evidence that showed that the complainant was indeed pregnant.

The appellant in his submission made heavy work of the fact that the trial court never ordered a DNA test to prove that the paternity of the child stating that the medical evidence was unreliable a view supported by the respondent.

It is trite that a DNA test is not mandatory and failure to adduce such evidence does not weaken the prosecution case. **See George Kioji vs R, CR App. No. 270 of 2012 (UR).**

In **Williamson Sowa Mbwanga v R [2016] eKLR,** the Court of Appeal pronounced itself as follows:-

> **"*As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured.* (See Twehangane Alfred V. Uganda, CR. App. No. 139 OF 2001)."**

It is immaterial whether or not the pregnancy of the complainant was as a result of the appellant as the offence of defilement requires that penetration be proved which has been sufficiently done as stated earlier in this Judgment.

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 knew the appellant.

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;***
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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".***

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. This court is bound by the decision of the Supreme Court on the doctrine of precedent. I find that the sentence was lawful.

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