IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 114 OF 2019

BETWEEN

DAVID NZOMO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 22nd February 2018 in Criminal Case No. 529 of 2016 at Kiambu Magistrates Court before Hon.B. Khaemba, SRM)

JUDGMENT

1. The appellant, **DAVID NZOMO**, was charged, convicted and sentenced to life imprisonment on two counts of the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act*** ("the ***Act"***). It was alleged that on 16th October 2014 in Kasarani Sub-County within Nairobi County, the appellant caused his penis to penetrate the vagina of **JMM** and **BJM** both children aged 14 years and 11 years respectively. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Act*** based on the same facts.

2. Following his conviction, the appellant now appeals against conviction and sentence. As this is the first appeal, I am required to review all the evidence and come to my own conclusion as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour. In order to fulfil this duty, it is necessary to set out the evidence as it emerged before the trial court.

3. BJM (PW 1) and JMM (PW 5) both testified on oath after a *voire dire*. They confirmed that they were students and the appellant was their teacher. They recalled that on 16th October 2014, they were together when the appellant called them to the staff room and gave JMM the keys to his house and asked them to go there and arrange it. They arranged and cleaned the house whereupon the appellant arrived with sodas and chips for them to eat. After they had eaten, he held their hands and told them to go to bed, remove their clothes and lie on the bed.

4. PW 1 narrated what happened as follows:

> *I removed my clothes. I had a dress. I only removed my short. I lied on my back. JMM also removed her clothes and lied on (the) bed. The teacher removed his clothes and started with me ……. He lied on me and put his penis in my vagina. I felt pain. I did not scream. He told me to keep quiet. JMM was watching us. After he finished he went to JMM. I did not do anything.*

5. PW 5 testified as follows:

> *We ate and he held our hands and took us to bed. He then touched my breast and had sex with me. After he finished with me, he went to BJM. After that we went home.*

When cross-examined, PW 5 added that:

> *You started with inserting your finger in our vagina, broke my virginity then inserted your penis.*

6. PW 1 testified that she went home but did not tell anyone about her ordeal. It was until 2015, when PW 5 told her mother who then informed PW 1's mother. When she was asked about the incident she stated that it was true that the appellant had sexually assaulted her. She was taken for examination at the hospital after reporting the incident to the police station.

7. PW 2, who was PW 1's mother, testified that on 29th September 2015, when PW 5's mother and PW 7 came to her shop and told her what

had transpired when their daughters were in school. When PW 2 confronted PW 1 about the issue, she told her how the appellant had sexually assaulted them. The following morning, she reported the incident to the police station. She recalled that the appellant asked her if she could settle the matter. She and PW 7 met with him and they agreed that he would refund them medical expenses amounting to Kshs. 100,000/- but they agreed on Kshs. 20,000/- . The appellant was however arrested and charged.

8. PW 7 testified that PW 5 was her daughter and that in October 2014, she was a student at the school where the appellant was teaching. PW 5 told her that she did not want to go back to school since the appellant had been touching her breasts. After prodding her for more information, PW 5 told her that the appellant sexually assaulted her and PW 1. She went to see PW 2 who inquired from PW 1 and she also confirmed that PW 1 had been subjected to an act of penetration. She recalled that PW 5 told her that the appellant had told them not to tell anyone. They reported the incident to the police station.

9. PW 3, an elder at Kamae area, testified that on 2nd December 2015, he was asked to mediate an agreement between PW 2 and the appellant. He met the appellant and PW 2 and they agreed that the appellant was to pay Kshs. 10,000/- for medical expenses. He later found out that she had not been paid.

10. PW 4 was the medical doctor who examined PW 1 on 18th December 2015. He examined her and noted that the hymen was not intact and the genitalia were normal. She concluded that she had been defiled. PW 4 confirmed that the child had been defiled a year before coming to hospital.

11. The Investigating Officer, PW 8 recalled that she was assigned to investigate the case on 6th October 2015 yet the incident took place in 2014. She recorded witness statements and issued the P3 form to PW 1. She produced the children's birth certificates. She stated that the incident was reported in 2015 because PW 5 told her that they feared telling their parents as the appellant had threatened them.

12. In his sworn testimony, the appellant denied the offence. He admitted he was the head teacher of the school where PW 1 and PW 5 were pupils. He told the court that from 15th October to 21st October 2014, the school was on mid-term recess. During that recess, he went upcountry to Yatta where he met DW 2 on 15th October 2014. He requested DW 3 to use his bulls to plough his land. DW 2 accepted and he collected them on the next day and returned them on 21st October 2014. He returned with his family including his wife, DW 3, and his son, DW 4, when mid-term was over. He did not stay at the school as he disagreed with the director. He transferred to another school with his son, PW 5 and other students. He did not last in that school so he went to another school with his son and PW 5. He later went to another school and relocated only with his son. He recalled that in 2016, he was called to the police station and interrogated about the case. he mentioned that PW 6 was indebted to him and when demanded his money, she brought the case.

13. DW 2 confirmed the appellant's testimony that he came and borrowed some bulls from him to plough and which he returned on 21st October 2014. The appellant's wife, DW 2, told the court that she was staying with the appellant at Kamer while he was teaching. She used to sell clothes outside her residence and when the school closed for midterm, she headed up country with the appellant. She recalled that the appellant told her that he had assisted some lady with some money as she was experiencing financial strain and because the lady refused to pay, he started having differences with the lady. The appellant's son, DW 4, testified that his father was going to demand some money from PW 6.

14. Based on the evidence I have outlined, the trial magistrate held that the prosecution had proved its case. The appellant challenged the conviction and sentence on the basis of the memorandum of appeal and further amended grounds of appeal filed on 9th December 2019 and 6th January 2020 respectively. The appellant also filed written submissions. The main ground of appeal is that the prosecution failed to prove all the elements of the offence of the defilement, he contended that the prosecution failed to produce medical evidence to support its case and that the prosecution evidence was inconsistent and contradictory. He complained that the trial magistrate ignored his defence which exonerated him.

15. The respondent supported the conviction and sentence. Counsel urged the court that the prosecution proved all the elements of the offence of defilement and that the appellant was properly convicted.

16. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

17. Both PW 1 and PW 5 gave clear testimony on how the appellant, who they knew as their teacher lured them to his house and proceeded to subject then to acts of penetration. The testimony was consistent and mutually corroborating leaving no doubt that an act of penetration was committed. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** their respective testimonies were sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the children were stating the truth.

18. The testimony of PW 1 was corroborated by the medical evidence given by PW 4 who examined her on 18th December 2015 and noted that her hymen was missing. The appellant submitted that it is possible that the hymen would have been ruptured by any other activity as was held in ***David Mwigirwa v Republic*** **[2017] eKLR**. However in this case, there was sufficient evidence that she had been subjected to an act of penetration by the appellant.

19. I also note that no medical evidence was advanced to support the case of PW 5. In this case the trial magistrate was satisfied, under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, that she was telling the truth. He stated that:

> *Just like PW 1, PW 5 remained very composed and consistent both in examination –in –chief and in cross-examination by the accused, who she fondly referred to as teacher David. I am satisfied that she spoke the truth, since in any case, she stood to benefit nothing in lying about such an unfortunate and traumatizing incident to a young girl of her age.*

20. It is thus clear that in both instances, the court was satisfied that the children were truthful and accepted their testimony. I also hold that medical evidence is not a requirement of proof of defilement. It is only corroborative and the court may look at other evidence to establish that penetration took place. This issue was elucidated by the Court of Appeal in ***Kassim Ali v Republic*** **MSA Criminal App No. 84 of 2005 (UR)** where the Court of Appeal held that, *"[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence."*

21. From the evidence it is clear that the incident took place in October 2014 and the incident was reported in 2016. The reasons for this are clearly explained by PW 1 and PW 5. They were both threatened by the appellant. It is only PW 5 who told PW 6 when she wanted to move school due to the abuse she had suffered. PW 1 was only prompted to reveal what happened after the information had come through PW 2 from PW 6. In both cases, it is clear that PW 1 and PW5 acted independently and could not have colluded to fix the appellant.

22. The appellant's defence was two-fold; that there was a grudge between him and PW 6 and that at the time the incident took place, he was away from the school. As regards the issue of grudge, the appellant implicated PW 6 as the person who owed him money. However, this line of defence does not take into account the position of PW 1 and PW 2 who did not owe him any money. That issue was exploded by the testimony of PW 3 who tried to broker an agreement where the appellant would pay medical expenses for the two children. Why would the appellant enter into an agreement to compensate both parents for medical expenses if he was not guilty? I therefore reject that line of defence.

23. The incident took place on 16th October 2014. When cross-examined, PW 5 stated that the school was on mid-term but they were in school attending tuition. Even the appellant left for Yatta on that day, there was still room for him to commit the felonious act and in view of the testimony of PW 1 and PW 5, the alibi evidence cannot stand.

24. The last element of the offence of defilement concerns the proof of age of a child. The birth certificates for both children were produced. PW 1 was born on 8th August 2004 meaning she was 11 years old at the time the offence was committed while PW 5 was born on 25th December 2000 hence she was 13 years old when the offence was committed. For purposes of the offence of defilement, it is sufficient that the child is aged 18 years and below. The real age of the child is only relevant for the purpose of determining the sentence.

25. From the totality of the evidence, I am satisfied that the prosecution proved all the elements of the offence of defilement. I affirm the conviction.

26. The appellant was sentenced to serve 20 years' imprisonment on Count 1 and life imprisonment on Count 2. As regards the sentence, the term of life imprisonment was consistent with the prescribed mandatory minimum sentence under **section 8(2)** of the ***Act*** where the child is aged below 11 years and below. In the ***Francis Karioko Muruatetu and Others v Republic*** **[2017] eKLR** case, the Supreme Court held that the mandatory death sentence imposed on any person convicted of murder was unconstitutional as it interfered with judicial authority to determine the sentence. In ***Christopher Ochieng v Republic*** **KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** the Court of Appeal extended the same principle to offences under the ***Act*** as follows:

> *In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra****), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.*

27. As I am bound by those decisions, I find that the life imprisonment meted upon the appellant was excessive and cannot stand. I therefore substitute the term of life imprisonment with imprisonment for a term of 20 years. Since the appellant was in pre-trial custody, the sentence shall run with effect from the date he was arraigned in court.

28. I affirm the conviction. The sentence of life imprisonment is quashed and substituted with 20 years' imprisonment. As a result, the appellant is sentence to 20 years' imprisonment on both counts which shall run from **4th March 2016**.

DATED and DELIVERED at KIAMBU this 8th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.