REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 75 OF 2019

BETWEEN

JOHN KAMAU MUHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 27th March 2019 in Criminal Case (SO) No. 21 of 2018 at Gatundu Magistrates Court before Hon.C. M. Makari, SRM)

JUDGMENT

1. The appellant, **JOHN KAMAU MUHIA**, was charged, convicted and sentenced to life imprisonment after being found guilty of the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***") The particulars of the offence were that on 23rd July 2018 at [particulars withheld] Village within Gatundu South Sub-County, he intentionally and unlawfully caused his penis to penetrate the vagina of MHW, a child aged 9 years.

2. The appellant has appealed against conviction and sentence based on the grounds set out in the memorandum grounds of appeal filed on 2nd October 2019 and amended grounds of appeal filed on 6th January 2020 filed together with written submissions. The thrust of his appeal is that the trial magistrate erred by failing to find that the prosecution had not proved the elements of the offence of defilement to the required standard. Counsel for the respondent supported the conviction and sentence and submitted that the prosecution proved all the elements of the offence of defilement.

3. As this is the first appeal, I am required to review all the evidence and come to my own conclusions 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.

4. In order to prove its case, the prosecution called 5 witnesses. After a *voire dire*, the complainant, PW 1, gave unsworn testimony. She told the court that she was 9 years old. She recalled that the appellant used to work at the Tea Centre and she used to see him daily. On the material day, 23rd June 2018, at about 8.00pm the appellant came to see her father (PW 2). As he was talking to her mother, she went out for a short call and the appellant followed her. He waited for her to leave the toilet and took her to the Tea Center where he worked. PW 1 explained that he removed her panty and his trousers and underwear and did, *"bad manners"* to her by inserting his penis in her vagina. He told her not to scream otherwise he would kill her. He also warned her not to tell her parents. He gave her fresh juice and mandazi before she left.

5. PW 2 told the court that on the material night, he went to the shop to buy flour and on his way back home, he saw PW 1 coming from the Tea Center walking in a funny way. When he inquired from her what happened, PW 1 narrated her ordeal. At about that time, he saw the appellant. He called his wife and neighbours. His wife raised alarm causing the appellant to run away. He took PW 1 to hospital for examination and treatment. He reported the incident to the police the next day. PW 2 told the court that both he and PW 1 knew the appellant as he was a neighbour and watchman at the nearby Tea Centre.

6. PW 3, a village elder and member of the Community Policing, recalled that on the same night at about 9.30pm, PW 2 accompanied by his wife and PW 1 came to report an incident of defilement. He recalled that the child was holding some fresh juice and her hands were shaking. PW 1 narrated to him what happened. He advised PW 2 to take the child to hospital and report to the police. On the next day as he was going to the shops, he found a mob beating the appellant. He intervened and took the appellant to the police post. PW 4, was among the people who heard PW 1's wife screaming at night. When he followed up what happened, he was informed that the appellant had defiled PW 1. They looked for the appellant that night but did not find him. On the following day he was told that the appellant had been found. A mob went

after him but he was rescued by PW 4.

7. PW 5 was the doctor who produced the P3 medical form, the Post Rape Care (PRC) Form and treatment notes on behalf of the doctor who examined PW 1 on 26th July 2018. She confirmed that PW 1 was seen at the hospital on 24th July 2018 and on the material day, she was walking abnormally. Examination of the genital area showed that the labia majora was normal but there was reddening on the vaginal wall and the hymen was broken. She had vaginal discharge and reported pain while urinating.

8. The Investigating Officer, PW 6, recalled that he was at work when members of the public brought the appellant to police post on 23rd July 2018. PW 1 accompanied by PW 2 also came to the police post. He took the child to the hospital, visited the scene and recorded statements before charging the appellant.

9. When placed on his defence, the appellant elected to make an unsworn statement. He told the court that he was arrested while working. He stated that the charges against him were fabricated because he demanded Kshs. 5,000/- which he had loaned PW 2 when his wife was pregnant.

10. 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."*

11. PW 1's testimony narration of her ordeal was clear that she was lured by the appellant to the Tea Centre and subjected to an act of penetration. She described in detail what had taken place leaving no doubt that the appellant committed an act of penetration. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** her testimony was sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate considered her testimony and stated as follows:

> *[16] ….… The minor gave a vivid description of how (the) accused defiled her ….… The complainant's evidence was not shaken in cross-examination by the accused person and for her age, her evidence was remarkable for its clarity and valor and it came out clearly as that of an innocent child without guile and the court had no reason not to believe her.*

12. PW 1's testimony was nevertheless corroborated and fortified by other evidence. First, PW 2 who saw her immediately after the incident noted that she was in a state of distress in the manner she was walking. Second, the medical evidence produced by PW 5 through the P3 medical report, PRC form and initial treatment notes show that the hymen was torn and the vagina inflamed. The doctor who recorded the PRC form also noted her state of distress and the fact that she had difficulty walking. As the trial magistrate noted, such symptoms are not common in children and could only be attributed to an act of penetration that had taken place the previous night. At this stage, I wish to point out that the testimony PW 5 could produce the medical report under **section 77** of the ***Evidence Act***. In his testimony, PW 5 explained that he knew the examining doctor, his handwriting and signature and was able to inform the court of the findings thus satisfying the court of the authenticity of the report

13. Although the incident took place at night, the appellant was not a stranger to PW 1. He came to her home, followed her, took her to the Tea Center where he was working. PW 2 confirmed that he knew the appellant who was a neighbour and was also working at Tea Centre. His also saw the appellant leaving the Tea Centre on that night so soon after he had seen PW 1 coming home. I therefore find and hold that the appellant is the person who committed the act of penetration.

14. In his defence, the appellant did not say anything about the affirmative evidence of PW 1 and the fact that he had been seen by PW 2 near the *locus in quo*. He raised the issue of a grudge which I dismiss for two reasons. First, I accept the trial magistrate's finding that the child was honest hence the grudge could not be attributed to her. Second, the issue was not put to or suggested to PW 2 in cross-examination particularly when PW 2 was clear that he knew the appellant well and that he had no issues with him.

15. The last element of the offence of defilement concerns the proof of age of a child. 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. Proof of age is a question of fact. It may be proved by the testimony of the child, if she is sufficiently intelligent to recall her age, the testimony of the parents, documents evidencing the date of birth like the birth certificate, immunization card and the baptism card (see ***Richard Wahome v Republic*** **NYR CA Criminal Appeal No. 61 of 2014 [2014] eKLR**). Medical evidence like age assessment report may also prove age of the child.

16. In this case, PW 2 told the court that although the child was born on 24th October 2009, he had left the documents in Uganda. An age assessment was done and the report produced in evidence showed that the child was aged between 10 to 11 years old. I therefore find that PW 1 was a child and was aged 9 years as stated by the father.

17. I am satisfied that the prosecution proved all the elements of the offence of defilement. I affirm the conviction.

18. 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.*

19. 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 25 years. Since the appellant was in pre-trial custody, the sentence shall run with effect from the date he was arraigned in court.

20. I affirm the conviction. The sentence of life imprisonment is quashed and substituted with **25 years' imprisonment** to run from **26th July 2018**.

DATED and DELIVERED at KIAMBU this 7th 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.