REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 42 OF 2019

JOSEPH GIMUNGAYA SAMBURU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(**Being an appeal against the conviction and sentence dated 26thSeptember, 2017 of the subordinate court in Criminal Case No. 22 of 2017 at Kilgoris Law Courts before Hon. D.K. Matutu Esq. (S.R.M.)**

JUDGMENT

1. The appellant had been charged with the offence of attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 29th April, 2017 at [particulars withheld] village in Transmara West District of Narok County he intentionally attempted to cause his penis to penetrate the vagina of JBG a child aged thirteen (13) years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**.

2. The prosecution called 4 witnesses to testify in support of its case before the trial court while the appellant gave an unsworn statement in his defence.

3. I will proceed to analyse the evidence in its entirety, weighing any conflicting facts and reach my own conclusion as is required of a first appellate court. In doing so I will bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses testify. *(See **Kiilu & Another vs. Republic [2005]1KLR 174**)*

4. The minor, JBG (PW1) testified that on 29th April, 2017 at around 5:00 a.m. she was escorting her mother who was heading to Lolgorian market. They met the appellant who was paid Kshs. 50/= to take her home by *bodaboda*. PW1 testified that her mother knew the appellant though she did not. She recalled that the appellant took her to a bush, ordered her to undress and grabbed her when she tried to run away. The appellant had made her lie down and slept on her. She had no underwear at the time and that the appellant had unzipped his trousers, removed his penis and inserted it into her vagina. She screamed and the appellant threatened to cut her with a knife and left her there. PW 1 testified that later when the accused had fled she was found by a dumb woman who heard her screams and took her to hospital. She testified that the appellant had said he was going to fetch firewood when he took her to the bush but did not collect any firewood.

5. JBG's mother S.M. (PW 2) testified that on 29thApril 2017 at around 5:00 a.m. she left home for Lolgorian market with her daughter PW1, who was 13 years old at the time. At around 7:00 a.m., as she waited for a *bodaboda* to take her to Lolgorian, she saw the accused heading home. She had known the appellant for over one year and knew that he was a *boda boda* operator. She paid him to take her daughter home as she waited for another *bodaboda* to the market. She was called and informed that her child had had an accident. When she asked the girl what had happened, PW 1 told her that she had been defiled by the person whom she had asked to carry her. She denied having ever quarrelled with the appellant. In cross examination, she testified that PW1 was in the camp when she went back. She testified that she was the one that had given PW1 to the appellant.

6. The Investigating Officer, PC Wephukhulu David (PW3) of Lolgorian Police Station testified that the station had received the report concerning the defilement of PW 1 on 29th April 2017. The appellant had been asked to carry PW1 home but diverted her to a thicket and wanted to defile her. PW1 was rescued by members of the public when she raised an alarm. The appellant ran away but was later arrested by member of the public.PW3 testified that he issued a P3 form and accompanied the complainant to the hospital where the form was filled. He also testified that PW1 had been born on 21st May 2005 according to the birth notification which he produced as P. Ext. 2.

7. Julius Munyendo, a clinical officer from Lolgoria Sub-County Hospital testified that PW1 had gone to the facility on 29th April 2017 alleging that she had been defiled by a known person on that dayat about 7:00 a.m. The clinical officer testified that he had done a general examination of the girl and found that she was in fair condition and the systems of the body were normal including her upper and lower limbs and her reproductive system. He testified that according to his examination, the hymen was broken although not freshly. He did not notice any lacerations or discharge from his examination. The lab tests showed no spermatozoa and the HIV test was negative. His conclusion was that there had been attempted defilement.

8. When put on his defence, the appellant testified that he was a *boda boda* operator and also sold charcoal. He denied the charges against him and testified that on the material day, he woke up early to go to Sirare to take charcoal and returned at 10:00 a.m. He received a call asking him to go to Lolgorian Police Station and when he got there he was accused of attempted defilement of a girl. When he went to the hospital, the doctor said that the girl had not been defiled.

9. Upon the conclusion of the matter, the trial court in its judgment found the prosecution had made out its case against the appellant. The court found the appellant guilty of attempted defilement and sentenced him to 10 years imprisonment.

10. Aggrieved by the trial court's decision, the appellant filed a petition for sentence review dated 10th April 2019. He urged this court to set aside his sentence on the grounds that;

a. He did not take plea of guilty to the charges levelled against him;

b. The trial magistrate erred in law and fact by sentencing him without considering his stay in remand cells for over five months due to his inability to raise funds for bond;

c. Having given his mitigation, the trial magistrate did not put into his ruling the fact that he was the breadwinner of the family;

d. It was inhumane and against nature to defile a young girl of such age and he did not commit the offence as it was purported and he still believed he was innocent hence his plea for a reduced term of a sentence lesser than 10 years; and

e. He was reformed and pitied himself for the time he had spent behind bars.

11. The appellant also filed written submissions challenging his conviction. He argued that he had not been supplied with prosecution statements during trial and this proved that the entire case had been conjured to frame him.

12. He also submitted that the minor's mother PW2 had testified that she was called and told that her daughter had had an accident but the person who called her was not named or called to testify and that this was hearsay evidence that could not be relied upon. The appellant further contended that PW3 who was the investigating officer had testified that he had been arrested by members of the public earlier in the day and that PW2 came afterwards. The investigating officer had also stated that PW2 had told him that the appellant was the one that had attempted to defile PW1, yet none of the members of the public had been called to testify in the matter.

13. The appellant argued that since the clinical officer had testified that his general examination revealed that the minor's body was in fair condition, there was no proof of attempted defilement. He further submitted that he had been given the child at 7:00 a.m. and not 7:00 p.m. and that it was another woman and not PW2 who had handed the child to him.

14. In opposing the appeal, Ms. Kibungi for the State, submitted that the substance of the charge had been read to the appellant on 3rd May 2017 and he pleaded not guilty to both charges. The record also showed that he had been given a chance to mitigate and it was therefore wrong to say that his mitigation was not considered. Counsel also argued that the charge before the trial court was for attempted defilement and penetration need not have been proved. She submitted that the testimony of PW 1 had been corroborated by that of PW 2 who testified that she had known the appellant for over a year. Counsel also urged the court to uphold the sentence as it was lawful under section 9(1) and 9(2) of the Sexual Offences Act.

15. From the foregoing, the following are the issues arising for determination;

a. Whether the appellant's conviction is unsound due to an infringement of his right to fair trial;

b. Whether the trial court erred in finding that the prosecution had proved its case; and

c. Whether the sentence meted on the appellant was excessive.

16. The record shows that the appellant was charged and took plea on 3rd May 2017. He pleaded not guilty to both the main count and the alternative count and the hearing of the matter commenced soon thereafter. The plea was properly taken by the trial court

17. The appellant complains that he was not issued with witness statements even after he had asked to be supplied with them. Having perused the record, I found that there was no indication that the appellant was issued with witness statements. There was also no indication that he had asked for the statements. The right to be informed of the evidence the prosecution intends to rely on in advance is a right enshrined in **Article 50 (2) (j)of the constitution**. Whether a violation of a right provided for under Article of the constitution 50 leads to an acquittal depends on the circumstances of the case. (See ***Simon Ndichu Kahoro v Republic NRB CA*** **Criminal Appeal No. 69 of 2015 [2016]eKLR)**

18. It has not been demonstrated that the appellant in this case was prejudiced by the failure of the prosecution to furnish him with witness statements. The appellant fully participated in the trial by cross examining the witnesses and testifying in his defence. His conviction cannot therefore be overturned on the basis that he was not issued with statements.

19. The appellant was convicted for the offence of attempted defilement which is prohibited in **Section 9(1)** and **9(2)** of the **Sexual Offences Act** in the following terms;

9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted

defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

20. To prove the case against the appellant, the prosecution needed to prove the age of the minor, the identity of the appellant and his attempted commission of the offence. There was no contention on the age of the victim. The complainant's mother PW 2 had testified that the victim was 13 years old when she testified. PW 3 also produced the complainant's birth notification showing that the complainant was born on 21st May 2005and was therefore12 years old when the alleged offence occurred.

21. The evidence of PW 1 and PW 2 was the only evidence connecting the appellant to the offence. Their evidence was that the complainant PW1 had accompanied her mother PW 2 to the market on 29th April 2017. On the way, they met the appellant who was a *boda boda* operator. PW 2 knew him from their area. She asked him to take PW 1 home and paid him Kshs. 50/=. PW1 testified that on the way the appellant took her to the bush under the guise of fetching firewood. He ordered her to undress, made her lie down, removed his penis and inserted it into her vagina. The appellant fled when PW 1 screamed. She testified that she had been found by a dumb woman and later taken to hospital. PW 2 testified that she had been called and informed that her daughter had had an accident. She went to the camp and found PW1 who told her that the man she had asked to take her home had defiled her. PW 3 testified that the appellant had been arrested by members of the public afterwards and charged for the offence.

22. The appellant challenged his conviction on the grounds that it was not clear from the prosecution's case, what time the offence occurred. In her evidence PW1 had testified that they left home for the market at 5:00 a.m. and met the appellant at 7:00 p.m. PW 2 testified that they left home at 5:00 a.m. and met the appellant at around 7:00 a.m. The P3 form produced by the clinical officer indicated that the offence had taken place at 7:00 a.m.

23. **Section 382** of the **Evidence Act** provides;

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

24. The trial court was convinced, as I am too, that the offence took place in the morning at 7a.m. The P3 form indicated that the offence occurred at 7:00 a.m. and was reported to the police at 2:20 p.m. I cannot rule out the possibility of there being a typographical error in the record, since for instance, the typed proceedings indicate that PW1 testified that they left home at around 5:00 p.m. whereas the handwritten record shows that she testified that they had left home at around 5:00 a.m. The sequence of events as narrated by PW1 and PW 2 were consistent and the mistake in time did not render their evidence unbelievable.

25. As for the appellant's complaint that the dumb woman who had found PW1 and the members of public who were said to have arrested him had not been arraigned in court, I find that the evidence of PW 1 and PW 2 was sufficient to identify the appellant as the perpetrator. The prosecution was not expected to call extra of witnesses, if the evidence of the witnesses it called could prove its case sufficiently. PW 2 testified that PW1 had told her that the person she had asked to take her home was the one that had defiled her. PW 2 testified that she recognized the appellant as a *boda boda* operator from her area. She had known him for a year and even knew where he lived. The appellant confirmed in his defence, that he was in fact a *boda boda* operator. The recognition of persons is more assuring and reliable as compared to the identification of strangers. I therefore find that the appellant was properly identified by the prosecution witnesses.

26. The prosecution also needed to prove the act of attempted defilement. For the offence of attempted defilement to be proved, there was no need for physical evidence of bruises or lacerations on the complainant's body. (See ***Tyson George Ngowa v Republic Criminal Appeal No. 40 of 2015 [2016] eKLR& Tyson George Ngowa v Republic [2017] eKLR Criminal Appeal No. 40 of 2015***).

27. In **Kassim Ali v Republic [2006] eKLR** it was held:

"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

28. The prosecution was only required to prove that the person charged came up with a plan to commit the offence of defilement, that he set out to actuate his plan and did the very last act necessary for him to commit the offence of defilement but failed in his unlawful quest.

29. There was no medical evidence showing that the complainant had been injured in the attempt. PW1 was the only witness to the act. **Section 124** of the **Evidence Act** provides that the testimony of the victim does not require corroboration and can support a conviction if, for reasons to be recorded the trial magistrate believes the victim is telling the truth. The trial magistrate in this case, considered the foregoing provision and found PW 1 to be a truthful and credible witness. I therefore find that the trial magistrate properly directed himself on the law on this issue. I also find that the prosecution proved all elements of the main charge against the appellant beyond reasonable doubt and I hereby uphold the conviction.

30. Regarding his sentence, the appellant urged this court to reduce it to a term lesser than 10 years. ***Section 9 (2)*** provides a minimum mandatory sentence of 10 years for the offence of attempted defilement. Having heard the appellant's mitigation, the trial court held;

"Sexual offences are serious offences. Legislature gave minimum sentences. That is the only one that requires to be meted out by the court. The accused is sentenced to serve ten (10) years imprisonment."

31. While addressing the issue of sentencing under the Sexual Offences Act, Odunga J. in ***Raphael Mutunga Mutinda v Republic Criminal Appeal Number 92 of 2017[2019] eKLR***held as follows;

> *40. What the said section provides for is a prima facie mandatory minimum sentence. However, in the current constitutional dispensation the constitutionality of such sentences is highly doubtful since in my view they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in* ***Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015…***
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> *45. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences…*
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> *47. Whereas I appreciate that there is a view held by some jurists that in minimum mandatory sentences the Court has no discretion, in our case clause 7 of the Transitional and Consequential Provisions provide as follows:*
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> > *All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.*
>
> *48. Therefore, the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the Sexual Offences Act, No. 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the Muruatetu Case."*

32. The court in ***Raphael Mutunga Mutinda*** proceeded to find that the trial court wrongly felt compelled to sentence the appellant convicted of committing an indecent act to 10 years by the apparent mandatory minimum. In reducing the sentence, the court held;

> *51. Therefore, apart from the issue of the said rampancy of the crime, the decision to mete out the said sentence was due to the fact that the hands of the learned trial magistrate were tied by the apparent mandatory minimum sentence. In this case, the appellant's age was regrettably not disclosed. It was however submitted that he was married with a wife and two children aged 8 and 4 years, was remorseful and was a first offender.*
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> *52. This court is aware that following the decision in Muruatetu Case, some of the capital convicts have had their sentences reduced from death to even 15 years.*
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> *53. In this case while appreciating the gravity of sexual offences and their effect on the victims thereof, it is my view that the justice of this case would be better served by sentencing the appellant to 5 years. This does not mean that in appropriate cases sexual offenders cannot be sentenced to 10 years or even more. It is simply that each case must be considered on its peculiar circumstances.*

33. This position is supported by the decision of the Court of Appeal in the case of ***Dismas Wafula Kilwake v Republic [2018] eKLR***, where the Court of Appeal held;

> *In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in* ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015****], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*
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> *Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*

34. In the case of ***Peter Saikipor Naiyioma v Republic Criminal Appeal No. 29 Of 2019 [2019] eKLR*** where a 19 year old appellant had been convicted for the offence of defilement contrary to S**ection 8 (1)** and **8(3)** the court applied the principle in ***Dismas Wafula Kilwake (supra)*** to reduce a sentence of 20 years imprisonment to 1 year imprisonment.

35. It is apparent that the trial court in this case felt constrained to impose the sentence of 10 years imprisonment in accordance with the law and did not exercise of its discretion whilst sentencing. However I am of the considered view that in this case the sentence was adequate with the nature and gravity of the offence. The appellant had been entrusted to protect and deliver PW1 home by her mother PW 2 but chose to grossly dishonour that trust by attempting to defile her. The appellant had gone so far in actuating his nasty intent and would have completed

the act had he not been stopped by PW 1's cry for help. This incident must have caused PW1a lot of metal anguish. In meting out its sentence on such acts, it is essential for courts to take into account the need to deter such heinous crimes against children which have become rampant in our society.

36. I however also take note that the appellant was a first offender. He says that he is remorseful and has reformed in the period he has spent behind bars. The appellant was arrested on 29th April 2017 and has been in custody since.

37. Considering all the foregoing, I uphold the conviction and sentence of 10 years imposed on the appellant for the offence of attempted defilement. The sentence shall however be inclusive of the period from 29th April 2017 when he was in custody in accordance with **Section 333(2)** of the ***Criminal Procedure Code***.

Dated, signed and delivered at Kisii on this 7thday of February 2020.

R.E.OUGO

JUDGE

In the presence of;

Appellant in Person	**Present**
Mr. Otieno	**Senior State Counsel ODPP**
Ms Rael	**Court clerk**