REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 113 OF 2018

JOSHUA KIPCHUMBA KEMBOI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence of Hon. H. M.

Nyaberi– SPM Iten dated and delivered on the 20th day of November 2018 in

the original Iten Senior Principal Magistrate's Court Sexual Offence No. 7 of 2017)

JUDGEMENT

The appellant is serving a term of life imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. This appeal is against the conviction and the sentence.

The appellant argued the appeal based on seven grounds of appeal as follows: -

> **"1. THAT the pundit trial Magistrate erred in both law and facts when he convicted me to serve life sentence yet failed to find that the medical evidence was not sufficient to prove penetration.**
>
> **2. THAT the prosecution failed to supply the defence all the material evidence that they intended to rely upon.**
>
> **4. THAT the prosecution failed to prove their case against the appellant by shifting the burden of proof to the appellant c/sec 107, 108 EA cap 80.**
>
> **5. THAT the evidence tendered was not reliable to support the provisions of sec 124 of the Evidence Act cap 80 laws of Kenya.**
>
> **6. THE trial court failed to appreciate the fact that the identification of the appellant was not proper as was under unfavourable circumstances.**
>
> **7. THAT the trial Magistrate erred in both law and facts when he convicted the appellant yet failed to find that the witnesses who were recalled for further examination were not availed c/se 168 CPC."**

The appellant canvassed the appeal through written submissions to which Ms. Kagali, Learned Prosecution Counsel, responded orally.

I have considered the submissions and also evaluated the evidence before the trial court so as to arrive at my own independent findings.

To sustain a conviction for defilement, the prosecution must prove the following elements beyond reasonable doubt? –

> **(a) That the victim was a child and the victim's age for purposes of the sentence.**
>
> **(b) Penetration.**
>
> **(c) Identity of the perpetrator.**

I am satisfied that in this case all the elements were proved beyond reasonable doubt. The child's age was proved through a child Health Card and the doctor also approximated her age to be seven years. Moreover, in this case her exact age needed not to be proved and it was sufficiently demonstrated that she was below eleven years. I am satisfied that the evidence adduced to prove her age sufficed.

On penetration, the child gave a very elaborate account of how the appellant found her at home alone and carried her to his parent's house where he ordered her to lie on the floor, undressed her, removed his trouser then pulled her into his thighs and then inserted his urinating organ into her vagina. She was so clear and consistent in her evidence that I was left wondering at the trial Magistrate's remarks that she could not comprehend the nature of questions put to her. Even when put through rigorous cross examination she remained unshaken. The trial Magistrate noted in the judgement that he watched her demeanour and she was composed. I am satisfied that she was truthful and I believe her. Whereas **Section 124 of the Evidence Act** removes the necessity of corroboration in sexual offences, her evidence received corroboration from the doctor who examined her not long after the ordeal. The doctor noted there were bruises along the labias major and minor and that they were both swollen. This is consistent with the complainant's evidence that the perpetrator inserted his genital organ into hers. I am satisfied therefore that penetration was proved beyond reasonable doubt.

On the identity of the perpetrator the complainant stated that she knew the appellant prior to the incident and the appellant's father testifying on his behalf gave evidence that the families were known to each other and that the appellant had lied to say he did not know the complainant. The incident occurred at 4pm hence in broad daylight and the circumstances were therefore favourable for a positive identification. Further, when the complainant met her older sister who had been at the river she fearlessly and confidently told her what the appellant had done to her. Indeed, her sister (Pw4) confirmed that she looked at her under pant and saw it had blood. Pw4 innocently stated that she washed the under pant and cleaned the complainant which she ought not to have done but which I find does not water down the evidence but instead goes to show that the complainant was not mistaken about the identity of the man who had molested her. I am satisfied the charge against the accused was proved to the required standard and that his defence did not offer a rebuttal to the accusation. The appeal lacks merit and it is dismissed.

On the sentence, I find that the mandatory nature of the sentence prescribed for this offence having been rendered unconstitutional by the Supreme Court's decision in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** the appellant too is entitled to have his sentence reduced. Accordingly, I hereby set aside the sentence of life imprisonment but given the gravity and circumstances of the offence substitute it with one of imprisonment for a term of twenty-five (25) years to be reckoned from the date he was sentenced by the trial court. It is so ordered.

Signed and dated this 16th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE