REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 40 OF 2018

SAMMY ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mwingi Senior Resident Magistrate's Court Criminal Case No. 478 of 2013** by **Hon. M. W. Murage (Ag. SRM) on 08/10/14)***

J U D G M E N T

1. **Sammy Ali,** the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **16th** day of **August, 2013** at **[Particulars withheld] Sub-Location** in **Migwani District** of the **Kitui County** intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of **AKW** a child aged **11 years.**

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **16th** day of **August, 2013** at **[Particular withheld] Sub-Location** in **Migwani District** of the **Kitui County** intentionally did an act which caused the contact of his male genital organ namely penis with female genital organ namely vagina of **AKW** a child aged **11 years.**

3. After being taken through full trial, he was convicted for defilement and sentenced to **life imprisonment.**

4. Aggrieved, he appeals on grounds that: there was no conclusive proof of the age of the Complainant; there was no sufficient proof of penetration; there was no proof that he (Appellant) was the perpetrator of the act of penetration and the defence put up that was cogent was not considered.

5. Facts of the case were that on the **16th August, 2013,** PW1, the Complainant had gone to grind flour and while at her grandfather's place, the Appellant grabbed and dragged her to some terraces and molested her. After the act he dressed up and left. Later in the day he saw her near the car wash and gave her **Kshs. 50/=** with instructions to pay the sum for grinding flour at the posho-mill and give her mother the balance. She grinded the flour and went home. She did not tell anyone but she started experiencing pain while urinating. Her mother sought to know what happened and she divulged the information. She was taken to **Migwani Hospital** where she was treated and a Medical Examination Report (P3) issued.

6. Upon being put on his defence the Appellant denied having defiled the Complainant and alleged that he was framed because he is the only person who assists his mother.

7. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that the Court relied on evidence that he committed the offence because he gave the Complainant **Kshs. 50/=,** a fact he did not deny as she had borrowed the money from him and it is not illegal to lend someone money. He faulted the Court for relying on evidence of the document produced which was inconclusive proof of the age and lacerations on the genitalia that did not establish when exactly the injuries were sustained and what was used to occasion them. Relying on the authority of **PKW vs. Republic (2012) eKLR** he argued that the fact of a broken hymen *perse* was not proof of penetration.

8. The State (Respondent) through learned Counsel **Mr. Mamba** opposed the Appeal. He urged that there was evidence of mild external bruises on the genitalia of the Complainant who identified the Appellant as the perpetrator of the act. That the finding of the doctor did establish the fact of penetration of the Complainant's genitalia. On sentence, he argued that the sentence imposed was the minimum mandatory prescribed sentence for the offence.

9. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. Being a case of defilement, the Prosecution was duty bound to prove:

(i) The age of the victim.

(ii) Evidence of penetration.

(iii) Positive identification of the perpetrator of the act of penetration.

11. In the case of **Mwalango Chichoro Mwajembe vs. Republic (2016) eKLR** the Court of Appeal held that:

> ***"… the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ..."***

12. In the instant case, PW2 **Jemima Kiteme** the mother of the Complainant told the Court that she was born on the **9th December, 2001** and adduced in evidence a Child Health Card which established the fact of the child having been of an apparent age of 12 years.

13. Penetration is defined by **Section 2** of the **Sexual Offences Act** as:

> ***"…. the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

14. PW1 told the Court that the Appellant had sex with her. She felt pain in the process. When she went home she would feel pain while urinating such that she would cry. PW2 her mother noticed that she would not do chores as assigned but would just lie on the mat and cry. This made her confront her that is when she divulged that she had been molested.

15. Upon being taken to hospital she was examined and found having sustained lacerations on vaginal walls but the outer genitalia was intact.

16. The Complainant herein was a child of tender years **(See Kibageny arap Korir vs. Republic (1959) EA 92).**

17. **Section 124** of the **Evidence Act** provides thus:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

18. The Complainant stated thus:

> ***"… he grabbed me and covered my mouth, he dragged me by the hand to some terraces at Kinee Shamba. He told me to lie down … he stripped me. He asked me to remove my pants but I refused. He then removed my pantie. Also took off his clothes. He had sex with me … he got up and left. I felt pain while he was doing it …"***

19. The Complainant did not disclose what happened until a week later. But at the point of being examined, there was evidence of lacerations on the vaginal walls. The trial Magistrate who had the opportunity of seeing and hearing the Complainant testify stated that she exercised no doubt in her mind as to who defiled her.

20. It is admitted by the Appellant that indeed he gave the Complainant **Kshs. 50/=.** The Complainant stated that he gave her the money to pay for grinding costs and give the balance to her mother. PW2 viewed the money as a bribe following the event therefore gave it back to the Appellant.

21. In his defence the Appellant claimed that he was fixed because he is the only one who assists his mother. It was not explained as to why their neighbours would want to ensure his mother did not get necessary help. At the point of cross examination, it was not suggested to the witnesses who testified that they came up with charges following allegations brought up in his defence. Therefore, the trial Magistrate did not fall into error in disbelieving him.

22. In the premises, I find no merit in the Appeal against the conviction that I affirm.

23. With regard to the sentence, the Court of Appeal considered the issue of sentencing in the case of **Evans Wanjala Wanyonyi vs. Republic (2019)** where it the Court stated thus:

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
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> ***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.***
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> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."***

24. Guided by the authority, I do set aside the sentence imposed and substitute it with a sentence of **Twenty (20) years imprisonment** to be effective from the date of conviction and sentence by the Trial Court.

25. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **9th** day of **January,** 20**20.**

L. N. MUTENDE

JUDGE