REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 56 OF 2016

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. Z. Abdul (R.M) in Narok CMCR No. 150 of 2013 on 19th July 2013)

PHILEMON KOECH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant is challenging his conviction and life sentence imposed on him for defilement under Section 8(1) & (2) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on 5/2/2013 at [Particulars withheld] area in Narok South district within Rift Valley province, intentionally caused his penis to penetrate the anus of LC a child aged 5 years old.

3. He raised the following five (5) grounds in what he referred as mitigation of appeal;

a. That he pleaded guilty at trial.

b. That he is a first offender and very remorseful and apologetic and for that reason coupled with the fact that he was misguided by disgruntled peer group whom he has long forsaken, he prays that the excessive sentence be lessened.

c. That on the alternative he being now a born again Christian, he prays that he be given freedom as a result of clemency for he utterly regrets the said act.

d. That he is a very young person and as of now suffering from health disorders in his chest and he fears that a lengthy custodial sentence might be detrimental to him grossly.

e. That he promises hence forth to be a true citizen and lead a constructive life.

4. The appellant also filed amended grounds of appeal under Section 350(3) (v) of the C.P.C. that;

a. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant yet failed to find that the age of the claimant was conclusively established.

b. The learned trial court failed to find that section 211 of the CPC was not complied with.

c. The learned trial court failed to note that there were glaring contradictions.

d. That the prosecution failed to call crucial witnesses to prove their case.

e. That The learned magistrate failed to comply with section 169(1) of the CPC

f. That the contents of P3 that was relied on does not support the charges of defilement.

g. That the sentence meted out was manifestly excessive

5. The appellant was placed on his defence. To his defence, he denied the charges. He told the court that he did not commit the alleged offence.

Appellant's submissions

6. The Appellant submitted that the prosecution did not produce any cogent evidence in support of the assertion that the claimant was 5 years. The mother of the claimant did not mention or give any documentary evidence in support of the age of her child. The P3 form shows that the claimant was 5 years old. The clinical officer did not inform the court how he arrived at the 5 years. The age on the P3 is not of any probative value. He cited the cases of ***Hasson Ali Mwanchongo V Republic [2006] eKLR, Alfayo Gombe V Republic[2010] eKLR, R Vs Bonython [1984] 38 SASR 45 And Kenneth Kimgetich Soi Vs Republic Criminal Appeal No. 168 Of 2013.***

7. The appellant submitted that provisions of section 211 of the CPC was not complied with neither the procedure under section 311 of the CPC was followed. He complained that he was ambushed to make a defense in total darkness without being informed of his legal rights and constitutional rights. The same was a violation of Article 27 and 50 of the Constitution.

8. The appellant submitted that the evidence of PW1 and her mother and the investigation officer were contradictory. That the mother of the complainant said that appellant was a laborer hence he termed the evidence as coached and should not be believed.

9. The appellant submitted that the uncalled witnesses would have shed light. That the investigation officer did a shoddy job. He did not interrogate Mama Grace, Banjo Nampaso, Kolia Nampaso, Mama Alex and Alex to confirm the allegations or get the contrary of it. His defense was not considered by the trial court. He cited the case of ***Bukenya and another Vs Uganda [1972] EA 549.***

10. The appellant submitted that after the magistrate had outlined the whole evidence she did not go further to identify points of determination, the decision and reason for the decision hence a violation of section 169(1) of the CPC. He cited the case of ***James Nyanamba Vs Republic [1983] eKLR.***

11. The appellant submitted that the clinical officer who examined the claimant noted no injury.

12. The appellant submitted that the sentence meted out on him was manifestly excessive. He cited the cases of ***Wilson Kipchirchir Koskei V Republic [2019] KLR, Francis Karioko Muruatetu & Another Vs Republic[2017] eKLR***

13. The appellant urged this court to analyze the whole evidence and come up with its own finding.

PROSECUTION'S SUBMISSION

14. The prosecution submitted that the age of the victim was proved though *voir dire* and corroborated by PW3 in the P3 form. They cited the cases of ***Evans Wamalwa Simiyu Vs Republic [2016] eKLR and Rua Ngao Mwatuma V Republic [2014] eKLR*** and section 19 of the cap 15 laws of Kenya.

15. The prosecution submitted that the element of penetration was proved through the viva voce evidence of PW1 and the medical evidence presented before court.

16. The prosecution submitted that failure to give the description of the assailants to the police at the time of reporting did not negate the positive identification of the appellant at the ID parade.PW1's account of events of the date of the incident were well corroborated by PW4. They relied in the case of ***John Mwangi Kamau V Republic 2014] eKLR.***

17. The prosecution submitted that the appellant was well known to PW1. Therefore, no issue of mistaken identity could arise. The evidence of PW1 was corroborated by pw2 who being informed knew it was the appellant.

18. The prosecution submitted that all the evidence was consistent and was well corroborated. The evidence adduced linked the appellant as the perpetrator. The evidence of pw1 was corroborated by pw3 who confirmed that he was defiled.PW1 never at any time contradicted himself and the same was corroborated by documentary evidence.

19. The prosecution submitted that appellant gave unsworn evidence which was not tested through cross examination hence its probative value is weak.

20. The prosecution submitted that the appellant did not raise the issue concerning him being a minor during trial hence the only conclusion is that he is an adult as indicated in the charge sheet.

21. The prosecution submitted that on 6th July 2021 in the ***Francis Muruatetu*** case in paragraphs 11, 14 and 15 the court has restricted the application of the ***Muruatetu*** principles only to cases of murder.

22. The prosecution submitted that the sentence imposed by the trial court on the appellant was proper based on the circumstances of this case.

ANALYSIS AND DETERMINATION

Court's Duty

23. Since this is a first appeal, it is incumbent upon this court to re-evaluate the evidence presented at trial and draw its own independent conclusions. This court must however remain cognizant of the fact that it does not have the benefit of hearing and seeing the witnesses as the trial court did. See ***Okeno vs. Republic [1972] E.A 32.***

24. The ever constant questions in a criminal appeal against conviction and sentence-which constitute issues for determination- are: -

> **i. Whether the prosecution proved its case beyond reasonable doubt; and**
>
> **ii. Whether the sentence imposed on the appellant is manifestly excessive or harsh in the circumstances.**

The offence and penalty clauses

25. The relevant offence and penalty clauses in this appeal are; Section 8 (1) and 8 (2) of the Sexual Offences Act, respectively.

26. Section 8(1) of the Act provides:

> **8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

27. And, Section 8(2) thereof 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."**

Elements of the offence

28. Arising from the law, the elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are: -

> **i. Age of the complainant;**
>
> **ii. Penetration; and**
>
> **iii. Positive identification of the assailant.**

Age of complainant

29. Of proof of age of the complainant, the Court of Appeal stated in ***Edwin Nyambogo Onsongo Vs Republic (2016) eKLR*** that: -

> **"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."**

30. The appellant contended that the age of the complainant was not proved, and that the indication of his age in the P3 FORM was not on any factual basis. What does the evidence portend?

31. The complainant testified that he was 5 years old. According to his mother, PW1 was in top class at [Particulars withheld] primary school. The trial court conducted a *voir dire* examination on the child and was satisfied that child is sufficiently intelligent. His evidence was believable and credible on age.

32. The P 3 form also indicated that he was 5 years old. The appellant argued that the indication of age in a P3 Form is of no probative value. I do note, however, that the P3 form was duly filled by a qualified person who examined the complainant, A P3 form ordinarily contains information provided by the complainant, or guardian in case of a child. The source of and the information contained in the P3 form on age has not been discredited in any way. The objection by the appellant, is, therefore, without any foot on which to stand.

33. On the basis of the evidence adduced in court, the age of the complainant was proved beyond reasonable doubt to be 5 years.

Penetration

34. Penetration is defined in Section 2(1) of the Sexual Offences Act to be: -

"The partial or complete insertion of the genital organs of a person into the genital organ of another person."

35. Given the facts of this case, definition of genital organs is relevant. According to section 2(1) of the Sexual Offences Act: -

"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes <u>the anus</u>; [underlining mine]

36. PW1, the complainant testified that the appellant did bad things to him. They had gone to heard cattle together with him. The appellant took him to Alex's house which was still under construction. The appellant made him lie down and removed his trousers and inner wear. The appellant removed all his clothes and made PW1 to lie on his stomach. The appellant lied on the back of PW1 and did 'Tabia Mbaya' to him on his buttocks by inserting his penis. PW1 felt pain.

37. P3 form (PExh.1) produced by **PW3-**The Clinical Officer, Mr. Zachary Bii based at Ololunga district Hospital, showed that the anal area had tenderness which was noted on examining finger and feceas. The approximate age of the injuries were 5 days. He stated that the boy looked depressed and walking in pain. PW3 concluded that the boy was sodomized. This piece of evidence is consistent with the evidence by the complainant. Accordingly, this is proof beyond reasonable doubt that there was penetration of the child's anus. I so find.

Did the appellant cause the penetration?

38. The mega question, however, is: whether the appellant caused the penetration?

39. Identification of the Appellant as the person who caused penetration of the complainant must be proved beyond reasonable doubt by the prosecution.

40. The complainant who was established to be of sufficient intelligence was categorical that it was the appellant who caused penetration of his anus with his penis. The complainant knew the appellant well and explained in clear detail who committed the act on him, how and where the obnoxious act happened. This was identification on recognition.

41. A thorough scan of the evidence adduced does not reveal any element or possibility of delusion or mistaken identity on the part of the complainant in recognizing the Appellant as the person who penetrated his anus.

42. I am aware of the exception in section 124 of the Evidence Act to the requirement of corroboration in sexual offences, and that the court may convict on the evidence of the victim alone, if**,** for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. See Section 124 of the Evidence Act which provides as follows:

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

43. The complainant narrated to the court the events and how they occurred and he was categorical that the appellant removed all his clothes, removed PW1's clothes and sodomized him. He identified him since he knew him, for he herds his father's cattle. And they had gone together on that particular day to herd the cattle. His evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant.

44. In any event, the testimony of the complainant was corroborated by **PW2, PW3** and **PW4.**

45. PW2 -RCC is the mother to the complainant. She stated that PW1 did not report the incident to her until when she questioned him after receiving information from Benjo Nampaso, and Kolia Nampaso. PW1 told her that he had not reported the incident because the appellant had threatened that he would kill him if he reported.

46. PW3 stated the complainant was alleged to have been defiled by a person known to him while herding cattle.

47. PW4- NO. 91102 P.C Mowage Douglas, was the Investigating officer. He reiterated testimonies of the other witness which formed the basis and informed the result of his investigations herein.

48. The evidence by the prosecution proves beyond reasonable doubt that the appellant caused penetration of the complainant. I so find and hold.

49. Accordingly, the appeal on conviction lacks merit and it fails.

Of sentence

50. Under Sexual Offences Act, sentence for defilement is prescribed based on the age of the victim of sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider as such in sentencing. I should think, therefore, that, if the law could clearly so state and use appropriate terms thereto, the potency of many objections being raised on constitutional front on minimum sentences in the Sexual Offences Act, may be greatly minimized, or eliminated or rendered ineffective. Apt legislative art is required here.

51. In this case, the complainant was below the age of 11 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which 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."**

52. I ask myself whether the life sentence imposed on the appellant is appropriate sentence in the circumstances of this case.

53. The Court of Appeal in ***Thomas Mwambu Wenyi vs. Republic [2017] eKLR*** cited the decision of the Supreme Court of India in ***Alister Anthony Pereira vs. State of Maharashtra at paragraphs 70-71*** where it was held on sentencing that: -

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."**

54. Of important consideration: first, the victim of the offence is a child of 5 years. Second; the said child will forever live with the shame and great mental trauma caused to him by this savage act of sexual debauchery. Third; this is a serious offence of which extreme societal desire to get rid of society of these wickedness and sexual perversion has been expressed publicly and formally through Sexual Offences Act. See James ***Okumu Wasike (2020) eKLR.***

55. In aggravation the appellant used an unfair advantage to secure and satisfy his sexual desires on the minor. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

56. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the Sexual Offences Act is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the Constitution. But, I profess a new yardstick in dealing with such existing law. Section 7 of the Transitional Provisions under the Sixth Schedule of the Constitution foresaw a dilemma of application of the Constitution upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity with the Constitution. The section provides: -

7. Existing laws

> **(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

57. In light thereof, I do think it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially existing law- if the offensive or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore, read the word ‘*’shall’’* in section 8(2) of the Sexual Offences Act to mean ‘*’may’’* in order to bring the section into conformity with the Constitution.

58. Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with the Constitution. In the meantime, they should take up pronouncements such as this one, and carry out appropriate legislative enactments or amendments to existing law in order to bring it into conformity with the Constitution.

59. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing is likely. This is an important consideration here.

> 1. I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to eke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing. In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for the young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment.
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> 2. In sum, I set aside the life sentence. In lieu thereof, the appellant will serve 20 years' imprisonment from the date he was first

sentenced. It is so ordered. The appeal on sentence succeeds.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF NOVEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. Ms. Torosi for DPP

3. Mr. Kasaso – CA