REPUBLIC OF KENTA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 72 OF 2019

BETWEEN

LYDAKEN LENOZIKIRINA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 9th May 2019 in Criminal Case (SO) No. 4151 of 2016 at Thika Magistrates Court before Hon.G. Omodho, SRM)

JUDGMENT

1. The appellant, **LYDAKEN LENOZIKIRINA**, 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 22nd April 2016 at [particulars withheld] estate within Kiambu County, the appellant intentionally caused his penis to penetrate the vagina of WKW, a child aged 10 years.

2. The appellant has appealed against conviction and sentence and has relied on the amended grounds of appeal filed on 7th 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. He submitted that he was not properly identified as the person who defiled the child. He also claimed that his alibi defence was not considered. 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 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.

4. In order to prove its case, the prosecution called 5 witnesses. After a *voire dire*, the complainant, PW 1, gave sworn testimony. She told the court how on one Sunday, she went to the neighbour's house and found the appellant and another man she did not know. When she entered the house, the other man left and she was left with the appellant whom she knew as *"Jose"* seated on the bed. She attempted to leave but the appellant pulled her close. She narrated what transpired as follows:

> *He pulled me to the bed (He) made me lie on the bed, squeezed my thighs. The door was by this time closed. He placed a knife on the table and he said if I make noise he would kill me. He lied on me. He told me if I told my mum I was unwell he would give me 10/-. Accused was tying a leso. Accused had removed my clothes from me including my panty. He inserted his penis into my vagina. He never said a word. I never shouted. I was in pain. He warned me not to speak about it or else he would slaughter me. I dressed up and left.*

5. PW 1 did not tell her mother. She told the court that her vagina bled and she was in pain. She was taken to hospital and she told the doctor she could not walk. The doctor examined her and spoke to her mother and informed her what had happened.

6. The child's mother, PW 2, testified that on 3rd May 2016, PW 1 was crying. She complained that her private parts were in pain and she could not urinate. She did not tell her what had happened so PW 2 just massaged her private parts to relieve her pain. She took her to the hospital where she noted the child's vagina was swollen and reddish. Unknown to her, PW 1 went to hospital and saw a doctor. The doctor called her and told her to monitor PW 1 closely. When PW 1 collapsed on 28th May 2016 and was rushed to hospital, it was realized that she had been defiled. This is when the matter was reported to the police station and the P3 medical form issued. PW 1 identified the appellant as the person who sexually assaulted her. PW 2 told the court she knew the appellant as he was a neighbour.

7. PW 3, an administration police officer, told the court that PW 1 led them to the appellant's residence where he was arrested on 28 th May 2016. He was among three people who were at the house. The investigating officer, PW 4, testified that he was assigned to investigate the case on 28th May 2016. He produced the birth certificate which showed that PW 1 was 10 years old. He also issued the P3 medical form to be filled.

8. The P3 medical form was produced by a doctor, PW 5, who examined PW 1 on 7th June 2016. He noted that her vagina was swollen with a broken hymen. He also produced the Post Rape Care (PRC) form which was signed on 27th May 2016 and which showed that PW 1's hymen was broken and the vagina swollen.

9.When put on his defence, the appellant elected to make an unsworn statement in which he denied the offence. He told the court that he was arrested on 28th May 2016 while at the house of a lady friend. He stated that the police were looking for *Jose* whom he did not know and that he was arrested along with other Masaai men. The appellant further stated that PW 1's mother used to supply him vegetables but she was not pleased with him as he had not settled her debt.

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 described in detail what took place when she was called to the house of the neighbour and subjected to 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 telling the truth. In this case though, the trial magistrate was satisfied PW 1's testimony was corroborated by the medical evidence produced by PW 5 who examined her. It is important to note that prior to this she had been having pain in her private parts which were noted by PW 2. Those pains arose only after she had been subjected to an act of penetration and were attributable to that act given that she was a child where in absence of such an act, she would not be suffering such pain and injury to her private parts.

12. The identity of the perpetrator was a critical issue in this matter as the appellant denied that he was the one who caused the act of penetration. PW 1 knew the appellant who was residing in the same neighbourhood. She is the one who led the police to arrest him and in any case, the appellant admitted that he knew PW 2 and it is impossible to believe that he was a stranger to PW 1. In her evidence, PW 1 narrated earlier instances where the appellant among his friends had made sexual advances to her. I find that from the totality of this evidence is that the claim of mistaken identity is baseless.

13. Apart from stating that he was not the person who defiled PW 1, the appellant's defence that he was framed by PW 2 cannot withstand the strength of the prosecution case. Although PW 2 admitted that the appellant owed her money, the testimony of PW 1 and the entirety of the evidence does not disclose any grudge on her part.

14. PW 1 was subjected to cross-examination by the appellant twice during the proceedings and in both instances she was firm and resolute about what transpired. That she did not report the incident immediately was explained by her. She was under grave threat so she feared and it is only because she became very sick that PW 2 discovered what happened.

15. Apart from the fact of penetration by the appellant, the prosecution proved the age of PW 1 by producing the birth certificate which showed she was born on 6th March 2006 making her 10 years old at the time she was abused. The totality of the evidence is that the prosecution proved its case beyond reasonable doubt. I therefore affirm the conviction.

16. 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.*

17. 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.

18. I affirm the conviction. The sentence of life imprisonment is quashed and substituted with **25 years' imprisonment** to run from **1st June 2016**.

DATED and DELIVERED at KIAMBU this 10th 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.