REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 99 OF 2018

KEVIN SAGALI.....APPELLANT

VRS

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. N Wairimu – PM Eldoret

dated 25th October 2018 in the original Eldoret Chief Magistrate's Court Sexual Offence No. 153 of 2016}

JUDGEMENT

The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act the particulars of the offence being that on 25th June 2016 at Eldoret West District within Uasin Gishu County he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of LN a child aged 9 years.

He faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act whose particulars were that on 25th June 2016 at Eldoret West District within Uasin Gishu County he intentionally and unlawfully caused his genital organ to come into the genital organ of LN a child aged 9 years old.

The appellant pleaded not guilty to the charges but after hearing and evaluating evidence from both sides the trial Magistrate found that the charge of defilement had been proved beyond reasonable doubt, convicted him and proceeded to sentence him to life imprisonment.

Being aggrieved he preferred this appeal. The gist of the appeal is that he was not positively identified as the perpetrator of the offence given that the complainant was alleged to have been defiled by a person called Banjuka which is not the name in the charge sheet; that his arrest was prejudicial; that penetration was not proved and was not supported by medical evidence and that the investigations were shambolic and crucial witnesses were not called.

The appeal which was vehemently opposed was canvassed both orally and through written submissions.

I have considered the rival submissions very carefully. As is my duty as the first appellate court I have also to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses **(see Okeno v Republic [1972] EA 32).** It is my finding that all the elements of the offence of defilement to wit that the victim of the offence was a child and her age for purposes of sentencing, penetration and identity of the perpetrator were all proved beyond reasonable doubt against the appellant.

A certificate of birth Entry No. [….] produced in evidence as exhibit 4 showing the complainant was born on 09.09.2006 not only proved that she was a child but that she was 9 years old at the time the offence was committed hence bringing the issue of age to rest. In her evidence taken on oath upon a voire dire confirming that she understood the nature of an oath she vividly narrated how she was accosted as she was taking a bath. She stated that the perpetrator first covered her mouth then pulled her hands to the back and threatened to stab her with a knife he was holding if she made noise. After forcing her to kneel down he tied her hands and gagged her by use of a handkerchief before inserting his private part (genital organ) into her private part (genital organ). She testified that when she cried he showed her a knife and ordered her to keep quiet. She testified that she only managed to escape because his keys fell from his pocket and when he turned to pick them up she hit him on his private parts with her leg and he fell. She ran home and cut the rope he had used to tie her hands. It was not however until two days later that she gathered the courage to tell her mother's friend what had happened and the friend in turn told her mother. It was then that she was taken to hospital for examination. Thereafter they reported the matter to Baharini Police Post. Her mother MW(Pw2) confirmed that she was informed about the matter by her friend one W and Corporal Jacquiline Chum (Pw4) the investigating officer confirmed that the matter was reported to Baharini Police Station on 29th June 2016. The doctor (Pw3) also confirmed the child was seen and examined at Moi Teaching & Referral Hospital on 29th June 2016 and that the finding of the examination conducted upon her was consistent with defilement. The evidence of these three witnesses goes to show that the complainant was a truthful and reliable witness. Indeed, that of the Doctor (Pw3) corroborated that penetration occurred. I therefore believed the complainant's evidence that the perpetrator

inserted his genital organ into hers. It is immaterial that W was not called as a witness as her evidence would only have gone to corroborate that of the complainant which is not a requirement in sexual offences – **(see Section 124 of the Evidence Act).**

As for the identity of the perpetrator the complainant testified that the incident occurred at 4pm hence in broad daylight. She also testified that she saw the perpetrator and that it was the appellant who she knew as Banjuka. She testified, and this was corroborated by her mother, that he used to go to their home often as it was him who used to clean their carpet. He would also be given other chores by her mother. On the material day her mother served him tea before leaving with Angel the youngest child. In his testimony the appellant confirmed he was commonly known as Banju thereby confirming that was his alias. He also confirmed that the name Kevin Sagali used in the charge sheet was his. I am therefore satisfied that the names Kevin Sagali and Banjuka refer to one and the same person and that there was no defect in the charge sheet. Contrary to his evidence the appellant was apprehended on 29th June 2016 but not 22nd June 2016 and there can be no doubt therefore that it was him who committed this offence on 25th June 2016. Although the doctor who examined the complainant did not attend court the P3 Form was properly admitted in evidence as in any event it could have been produced even under **Section 77 of the Evidence Act.** Moreover, this court could still have found the appellant guilty based on the evidence of the complainant solely because under **Section 124 of the Evidence Act** corroboration is not a requirement. The upshot is that there is no merit in the appeal on conviction.

Regarding the sentence, I note from the record that much as the trial Magistrate indicated she considered the appellant's plea in mitigation, the circumstances of the offence and a pre-sentence report by the probation officer, the reason she imposed the sentence of life imprisonment was because it was the minimum sentence prescribed by the law and her hands were tied. That stricture has since been removed by the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** which has been followed by the Court of Appeal in several cases of defilement. Given the age of the appellant at the time he committed the offence and the contents of the pre-sentence report, I am constrained to find that the sentence imposed by the trial court is not likely to serve the objectives of sentencing. Accordingly, **I hereby set aside the sentence of life imprisonment and substitute it with one for a term of imprisonment for a term of twenty-five (25) years** the term being reckoned from the time of his arrest so as to take into account the period he was in remand custody. It is so ordered.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

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

H. A. OMONDI

JUDGE