



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.166 OF 2018**

**FRANCIS NG'ANG'A KIBIRA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(An Appeal arising out of the conviction and sentence of Hon. J. Kibosia SRM***

***delivered on 16<sup>th</sup> July 2018 in Makadara CM Cr. Case (S/O) No.51 of 2016)***

**JUDGMENT**

The Appellant 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 16<sup>th</sup> April 2016 at about 2.00 p.m. at [particulars withheld] within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of SRN, a child aged six (6) 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 16<sup>th</sup> April 2016 at about 2.00 p.m. at (particulars withheld) within Nairobi County, the Appellant intentionally touched the vagina of SRN, a child aged six (6) years with his penis. 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 and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He faulted the trial court for failing to find that the element of penetration was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He was of the view that the trial court failed to properly evaluate whether the complainant was a truthful witness. He was aggrieved that the trial court relied on the prosecution's evidence which was inconsistent and full of contradictions. He asserted that the trial court failed to properly evaluate his defence in arriving at its decision. He was aggrieved by the sentence meted out by the trial court stating that the same was unconstitutional. 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. Akunja for the State opposed the appeal. She averred that the complainant was on her way to the shop when the Appellant called her to his house. He undressed her and sexually assaulted her. He warned her against telling anyone about the incident before letting her go. She asserted that PW2, the complainant's mother saw the complainant leave the Appellant's house. PW2 examined the complainant's genitals and discovered that her vaginal wall was reddened. Learned State Counsel submitted that medical evidence adduced by PW3 and PW4 established penetration since the complainant's hymen was absent. She pointed out that the complainant's birth certificate was produced in evidence. She dismissed the Appellant's assertion that a grudge existed between him and PW2. She was of the view that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She averred that the Appellant was well known to the victim as he was her neighbour, and hence his identification was that of recognition. 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, SRN, was the complainant. She testified that on the material day, she was on her way to a nearby shop to buy *mandazi* when the Appellant called her. He took her to his house and laid her on the bed. He undressed her. She stated that she was wearing a dress and stockings. He removed her stockings and underwear. He opened the zip of his trousers and then undressed. He proceeded to insert his penis in her vagina. She stated that she felt pain. After the Appellant was done, he told her that he loved her. He warned her against telling anyone about the incident before letting her go. She stated that her mother saw her leave the Appellant's house. She did not inform her mother of the incident immediately as she was afraid. She later told her what the Appellant had done. The complainant stated that she knew the Appellant. He was their neighbour. She referred to the Appellant by his name.

PW2 BKM is the complainant's mother. She told the court that complainant was born on 2<sup>nd</sup> December 2009. On 16<sup>th</sup> April 2016, at about 2.00 p.m., she was doing laundry. She sent the complainant to the shop to buy *mandazi*. She realized that the complainant had taken too long to come back. She went outside to try and locate her. Her house was located on the second floor. She went downstairs and saw the complainant coming out of the Appellant's house, which was located on the ground floor. The complainant looked worried. She took the complainant to the house and asked her what she was doing at the Appellant's house. The complainant told her that the Appellant had instructed her not to tell anyone. PW2 cussed her after which the complainant finally opened up. The complainant informed her that the Appellant called her to his house as she was going to the shop. He opened the zip of his trousers and undressed. He also removed her underwear and proceeded to insert his penis in her vagina. The complainant told her that the same thing had happened the previous Sunday. PW2 examined the complainant's genitals and noticed that the same had reddened. She immediately called her husband. They took the complainant to Nairobi Women's Hospital. They afterwards reported the incident at Kasarani Police Station. On cross-examination, PW2 stated that she had known the Appellant for about two years prior to the alleged incident. They were neighbours. She stated that she did not hold any grudge against him.

PW3 Dr. Joseph Maundu from Police Surgery stated he examined the complainant on 21<sup>st</sup> April 2016. She was alleged to have been defiled on 16<sup>th</sup> April 2016. He stated that her external genitalia was normal. However, her vaginal walls were reddened and inflamed. Her hymen was torn. He also examined the Appellant on 22<sup>nd</sup> April 2016. He stated that he had no physical injuries and his genitals were normal. He produced both the complainant's and the Appellant's P3 forms in evidence.

PW4 Peter Ngatia was a Clinical Officer at Nairobi Women's Hospital. He stated that the complainant was examined at the said hospital on 16<sup>th</sup> April 2016 by Dr. Njoroge who had since left the hospital. PW4 stated that he was familiar with Dr. Njoroge's handwriting and signature since they had worked together for about four (4) years. The Appellant did not have any objection to PW4 adducing evidence on behalf of Dr. Njoroge. PW4 produced the complainant's Post Rape Care Form in evidence which indicated that upon vaginal examination, the complainant's hymen was torn at 7 O'clock. Her vagina was hyperemic with lacerations around the vaginal walls. He testified that the complainant had been penetrated.

PW6, CPL Esther Chepkoech who was then attached at Kasarani Police Station, investigated the case. She was assigned the case on 17<sup>th</sup> April 2016. The complaint was reported by PW2. She arrested the Appellant at his house. She stated that the Appellant lived in the same building as PW2 and the complainant at Canopy Area. She interviewed prosecution witnesses and recorded their statements. She also took the complainant and the Appellant to hospital for examination. After concluding her investigations, she proceeded to charge the Appellant with the present offences. She produced the complainant's birth certificate into evidence which indicated that she was born on 2<sup>nd</sup> December 2009.

The Appellant was put on his defence. In his unsworn statement, he denied having sexually assaulted the complainant. He told the court that he worked at Zimmerman as a mason. The complainant and her mother lived in the building where he was working. He used to go to PW2's house to do repairs and deal with any water related issues. He stated that in February 2016, he got into a disagreement with PW2 since he did not allow her to fetch water. They had another disagreement in March 2016 when PW2 left litter near the stairway. He reprimanded her and she spit on him. On the material day of 16<sup>th</sup> April 2016, he went upstairs to pump water. As he was coming back down, he met the complainant standing on the stairway. She informed him that she was waiting for her mother. PW2 came and instructed the complainant to go upstairs to the house. He left and went outside the gate. On 21<sup>st</sup> April 2016, police officers came to his house and arrested him. They took him to Kasarani Police Station. They later charged him with an offence that he was not aware of.

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 comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). 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, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well as the rival submission made by the parties to this appeal. 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 elements forming the offence of **defilement** namely; the age of the complainant, proof of penetration and positive identification of the perpetrator. On the age of the complainant, PW2, who was the complainant's mother, testified that the complainant was born on 2<sup>nd</sup> December 2009. She was six (6) years of age at the time of the sexual assault. The complainant's birth certificate produced in evidence confirmed that the complainant was indeed six (6) years of age at the time of the sexual assault. **The Appellant did not challenge the evidence adduced with regards to the complainant's age. 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.**

**With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:**

***“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”***

The complainant narrated to the court how the Appellant called her to his house as she was going to the nearby shop. **He laid her on the bed and removed her stockings and underwear. He opened the zip of his trousers and undressed himself. He proceeded to insert his penis in her vagina. She stated that she felt pain. After the Appellant was done, he told her that he loved her. He warned her against telling anyone about the incident before letting her go. The complainant was candid that the Appellant inserted his penis in her vagina. PW2, the complainant's mother told the court that she saw the complainant leave the Appellant's house. The complainant informed**

her that the Appellant had sexually assaulted her. She examined the complainant's genitals and saw that her vaginal wall had reddened.

The medical evidence adduced by the prosecution established that indeed the complainant's vagina was penetrated. The complainant was examined at Nairobi Women's Hospital on the same day the incident occurred. The Post Rape Care Form adduced in evidence indicated that the complainant's vaginal walls were reddened. She had lacerations around her vaginal walls. Her hymen was also torn at 7 O'clock. This evidence corroborated the complainant's assertion that she was indeed penetrated. The complainant was also examined by Dr. Maundu (PW3) on 21<sup>st</sup> April 2016. He stated that the complainant's hymen was broken. **Her vaginal walls had reddened and was inflamed.** He produced a P3 form into evidence which indicated that the complainant's hymen had a tear at 7 o'clock. **Taking into consideration the P3 form and Post Rape Care Form produced in court, as well as the complainant's testimony, this court formed the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

The third issue is whether penetration was perpetrated by the Appellant. The Appellant was a neighbour to the complainant. She referred to him by name. He was therefore not a stranger. The Appellant's identification was by recognition. PW2 testified that she saw the complainant leaving the Appellant's house. The complainant informed PW2 that the Appellant had sexually assaulted her. PW2 examined the complainant's genitals and saw that her vaginal walls were reddened. From this evidence, the Appellant was properly identified as the perpetrator of the sexual assault. The Appellant in his defence denied that he sexually assaulted the complainant. He asserted that the present case was a ploy by PW2 to frame him of the present charges since she held a grudge against him. PW2 dismissed this assertion in her testimony. She told the court that she and the Appellant had been neighbours for close to two years prior to this incident and that she was not at odds with him.

This court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the sexual assault. The Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no probative evidential value. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. 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.*

*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 aforesaid 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, as well as the report by the probation officer dated 1<sup>st</sup> August 2018. The Appellant is a first offender. He submitted that he has a family and was the sole bread winner. This court notes that according to the probation report, the Appellant was not remorseful and maintained that he had been framed of the present charges.

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 by the trial court. This court has taken into consideration the period that the Appellant was in lawful custody both before and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2020

L. KIMARU

JUDGE