



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 50 OF 2016**

**DAVID NJOROGI NJIHIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment dated 20<sup>th</sup> December, 2012, of Hon. S.M Githinji, Chief Magistrate, in Naivasha CMCC No 2170 of 2007)*

**JUDGMENT**

1. The accused was charged with the offence of defilement of a child contrary to **section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 4<sup>th</sup> November 2007 in Nyandarua District within Central Province the accused had Carnal knowledge of LWN a girl aged 11 years. After a full hearing in which the prosecution availed 7 witnesses. He was convicted and sentenced to life imprisonment.
2. The record indicates that the trial in the Naivasha Magistrate's court commenced on 7<sup>th</sup> March, 2012, as it was a retrial having previously been tried in Engineer.
3. The petition of appeal was first filed in Nakuru High Court on 5<sup>th</sup> February 2013. The file was subsequently transferred to Naivasha in 2016. Through his counsel, Mr Kanyonge, the appellant filed an amended petition of appeal on 19<sup>th</sup> September 2019. He appeals against both conviction and sentence in 13 grounds and prays that conviction be quashed and sentence be set aside.
4. For brevity, and instead of restating all the grounds of appeal here, I have consolidated those raising similar issues and summarized them together with the parties' arguments herein, as follows:

*a. Failure to comply with Section 124 of the Evidence Act when taking the victim's evidence*

The appellant submits that the learned trial Magistrate did not test the victim's ability to comprehend the issues and that she was telling the truth. The same was not recorded in the proceedings before the trial court. Further, that no evidence of the victim's actual age was produced during trial.

*b. Failure to adhere to rules of conducting an identification parade under the police standing orders – now the National Service Act 2011.*

- The appellant submits that PW2's evidence during trial was that he saw the appellant alone at the police station and confirmed that he was the one, and this proves that the parade was casually done. He further adds that PW4 conceded in cross examination that he did not know the appellant and that his daughter told him his name.

- The appellant further submits that he was convicted based on information obtained from an unprocedural identification parade even though trial court held that he was properly identified even in the absence of the identification parade. Thus, the absence of an identification parade did not affect the outcome.

-On section 124, the prosecution pointed out that there had been corroboration of the evidence of PW1 and it was on that basis that the trial court made its determination.

-On identification, the prosecution argued that PW1, the victim, was with her brothers PW2 and PW3 who all testified that they were

together on the material date; that they had seen the accused as they went to fetch firewood in the forest; that they knew the accused as Daudi and that he was their neighbor. They thus recognized him, which is more assuring that identification.

c. Absence of key prosecution witnesses.

- The appellant submits that key witnesses were not called including the doctor who filled the P3 form, the investigating officer and the OCS who conducted the alleged identification parade and they were substituted by person who knew very little about the case.

d. Investigating officer's evidence was hearsay

- The appellant submits that PW7 testified that he relied on information he had been given by the complainant including the name of the appellant and that he did not record statements neither did he visit the scene.

e. Failure to fulfil requirements of sec 8(1) and (2) of the sexual offences Act, an irregular P3 form and failure to abide by requirements of section 72 of the evidence Act.

- The appellant submits that no evidence was ever presented by the doctor, who was a key witness, to prove that penetration actually occurred, as he testified that the injuries on the victim were consistent with injuries inflicted by a blunt object but did not state that the injuries could have been inflicted by a male reproductive/genital organ.

- He further submits that there was discrepancy on the date of treatment as the P3 form was dated 2 days after the victim said she was treated. He adds that the P3 form was produced by Pw6 who was not the maker, he objected but the objection was turned down.

-On penetration the prosecution asserted that the trial magistrate relied on corroborated evidence to conclude that the victim's hymen had been broken and penetration occurred. Penetration, she argued, was defined to mean full or partial penetration.

f. Discrepancy in the date of alleged offence, arrest and the occurrence book report.

- The appellant states that there were discrepancies on date of arrest, date of report, date of medical examination and date of arraignment in court.

g. Trial Magistrate applied wrong principles of Law when awarding a life sentence

- The appellant submits that the mandatory sentence of life imprisonment is unconstitutional and relies on the Muruatetu case which declared the death sentence unconstitutional

## **Analysis and determination**

5. I now deal with each of the issues raised by the appellant in the grounds of appeal as follows.

### **Failure to comply with Section 124 Evidence Act**

6. **Section 124** of the **Evidence Act** requires corroboration of the evidence of a victim. **Section 125(1)** provides that all persons are competent to give evidence save for children of tender age. It is clear from the proceedings that at the time of testifying, the victim, who was born on 10/1/1996, was 16 years old and not a child of tender years. Voire dire examination was therefore not necessary as it is believed a person of 16 years is by statute competent and can comprehend and understand what is at stake.

7. In the celebrated case of **Kibageny Arap Kolil v R (1959) EA 82** the Court of Appeal for Eastern Africa held that;

*“the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voire dire examination. It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case.*

8. On the question whether age was proved, the victim, her father and the medical examination report also indicated the age of the victim as 11 years. In **Musyoki Mwakavi v Republic [2014] eKLR** it was held that:

*“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”.*

9. From the foregoing, it is clear that on this issue the trial court did not err.

### **Failure to adhere to rules of conducting an identification parade under the police standing orders**

10. The victim's evidence was that she knew the man since he was their neighbor and that his children are her friends and further that she used to see him a lot in Njambini town. It means that identification of the accused was through recognition.

11. In the case of **David Gichuru M'arithi v Republic [2015] eKLR**, the Court of Appeal quoted the case of **Kinyua & Another v Republic Criminal Appeal No.11 of 2013** in that Court stated:

*“In this case, it is not in dispute that the appellants were well known to the complainant hence this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value. See this court's decision in Juma & another versus Republic [2003] KLR 380.”*

12. In light of the above authorities, the ground does not stand.

**Failure in and irregularities in evidence: absence of key witnesses, hearsay, irregular P3 form**

13. Under this head are a number of grounds (c, d and e) which I have combined.

14. On the complaint that there were certain witnesses left out by the prosecution in this case, **Section 143** of the Evidence Act states:

*“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”*

15. In the case of **Jackson Wanyoike Njuguna & Another v Republic [2019] eKLR** the Court of Appeal dealing with the issue of failure to call a number of witnesses referred to section 143 of the Evidence Act and stated:

*“[18] In this case, we are not able to discern any apparent added value that the ‘missing’ witnesses would have added to the already formidable case presented by the prosecution. The finding by the trial court that those additional witnesses were not crucial to the case; and the affirmation of that finding by the High court was thus proper.”*

16. It is trite law that the evidence of even a single witness is sufficient to convict a person, as was held in **George Kioji v R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) where the court stated:

*“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”*

17. The prosecution is thus not obligated to call on a particular number of witnesses or produce a voluminous number of exhibits to prove a sexual offence and in this case, defilement. The evidence of the victim alone is sufficient as long as the court believes beyond reasonable doubt that the defilement occurred. The prosecution, in addition to the victim, called other witnesses who corroborated the evidence of the victim and made it believable enough for the trial magistrate to find the appellant guilty and convict him.

18. On the issue of the P3 being produced by non-maker, **Section 77(1)** of the **Evidence Act, Cap 80**, provides that a document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. **Subsection (2)** thereof allows the court to presume the signature on such document to be genuine.

19. That notwithstanding, the P3 Form must ideally be produced by its maker. The Court of Appeal in **Sibo Makovo v Republic, Criminal Appeal [1997] eKLR**. Held as follows:

*“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.”*

20. In this case, PW6 produced the P3 form on behalf of Dr. Wainaina who was the maker of the document. Before doing so, the prosecution made an application for the production by PW6. The accused objected to the application and the trial court ruled to allow the production. Its reasons were that tracing the Doctor would not be easy without causing undue or inordinate delay and may also be exorbitant in cost if the Doctor was still in South Africa where he had gone for further studies. It was further noted that the case was old one and in the list of backlog cases, and thus further delay would not be in the interest of justice. The available witness confirmed that he had closely worked with the maker and knew his handwriting and signature. Finally, the court noted that PW6 was able to answer professional questions which may be put to her as a qualified practicing Doctor.

21. I therefore find no reason to fault the trial court on the production of the P3 by PW6 who was not its author.

#### **Discrepancies in dates in arrest date, occurrence book, medical examination and arraignment**

22. The appellant urged that there were contradictions and discrepancies in the evidence adduced. I agree. The question is whether the discrepancies are fatal to the case.

23. In the case of **Jackson Mwanzia Musembi v Republic [2017] eKLR** where the court relied on the Uganda Court of Appeal case of **Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6**. There, the Court noted that it is not every contradiction that warrants rejection of evidence. The Court put it thus:

*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”*

24. It is my opinion that the contradictions, even though they exist, were minor in that they do not affect the main substance of the prosecution’s case, which is defilement. This ground of appeal also fails.

#### **Whether the trial Magistrate applied wrong principles of law in meting sentence**

25. The prescribed sentence for defilement under **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** is a mandatory sentence of life imprisonment should the accused person be found guilty. That is the sentence the trial court meted the same stating noting that this was a retrial:

*“I can’t give any other sentence apart from the one indicated. I do feel for the accused who had initially been sentenced to 20 years’ imprisonment and appealed. Though the appeal to a given extent was successful...in this case he has lost out”*

26. The trial magistrate apparently felt bound by the mandatory provisions of the statute on sentencing. I also note that mitigation followed immediately thereafter. A mitigation hearing, properly so called, was not held on mitigation. All that happened was that the prosecutor stated that the accused was a first offender and the accused said he was young when arrested, that he fell ill and never committed the offence.

27. I note and am guided by the emergent jurisprudence on the question of invoking mandatory sentences. Whilst in the case of **Denis Kinyua Njeru v- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under **section 8** of the **Sexual Offences Act** are “*straight jacket*” penalties; and that they leave no room for the exercise of discretion by a sentencing court, the same court in the more recent case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR**, held that:

*“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:*

*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.*

*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.”*

28. In the appeal, the appellant invoked the principles in **Muruatetu**. I have no doubt that following **Muruatetu** and the subsequent authorities in the Court of Appeal, viz, **Wanjala, Christopher Ochieng** and **Jared Koita** (supra), a trial court has some discretion in sentencing subject to conducting a substantive hearing upon mitigation. Such a trial was not conducted.

29. I would therefore order that the appellant does undergo fresh mitigation in a sentencing trial to enable him to fully ventilate his relevant circumstances and the proportionality of the sentence that would be apt.

30. To that end, the matter is remitted back to the trial court for a resentencing trial and meting of sentence afresh. Mention before the Chief Magistrate to be on 9<sup>th</sup> March, 2020.

31. It is also directed that a Probation Officers report on the appellant be prepared and availed at the trial on re-sentencing.

32. In all other respects the appeal fails and is dismissed.

33. Orders accordingly.

**Dated and Delivered at Naivasha this 6<sup>th</sup> Day of February, 2020**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Michuki for the State
2. Tombe holding brief for Kanyonge for the Appellant
3. Appellant - David Njoroge Njihia - present
4. Court Assistant - Quinter Ogutu