REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 172 OF 2019

IWF alias A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal arising from the original conviction and sentence by Hon C.A. S. Mutai (S.P.M) in original Bungoma CMC Sexual Offence Case No. 60/2019 delivered on 25/10/2019***)**

JUDGMENT

1. The Appellant, IWF alias A, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offence Act, 2006**. The particulars were that on the 13th of June 2019 at around 11:00 a.m. at [Particulars Witheld] Village, Bumula Sub-County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina and anus of SWN, a child and minor aged 3 years. (*Name redacted to protect the identity of the minor*).

2. He faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 13th of June 2019 at around 11:00a.m. at [Particulars Witheld] Village in Bumula Sub County within Bungoma County, he intentionally and unlawfully caused his penis to come into contact with the vagina and anus of SWN, a child aged 3 years.

3. A synopsis of the prosecution's case was that on 13th June 2019, the Appellant went to the home of JKW, PW1, the father of the minor. When the minor's father was leaving for work at around 11:00a.m. he asked the Appellant to take the minor to the home of PW2, her grandmother. The Appellant was a neighbour and relative to the minor's father.

4. The Appellant took the minor on a bicycle to her grandmother. On arrival the grandmother noticed that the minor was in discomfort. She told her grandmother three times that she felt the urge to pass stool. The grandmother took her to the toilet three times but she was unable to pass any stool.

5. The grandmother took the minor to Siboti health centre in the evening upon realizing that she was unwell and alerted the minor's father. The minor was referred to Bungoma Referral Hospital where upon examination she was found to have mucosal fluid oozing around the anal area, and she had bruises on her vaginal walls. A P3 form was filled in her regard by the medical examiner and the conclusion was that she had been defiled.

6. On 14th June 2019 the grandmother made a report about the defilement at Kimaeti police patrol base to P.C. Peter Kimani, PW2 who was the police officer on duty at the station. Later that day the Appellant was arrested and taken to Kimaeti police station. He was subsequently charged as set out above.

7. When placed on his defence the Appellant testified without oath that on the day in question at around 11:00 a.m. he was sent home from school for lack of school fees. That he sent his brother to the home of the minor's father to ask for the school fees, and that the minor's father did not give him money for school fees and instead threatened to do something to him. He denied committing the offence.

8. At the close of the trial, the Appellant was found guilty and convicted on the main charge. He was sentenced to a term of 20 years imprisonment.

9. Dissatisfied with the sentence the Appellant filed an appeal on 29th July 2021 on the following grounds;

i. **That the appellant is economically poor, illiterate, a pauper and a layman who could not access the services of an advocate contrary to Article 5(2)(2)(h).**

ii. **That his sentence be reduced to the least severe in consideration of his mitigation.**

iii. **That the court does consider a non-custodial sentence.**

iv. **That the court does consider the time spent in remand.**

v. **That the minimum mandatory sentence is unconstitutional.**

vi. **That while in custody, the appellant has learnt life support skills.**

vii. **That confession outside court is inadmissible.**

10. The parties filed their respective submissions to the appeal which have been considered. The Appellant submitted that due to his poor status and being an orphan he could not afford an advocate to defend him. He submitted that an advocate should have been provided to him because of his low level of education. He also stated that he could not understand the analysis of the evidence presented by the medical examiners because of the language used. He relied on the case of **Petty v. Greyhound Racing Association (1968) 2ALL ER 545 pg. 549**.

11. The Appellant submitted further that, the sentence imposed upon him was harsh and excessive, that his mitigation had not been considered including the fact that he was arrested while he was still underage. He stated that nevertheless, while in prison he has been rehabilitated. Lastly, the Appellant submitted that the mandatory minimum sentence was unconstitutional.

12. The Respondent filed submissions in opposition to the appeal and stated that the issue of penetration was sufficiently addressed by the clinical officer who testified about the bruises on the labia majora that is, the outer wall of the vagina. Furthermore that it was determined that the child was 3 years old at the time of the offence.

13. On the issue of Appellant's age, the Respondent stated that he was found to be an adult by the clinical report of Dr. Mwangi, a dentist from the Kakamega County General Hospital. That the doctor had examined the Appellant and determined that he was above 18 at the time of the defilement.

14. Lastly on the ground that the sentence was harsh and excessive, the Respondent asserts that the sentence was too lenient in the circumstances of this case, the victim being a minor of tender age. The prosecution prayed that the sentence should be enhanced to life imprisonment as provided by Law and as the court is empowered to do by Section 354(3)(b) of the Criminal Procedure Code.

15. This is the first appeal in this case. The duty of the first appellate court as stated in the Court of Appeal case of ***Okeno Vs Republic [1972] EA 32*** is as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***
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> I have therefore re-evaluated the evidence tendered before the trial court being cognisant of the fact that I neither saw nor heard the witnesses as they testified and gave due allowance, therefore.

16. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Section 8(2) provides;

> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

The offence of defilement as created under Section 8(1) of the Sexual Offences Act, 2006 requires the prosecution to prove the following ingredients as a basis for conviction:

a) Age of the complainant,

b) The act of penetration and

c) The identity of the assailant.

17. The court held as such in ***Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013,*** where it stated:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

The requirement of proving the age of the complainant in sexual offences was emphasized in the Court of Appeal case of **Alfayo Gombe Okello v Republic (2010) eKLR** as follows:

> ***"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt.***

18. In this instance the father testified that the minor was 3 years old. The medical examination by the clinical officer M/s Wandili,PW3 also placed the minor's age at 3 years of age in her report dated 14th June 2019. The minor also underwent an age assessment carried out by PW4, Dr. Duncan Wanjalla a dental surgeon attached to Bungoma Referral Hospital. The doctor confirmed that the minor was indeed 3 years old at the time of the assessment soon after the assault. He produced in evidence an assessment report filled on 14th June 2019.

19. The best evidence concerning age would be a birth certificate. However other cogent evidence can be relied upon where there is no birth certificate as in this case. Having carefully reviewed the evidence on record, I am satisfied that the minor's age was proved through the evidence tendered to the required standard.

20. On the matter of proof of penetration, there is evidence indicating that when the minor arrived at her grandmother's home, the grandmother observed that she walked with difficulty. That three times the child asked to be helped to go to the toilet to pass stool but was unable to do so when she was taken to the toilet. The grandmother realized that all was not well with the minor and took her to hospital.

21. PW3, the clinical officer who examined the minor at Bungoma Referral Clinic testified that the minor had difficulties walking and sitting when she was brought to the hospital. Upon examination she found injuries on the labia majora and dried mucus on the vaginal and anal walls of the minor. The clinical officer confirmed that the minor had been defiled. I find this element to have been proved to the required standard.

22. Lastly, on the identity of the perpetrator, PW1, the minor's father said it was he who asked the Appellant to take the minor to the home of PW2, the grandmother. Indeed, on 13th June 2019 at about 11 a.m. PW1 went to work leaving the Appellant at home with his two children. PW2 also saw the minor arrive at her home with the Appellant on his bicycle sometime between 11a.m. and noon. She immediately observed that the minor walked as if she had some difficulty. Later on it was the minor herself who asked PW2 to take her to hospital which indicates that she was in pain. PW2 also noted that the Appellant was in a hurry to leave after he delivered the child.

23. The Appellant in his cross examination of the witnesses did not dispute these facts that he was the person left with the minor by PW1 at 11a.m. and that he delivered her to PW2 sometime before noon. The injuries sustained by the minor were also not disputed and there was no explanation that the minor was left alone or with someone else before the Appellant delivered her to PW2.

24. This indeed is a criminal case and the burden of proof rested with the prosecution to prove their case against the Appellant beyond reasonable doubt. There was no burden upon the Appellant to explain his innocence. I have however considered his defence in the context of the rest of the evidence on record and find that it has not raised any reasonable doubt whose benefit the Appellant could reap.

25. Under Section 8(2) of the Sexual Offences Act 2006, the sentence provided by the statute is life imprisonment upon conviction. The trial court handed him a prison term of 20 years. This was therefore not a lawful sentence to impose for a conviction under Section 8(2) of the Sexual Offences Act.

26. In his appeal, the Appellant beseeches this court to exercise leniency and substitute the sentence with a less severe one. The Appellant's mitigation was that he is sorry and is an orphan who has since been reformed and rehabilitated. Further that he had certificates in various life skills.

27. The appellate court is empowered to interfere with the trial court's sentence under exceptional circumstances, for instance when it is found that the trial court overlooked material factors or plainly misconducted itself. In the case of **Wanjema v Republic [1971] EA 494** it was stated that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

28. This court takes note that the sentence provided by the law is mandatory. The court was required to impose the sentence as provided by the law notwithstanding the mitigation by the Appellant. The discretion of the court where the law provides for a mandatory sentence is fettered.

29. Some of the objectives of sentencing in the sentencing policy guidelines are retribution and denunciation. Retribution is meant to punish the offender for his criminal conduct in a just manner while denunciation is communication of the community's condemnation of the criminal conduct.

30. I have carefully reviewed and re-evaluated the evidence with a view of arriving at my own conclusion and giving due allowance to the fact that I did not have the benefit of seeing the witnesses testify.

31. The court having not warned the Appellant before his appeal was heard, that the sentence he was serving was unlawful and that should his appeal not succeed the court would be obligated to substitute the proper sentence provided by statute, this sentence of 20 years imprisonment is left to stand. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER 2021.

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L.A. ACHODE

HIGH COURT JUDGE

IN THE PRESENCE OF.....APPELLANT IN PERSON

IN THE PRESENCE OF.....STATE COUNSEL