REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.53 OF 2018

DL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. R. Kitagwa

RM delivered on 21st March 2018 in Kibera CM Cr. Case (S/O) No. 52 of 2016)

JUDGMENT

The Appellant, DL, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 16th May 2016 at Lenana Forest in Riruta within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of MM a child aged five (5) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 16th May 2016 at Lenana Forest in Riruta within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act by causing his penis to touch the vagina of MM a child aged five (5) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of defilement and sentenced to serve life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the police failed to conduct proper investigations. He faulted the trial court for misapprehending the facts and evidence on record and therefore drawing adverse inference against him. He took issue with the documentary evidence presented before the trial court stating that the same were not authentic. He was of the view that the trial court failed to properly evaluate his defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Ms. Chege for the State opposed the appeal. She made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She asserted that the Appellant, who was the complainant's step father, sexually assaulted her and abandoned her in a forest. The Appellant lured the complainant by buying her food. She was rescued by good Samaritans after close to five days. They took her to Riruta Police Station. She was later admitted at a hospital where she underwent a minor surgery.

Learned State Counsel averred that the Appellant participated in the search of the complainant, yet he knew what he had done to her. She submitted that all the elements of the charge were established by the prosecution. An age assessment was conducted on the complainant. It established that she was approximately six (6) years old. The ingredient of penetration was also established by the medical evidence which corroborated the complainant's testimony. The complainant identified her father as the person who sexually assaulted her. On the issue of bad blood between the Appellant and his wife, Learned State Counsel was of the view that the Appellant would not have gone to his wife's place of business and later to the grandmother's house if they were not in good terms with them. In the premises, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, MM is the complainant. She told the Court that the Appellant was her father. She lived with him and her mother. Sometime in 2015, her mother took her to her grandmother's house. The Appellant picked her from her grandmother's house, bought her mandazi and took her to a forest. He asked her to undress. He applied some liquid on his penis and afterwards applied the same liquid on her vagina. He lay on top of her, strangled her and left her in the forest. She was rescued by a good Samaritan who took her to hospital. The complainant stated that she was feeling pain in her vaginal area and was not able to walk properly at the time. She was examined and treated at the hospital. Her aunt later took her to stay in a children's home. On cross-examination, the

complainant stated that the incident happened during the day. Her grandmother had gone to the market.

PW2, JRL is the complainant's mother. She stated that the Appellant was the complainant's step-father. She lived with him for about two years before they parted ways in May 2016. PW2 told the court that on 16th May 2016, she went to the market and left the complainant at her grandmother's house. While at the market, the Appellant came and informed her that her uncle from Uthiru had called him to inform her of funeral arrangements that were taking place back home. The Appellant thereafter left and went back to the house. At about 4.00 p.m., the Appellant came back to the market. He found PW2 and the complainant's grandmother. They all left together and went home. When they arrived at the grandmother's house, they discovered the complainant missing. They looked for her in various places to no avail. On 18th May 2016, PW2 reported the complainant missing at Riruta Police Station. The following day on 19th May 2016, while she was doing laundry, she noticed bloodstains on the Appellant's clothes. When she asked him about the same, he did not give any explanation.

PW2 further testified that she travelled to her rural home in Kakamega on 20th May 2016. She received a call from a good Samaritan the following day, who informed her that PW1 had been found near a railway line in a forest and had been taken to Nairobi Hospital. PW2 informed the Appellant. She immediately travelled back to Nairobi. The good Samaritan informed her to make a report at Riruta Police Station. A police officer from the said station took her to Nairobi Women's Hospital where PW1 was admitted. At the hospital, PW1 narrated to her how the Appellant picked her from the house and asked her to accompany him to Lenana. On the way, he bought her doughnuts. He took her to a forest, undressed her, and smeared some liquid on his penis and on her private parts. He then inserted his penis in her vagina while strangling her on the ground. PW1 was admitted at the hospital for about a week.

PW3, Robert Wekesa Wafula was a dental surgeon from Mbagathi District Hospital. She conducted an age assessment on the complainant on 21st March 2017. He examined her dental formula. After his examination, he came to a conclusion that the complainant was approximately six (6) years of age. He produced a medical report to the same effect into evidence.

PW4, Edward Kinotwe was a clinical officer at Nairobi Women's Hospital. It was his testimony that the complainant was brought to the said hospital by a good Samaritan on 21st May 2016. The good Samaritan found the complainant abandoned in a forest. He stated that the complainant was in pain and had difficulty walking. Upon vaginal examination, PW4 stated that the complainant had a perennial tear that extended to the vaginal wall approximately 4cm. He was of the view that the perennial tear was due to sexual assault. He stated that a procedure had to be done under anesthesia to repair the tear. He produced a medical report into evidence.

PW5, Dr. Kizzi Shako was based at Police Surgery. She examined the complainant on 16th January 2017, which was about six months after the sexual assault. She stated that the complainant's vaginal area was normal. Her hymen was torn at 6 O'clock. She also had a tear on her posterior fourchette (continuation of a tear to the anus, but does not reach the anus). The tear had healed. She noted that the complainant had earlier been treated at Nairobi Women's Hospital. She produced the complainant's P3 form into evidence. It was her evidence that the tear was most likely caused by penetration of the complainant's vagina.

PW6, P.C. Evelyn Mwikali investigated the present case. She was based at Riruta Police Station at the material time. She was on duty at the station on 21st May 2016, when members of the public came carrying a child (the complainant). They informed her that they had rescued the child who had been abandoned in Ng'ando Forest, which was part of Lenana Forest. PW7 took the complainant to Nairobi Women's Hospital. She was in pain. Her hands and legs were swollen. The members of the public informed her that when they rescued her, she did not have any clothes on her lower part of the body. She was only wearing a T-shirt. The complainant was admitted and the doctors informed PW7 that she had been sexually assaulted. After two days, PW7 was able to interrogate the complainant. She informed her that the Appellant, who was her father, took her to a forest where he sexually assaulted her. She stated that he inserted his penis in her vagina. PW7 further testified that the members of the public who rescued the complainant declined to record statements. After investigations, she charged the Appellant with the present offences.

The Appellant was put on his defence. He told the court that he resided at Lenana Race Course. He stated that on 15th May 2016, he had a disagreement with his wife (PW2) since she came home late. When he tried to inquire where she was, she told him that he had no authority to question her. She threatened to make him suffer. The following day, he received a call from PW2's uncle. He wanted to speak to PW2. The Appellant went to the market where PW2 was and gave her the phone so that she could speak to her uncle. He came back home together with PW2 and PW1's grandmother. After about half an hour, they noticed that PW1 was missing. They looked for her in vain. They reported the matter to the area Chief. He stated that he made a further report at Riruta Police Station. The following day, he travelled upcountry accompanied by PW2 and the complainant's grandmother.

The Appellant further testified that on 21st May 2016, he received a call from PW2 who informed him that PW1 had been found in Lenana. When he came back to Nairobi, he went to Riruta Police Station where he was arrested. The Appellant pointed out that the members of the public who rescued the complainant were not availed as witnesses before court. He stated that proper investigations were not conducted. The Appellant denied sexually assaulting the complainant. On cross-examination, the Appellant admitted that he was the complainant's step-father. He stated that he lived with her and PW2 for about a year and a half. He also admitted that the complainant was six years old.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira –vs- Republic [2003] eKLR). In the present appeal, the issue for determination is whether the prosecution established the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. Section 8(1) of the Sexual Offences Act provides that:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof beyond any reasonable doubt. In the present appeal, the complainant stated that she was five (5) years old. Her mother (PW2) told the court that she was five and half years of age. PW3 was a dental surgeon who conducted an age assessment on the complainant. He told the court that the complainant was approximately six (6) years old. He produced the age assessment report into evidence. The complainant's age was established to be tentatively between 5-6 years of age. This evidence was not challenged by the Appellant. He admitted during cross-examination that the complainant was six years old. **This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

This court now turns to the ingredient of penetration. Section 2(1) of the Sexual Offences Act defines penetration as:

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

In the present appeal, it was the complainant's testimony that the Appellant picked her from her grandmother's house. He bought her mandazi and took her to a forest. He asked her to undress. He applied some liquid on his penis and afterwards applied the same liquid on her vagina. He lay on top of her, strangled her and left her in the forest. She was rescued by a good samaritan who took her to hospital. The complainant stated that she was feeling pain in her vaginal area and was not able to walk properly at the time. She told PW2 and PW6 that the Appellant applied some liquid on his penis and her vagina. He then inserted his penis in her vagina while holding her neck to the ground. The medical evidence adduced by PW4 and PW5 established that indeed the complainant's vagina was penetrated.

PW4, who examined the complainant on 21st May 2016, stated that when the complainant was brought to the hospital, she was in pain and had difficulty walking. Upon examination of her vaginal area, PW4 stated that the complainant had a perennial tear that extended to the vaginal wall for approximately 4cm. They then conducted a minor surgery under anesthesia to repair the tear. He averred that the perennial tear was due to sexual assault on the complainant. PW5 examined the complainant on 16th January 2017, approximately six months after the sexual assault was alleged to have occurred. She stated that the complainant's hymen was torn at 6 O'clock. She also had a tear on her posterior fourchette (continuation of a tear to the anus, but does not reach the anus). She produced the complainant's P3 form into evidence. It was her evidence that the tear was most likely caused by penetration of the complainant's vagina. The medical evidence of the hymenal tears at 6 O'clock as well as the perennial tear which extended to her vaginal wall upto about 4cm corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue was whether penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He was her stepfather. They had lived together for about to two years. The Appellant admitted as much in his defence statement. She informed her mother as well as the investigating officer that the Appellant lured her from her grandmother's house, bought her mandazi and took her to a forest. He undressed her, applied some liquid on his penis and her vagina and sexually assaulted her while holding her neck down. He thereafter abandoned her in forest where she was rescued about five days later by members of the public. PW6 stated that the members of public who brought the complainant to the police station declined to record statements. The complainant was the only witness to the alleged defilement. The law is however clear that a conviction can be founded on the evidence of a victim of a sexual offence. Section 124 of the Evidence Act states 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*."**

The complainant narrated in detail how the Appellant picked her from her grandmother's house, took her to a forest and sexually assaulted her. The incident happened during the day. She told PW2 and PW6 what had happened. She identified the Appellant as the person who sexually assaulted her. He was known to her since he was her step-father. There was therefore no chance of mistaken identity as the Appellant was well known to the complainant. Having considered the evidence on record, this court is of the view that the complainant was telling the truth. She was only six years old and had no reason to implicate the Appellant who was her father.

This court has taken into consideration the complaint by the Appellant to the effect that no of the member of the public who are said to have rescued the complainant from the forest was called to testify. It was the Appellant's contention that the failure by the prosecution to call those witnesses weakened the prosecution's case. This court is however of a contrary opinion. Whereas the appearance of these members of public in court as witnesses would have corroborated the prosecution's case as regards the circumstances in which the complainant was found in the forest, it would not have added value to the cogent, consistent and truthful testimony of the complainant in regard to how she was sexually assaulted and later abandoned at the forest. The complainant, and not the members of the public, was the identifying witness. Her identification of the Appellant was that of recognition. This court holds that the failure by the prosecution to call the members of the public who rescued the complainant did not diminish or lessen the strength of the prosecution's case against the Appellant.

The Appellant in his defence stated that on the material day, he received a call from PW2's uncle who wanted to talk to PW2. He went to the market where PW2 was and gave her the phone so that she could speak to her uncle. He later came back home together with PW2 and PW1's grandmother. His defence is however displaced by PW2 who testified that after the Appellant came to inform her about the phone call he went back home. He later came back to the market at about 4.00 p.m. and they proceeded home together. The Appellant therefore had opportunity to commit the offence.

The Appellant in his defence further alleged that there was bad blood between him and PW2 as they had quarrelled the previous day. However, as the Learned State Counsel pointed out, the Appellant went to see PW2 the following day and even went back in the evening to pick her and the complainant's grandmother. They went back to the house together. His conduct does not point to a strained relationship

between them. There was no evidence of the existence of bad blood between the two. This court is of the view that the Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. It was properly dismissed as being of no evidential value. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made by parties to this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence**, Section 8(2) of the Sexual Offences Act provides a mandatory sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. However, the recent decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic [2017] eKLR*** held that the mandatory death sentence prescribed for the offence of murder by **Section 204** of the **Penal Code** was unconstitutional and that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the **Muruatetu case** was also extended to mandatory sentences imposed by the **Sexual Offences Act** in recent decisions by the Court of Appeal in **Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR**. The Court of Appeal in **Jared Koita Injiri** (supra) held thus;

> ***"...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
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> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

Guided by the aforestated decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the life imprisonment sentence that was meted on him was deserved or another sentence ought to be imposed. This court has considered the Appellant's mitigation in the present appeal. The Appellant is a first offender. He submitted that he has a family and was the sole breadwinner. This court also notes the inhuman nature in which the Appellant treated the complainant who was merely six years of age at the time. He sexually assaulted her and abandoned her in the forest. He literally left her for the dead. She was in the forest for five days before being rescued by members of the public. She was in such a critical state that when she was rescued she was rushed to hospital for treatment.

In the premises, this court sets aside the life imprisonment sentence given by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve thirty (30) years imprisonment with effect from the date he was sentenced before the trial court. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE