REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 19 OF 2019

SAMMY ABIYO JILLO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Hola MCSO No. 17 of 2017 by Hon. A. P. Ndege (PM) dated 6th December 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGEMENT

The appellant was charged with attempted defilement contrary to Section 9 (1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offences were that on 20th November 2017 at around 1930Hrs at [Particulars Witheld] Village in Tana River Sub-County within Tana River County intentionally attempted to cause his penis to penetrate the vagina of **CGH** a child aged 4 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 20th November 2017 at around 1930Hrs at [Particulars Withheld] Village in Tana River Sub-County within Tana River County intentionally touched the buttocks of **CGH** a child aged 4 years old with his penis.

At the end of the trial, the appellant was convicted and sentenced to 26 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 that the sentence imposed on the appellant was manifestly harsh and excessive in all the circumstances.***
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> ***2) That the learned trial Magistrate erred in law and fact by failing to consider no certified copy of the birth certificate as P.Exhibit MF-9 was produced as evidence by PW6 in compliance with section 66 of the Evidence Act.***
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> ***3) That the learned trial Magistrate erred in law and fact by failing to consider that the legal provision providing for a mandatory minimum sentence under section 9 in this case section 9(2) of the Sexual Offences Act No. 3 of 2006 conflict, contradicts and violates the provisions of section 216 and 329 of the CPC thereby denying the judicial officers their legitimate jurisdiction to exercise discretion in sentencing not to impose an appropriate sentence based on the scope of the evidence adduced and recorded.***

Background

(PW1) RBD, the victim's mother stated that the minor was born on 17th July 2013. It was her evidence that on 20th November 2017 after supper she put the victim and her sister to sleep on the bed, lit a tin lamp and closed the door from the out. She then went to her neighbour's house to watch news with her son. While she was at her neighbours, she sent her son to check how his siblings were. That the son rushed back and informed her that the door was open and that the tin lamp was off and that he saw someone but he had closed the door again.

(PW1) together with her husband, **(PW4),** rushed back to the house and lit the lamp and searched for the intruder. They did not find him the children's bedroom but found him hiding under their bed. She stated that the intruder's trouser was open. That on checking on the children, **(PW1)** stated that the victim had been pushed towards the edge of the bed and was lying on her stomach. She further stated that the victim's trouser and underwear had been removed and was only left with her blouse. It was **(PW1's)** testimony that she had dressed the victim in a red trouser and blouse and an underwear when she left her. She also stated that she saw some fluid besides the bed.

The intruder tried to escape but after a struggle **(PW4)** arrested him. **(PW1)** told the court that as the appellant struggled with **(PW4)** she screamed and the school's watchman came to their house to assist. They took the intruder to the chief who called the police. The police came and arrested the intruder and told **(PW1)** to take the victim to hospital. At hospital the victim was found with sand particles in her private parts but tests came out negative.

(PW1) stated that when she returned home she recovered a phone, blue sandals and tobacco wrapped in nylon. **(PW1)** identified the intruder as the appellant but stated that she did not know his real name but only saw him occasionally at her neighbour's place.

(PW2) CGH the victim was declared a vulnerable witness by the court and she gave her evidence through **(PW1)** who the court appointed as an intermediary. She stated that on the material day she had supper and was put to sleep by her mother. That she had worn a trouser and underwear. She then woke up in the hospital where she was given medicine by the doctor. She was later taken to the police station where she talked with a police officer.

(PW3) KA, the victim's sister gave an unsworn testimony after voire dire examination. She stated that on 20th November 2017 after the supper she refused to remain with her younger siblings who were put to bed. Her mother locked the house and they to watch T.V at her neighbour's house. She further stated that **(PW1)** become worried and told to go look at the children. When she got to the house she found the door open and the lamp had been put off. She saw someone in the house and called out. He responded. She locked the door and rushed to inform her parents.

(PW3) stated that her parents went into the house. She then heard her father shout "*toka! toka!"* and her mother screaming. Later her father and mother came out of the house with the intruder who she identified as the appellant. The appellant was then escorted to the chief.

(PW4) BG was the victim's father and told the court that she was 4 years old. He reiterated the evidence of **(PW1).** He added that he had seen the appellant at his neighbour's home two week before the incident.

(PW5) Rhoka Julius, worked as a watchman at Kone Primary School. It was his testimony that on 20th November 2017 he was at the school when he heard a woman screaming. He followed the scream to the house and knocked on the door. After identifying himself, PW1 let him into the house and he was told that the victim had been defiled. He was taken to children's bedroom where he saw male fluid on the mat. He rushed and reported the matter to the chief. The chief told him to bring the suspect to him. He rushed back to the victim's house and took the appellant to the chief's place and returned to the school.

(PW6) No. 96095 Esther Mutemi based at Hola Police Station was the Investigating Officer. She recorded the witness statements. She produced the items left behind in the house being slippers, a techno phone and tobacco as **(P.Exh4), (P.Exh5)** and **(P.Exh6)** respectively. She also produced the victim's trouser and innerwear as **(P.Exh7)** and **(P.Exh8).** Further, she produced the victim's birth certificate **(P.Exh9).**

(PW7) Bashir Doyo was the chief, Mikinduni location. He stated that on 20th November 2017 **(PW5)** rushed to his home and informed him that a child had been defiled. He called KRP officer to accompany **(PW5)** and they apprehended the appellant. The chief then called the police who came and re-arrested the appellant.

(PW8) Ismail Hirsi a clinical officer at Hola gave the medical evidence on behalf of **Esther Ndera** who was on leave. He stated that on examination of the victim there were no signs of forceful penetration and the lab results were all negative. He produced the treatment notes **(P.Exh2)** and the P3 **(P.Exh.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 an unsworn.

The appellant denied the charges and stated that on 20th November 2017 he was painting at Hola Mission when he received a phone call asking him to go to town. At town he saw **(PW4)** armed with a panga in the presence of another person. That **(PW4)** followed him and attacked him with a panga and took him to the chief's office. The chief called the police who took him to hospital where he was treated. That a police officer at the station snatched his treatment notes and shoes. He told the court that the case was a plot to harm him.

Submissions

Appellant's written submissions

The appellant relied on his written submissions filed on the 15th September 2020. The appellant submitted that the 26 years sentence was excessive and outside the law as Section 9(2) of the SOA provided for imprisonment of not less than 10 years. He further argued that Section 389 of the Penal Code provides for imprisonment of not more than 7years. It was the appellant's submission that there were two sentences for the offence of attempting and he should have benefited from the least server sentence. He relied on the case of **Baya Yaa vs R (2011) eKLR.**

It was the appellant's further submission that the mandatory minimum sentence prevented courts from exercising their judicial discretion and prevented the courts from considering an accused persons mitigation provided for under section 216 and 329 of the CPC. He contended that courts had held that mandatory minimum sentence were illegal and had reduced sentences of Appellants. In support for his submission he cited **Francis Karioko Muruatetu & Another v R [2017] eKLR; Rophas Furaha Ngombo vs R (2019) eKLR; Raphael Mutunga Mutinda v R (2019) eKLR** and **Amedi Omurunga v DPP (2019) eKLR.**

The appellant submitted that the age of the victim was not sufficiently proved as the birth certificate produced in court had not being commissioned under section 64 and 66 of the Evidence Act and was therefore inadmissible. He relied on the case of **Eliud Waweru Wambui v R (2019)** and **Moses Raphael Nato v R (2015) 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 evidence adduced at the hearing, there was no doubt that the appellant had intended to defile the victim seen from his overt act in undressing the victim and being erect. He urged that the prosecution had satisfied the test for attempt as laid out in **Mwadikwa Mutisya v R (1959) EA 18** and **Musa Said v R (1962) EA 454.**

On sentence, counsel submitted that the appellant was sentenced to 13years imprisonment which was within the discretion of the court and should therefore be upheld.

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.

The appellant attempted to defile the complainant. Section 9(1) and (2) of the Sexual Offences Act provides:

> ***"9(1) a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
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> ***(2) A person who commits an offence of attempted defilement with ad child is liable conviction to imprisonment for a term of not less than ten (10) years."***

The issue which arises is in respect of what constitutes an attempt to commit an offence. In a charge of attempted defilement, the prosecution ought to prove all other elements of defilement save for penetration. The said elements are; that the complainant was under the age of 18 years; that the appellant was positively identified as the perpetrator of the alleged offence and the steps taken by the appellant to execute the defilement which did not succeed. Attempted defilement can be simply termed failed defilement.

Under Section 388(1) (2) of the Sexual Offences Act, attempt to commence an act is defined as:

> ***"388(1) when a person intending to commit an offence commits begins to put his intention in execution, by means adopted to its fulfillment and manifest his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to have attempted to commit the offence.***
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> ***(2) It is immaterial except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of his offence or whether the complete fulfillment of his intention is prevented by circumstances independent of his will or whether he desists of his own notion for the further prosecution of his intention.***
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> (3) It is immaterial by reasons of circumstances not know to the offender it is impossible to commit the offence."
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> From the foregoing provisions of law, two requisites have to be met; the *mensrea* to commit the offence and the attempt to commit the offence (the *actus rea)*. In **Michael Lokomar v R (2016) eKLR Justice S.N. Riechi** observed as follows:
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> "In proof of an attempted commission of an offence the prosecution must prove means rea which is the intention and actus reus which is the act which constitutes the overt act which is geared to the execution of the intention. The actus reus must be more than the mere preparation to commit the act as there is a difference between preparations to commit an offence."

The accused must have reached at least the commencement of the execution of the intended crime. Another key aspect of attempted defilement is the commencement of execution of the intended crime. The appellant ought to have reached far enough towards the accomplishment of the desired result as to amount to a commencement of the consummation. Consummation is what is referred to as "commencement of the execution". In **Rex v Sharpe [1903] TS 868** the Court describes the same as the beginning of the final series of acts which complete the crime. Thus, the beginning of the acts of the final series depends on the circumstances of each case. It also involves a value Judgment by the court.

In the present case, the complainant was asleep hence she was not aware of what transpired. Nevertheless, there was cogent evidence from the witnesses that the appellant committed the offence. **(PW3)** and **(PW4)** recounted how on the day of the offence before they went to their neighbour's house to watch news, they had supper before putting the victim and her brother to sleep. At the time the complainant was dressed in her underwear, a red trouser and a blouse. Before leaving the house they left a tin lamp on and locked the door from the outside. **(PW3)** testified that **(PW1)** sent her to check on her siblings. She found that the tin lamp was off and the door was wide open. She claimed to have seen someone in the house. she locked the door and quickly informed her parents.

(PW1) and **(PW4)** rushed back to their house where the found that the tin lamp had been put off. In the children's bedroom they discovered the complainant was naked and that she had been pushed to the edge of the bed and there was a white discharge on the bed next to her. They searched the house and found the appellant hiding underneath their bed. He was ordered to get out from under the bed they noticed that the zip of the appellant's trousers' was open.

From the evidence adduced the appellant was caught hiding under **(PW1)** and **(PW4's)** bed. He was the only one in the house and the only inference to be drawn was that he is the one who put off the tin lamp and undressed the complainant. In the view of the court, the appellant's action of breaking into the house, putting off the tin, moving the complainant to the edge of the bed and, undressing her pointed to the intention of the appellant to defile her. His actions went beyond the preparatory stage to commit the offence but his attempt to defile the complainant cut short. **(PW1's)** instincts as a mother caused her to send **(PW2)** to check on her siblings, had that not have happened, the appellant certainly could have defiled her.

On the age of the minor, all the prosecution needs to prove is that the complainant was a minor at the time of the offence. There is no requirement to specifically prove the age of the complainant as is required to prove defilement under section 8 of the SOA. Sentences under Section 8 of the Act staggered depending on the age bracket of the complainant while, the sentence under section 9 is a general sentence as long as it shown that the complainant is a minor. It does not matter the age of the minor whether he or she is 5years old, 13 years old or 17 years old the minimum sentence is 10 years imprisonment.

In **Charles Nega v R Criminal Appeal No. 38 OF 2015 [2016] eKLR Mrima J** stated that:-

> ***"I however wish to further state that from the wording of Section 9 of the Sexual Offences Act (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction."***

In the case before the court, **(PW1)** and **(PW4)**, the parents of the complainant, stated that she was 4 years old. **(PW6)**, the investigating officer produced the complainant's birth certificate indicating that the complainant was born on 17th July 2013 and was therefore only 4 years old. Even without the evidence, from mere observation it is evident that the complainant was a toddler. It is the court's finding that the age of the minor was proved.

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".***

[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.

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 prosecution informed the court that the appellant had a previous conviction on the same offence where he was serving a sentence of 17 years. The appellant on mitigation stated that he had a school going child and his parents had both passed away. The record of the trial court clearly displays that in passing sentence, the trial Magistrate considered the mitigation by the appellant and found that the appellant was a habitual offender involving children of tender years. I am in agreement with the trial Magistrate that the appellant is a dangerous sexual offender who broke into the complainant's home at night and almost took advantage of a sleeping child. In the circumstance I find that the sentence was neither harsh no excessive and this ground must fail. However, the sentence shall run from the date of his arrest in accordance to section 333(2) of the Criminal Procedure Code.

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. Mr. Mwangi for the DPP
2. The appellant