REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 52 OF 2018

LEONARD NJUGUNA NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court

at Mpeketoni Criminal Case No. 184 of 2017 by Hon. V.K. Asiyo (RM)

dated 25th April 2018)

JUDGEMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 15th August 2017 at [particulars withheld] area Bahari Location, within Mpeketoni Sub-County Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of SWK a child aged 10 years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 15th August 2017 at [particulars withheld] area Bahari Location, within Mpeketoni Sub-County Lamu County, the Appellant intentionally touched the vagina of SWK a child of 10 years with his penis.

3. The prosecution called six witnesses in support of its their case.

4. The victim who was also the complainant SWK testified as PW1. The court administered a *voire dire* examination on her. She told the court that she was 10 years old, was in class 2 at Lake Amu primary school and that she understood the importance of telling the truth. The court formed the opinion that she possessed sufficient knowledge and could be sworn.

5. In her sworn statement, the complainant stated that on 15th August 2017 she was in the farm guarding the crops from wildlife together with other children being PW2, PW3 and one W. That the Appellant called them from the road and gave them melons which, they ate. That the Appellant told the other children to go outside his house while he took her into his house and told her to lie down on his bed. She said that she was wearing a dress and the Appellant proceeded to remove her 'panty' before he stripped naked and put his penis in her vagina without wearing anything. She said that she felt pain but she did not bleed on that day. That the Appellant told her not to tell anyone. Thereafter she went back to the farm to guard the crops. She said that the Appellant also gave her a black jacket (PMFI1) which she kept and did not tell anyone about the incident.

6. The complainant further told the court that her mother later found the jacket and when she inquired whose jacket it was, the complainant informed her that the Appellant had given it to her as a gift. That the complainant together with her mother went to the Appellant's house and that's when she told her mother what had happened. The complainant said that she went to the police with her parents. She was later taken to hospital where she was examined and given an injection.

7. SW (PW2) gave an unsworn statement after *voire dire* examination. He stated that in the month of August the Appellant took the complainant by the arm and took her into his house. That the complainant roasted maize and cooked one egg in the Appellant's house.

8. PK (PW3) also gave an unsworn statement after *voire dire* examination. He stated that on the 10th April he was with PW1, PW2 and W on the farm guarding the crops from wild animals. That the complainant, together with W, went to the Appellant's home while, PW2 and himself remained on the road. That the complainant went into the house and made an egg while the Appellant was seated outside. He stated that only the complainant went into Appellant's house.

9. JKM (PW5) the complainant's father, told the court that the Appellant was his neighbour. He testified that when he got home on 22nd August 2017, he found his wife with a jacket. That his wife asked the complainant whom the jacket belonged to but she refused to say. The following day, 23rd August 2017, his wife informed him that the complainant had told her that the Appellant had defiled and given her the jacket.

10. PW5 further testified that he sent his son Paul to call the headman and his other son K to call Kenya Police Reservists (KPR) who came and summoned the Appellant to his (PW5's) home. PW5 told the court that the Appellant admitted that he gave the complainant the jacket. They proceeded to take the Appellant to Mpeketoni Police Station. He later took the complainant to hospital where she was given ARV's. He stated that the complainant was 9 years old at the time of the offence.

11. No. [xxx] Corporal Kosmas Kipruto Kiptoo(PW6) of Mpeketoni Police Station was the investigating officer. He told the court that the complainant was taken to the station on the 23rd August 2017 by her parents accompanied by the KPR. That he took their statements and the black jacket and thereafter escorted both the complainant and the Appellant to hospital for tests. That at the hospital the Appellant was found to be HIV positive. He therefore applied for the complainant to be tested. The complainant was found to be HIV negative after two months.

12. PW6 stated that his investigations revealed that on the 15th August 2017, the Appellant defiled the complainant in his house at around midday and thereafter gave the complainant eggs, maize and watermelons. That the next day, 16th August 2017, the Appellant defiled the complainant again and gave her the black jacket and ka-ngumu (baked cakes). PW6 visited the Appellant's house with the complainant and she demonstrated how the Appellant got her into the house and defiled her. He described the house a two roomed house which was partitioned with a bed sheet. He also produced the complainant's birth certificate (P.Exh5).

13. Musyoka Kisilu (PW3) was the clinical officer at Mpeketoni Sub-County hospital who filled the P3. He stated that the complainant's genitalia was examined and found that hymen was broken but there were no lacerations or discharge. It was his opinion that the complainant may have engaged in a sex several times before. He stated that the complainant was tested for HIV and venereal diseases which results were negative. The complainant was put on medication to prevent infection and was also taken for counselling. He produced the treatment notes (P.Exh1) he used to fill the P3 (P.Exh2) and he also produced the post rape care form (P.Exh3).

14. Put on his defence, the Appellant chose to give an unsworn statement. He stated that on the 15th August 2017, he went to make 'Mukoma' at 7:00 am and returned home at around 4:00pm then went to the farm to cultivate vegetables. Later, he went to the shops, came back home, cooked supper and slept. That on the 16th August 2017, he was in the bush until 3:00pm when he returned home.

15. The Appellant stated that on the 23rd August 2017 in the morning, he was on his way back from the shop after buying cigarettes when he met with the complainant and her entire family. That the complainant's father (PW5) informed him that they wanted to see him as he had defiled the complainant and given her a jacket but they were waiting for the village elders.

16. The Appellant further stated that he went to the shop to buy cigarettes. He met his brother on the way and informed him about the matter and on his way back to his house; he met with two KPR officers who wanted to take him to hospital to be tested. That he locked his house, gave the key to his brother, and voluntarily went with the KPR officers to the police station where he was charged.

17. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to imprisonment for life.

18. The Appellant was aggrieved by the conviction and sentence and lodged his homemade petition of appeal on 31st July 2018. His eleven grounds of appeal are to the effect that the prosecution did not prove that the complainant was defiled; that the trial magistrate failed to rely on the documentary medical evidence adduced by the doctor; that the evidence by PW5 was hearsay evidence which had no value and; that the trial magistrate relied on the evidence of the investigating officer which was obtained from the complainant's family.

19. The Appellant filed written submissions on the 12th June 2019 in support of his appeal. At the hearing of the appeal on 10th July, 2019, he told the court that he would rely on his written submissions. In summary, his submissions were that the charge sheet was defective as it never contained the word "unlawfully" and therefore it did not disclose the offence of defilement. He relied on the case of **Albert Oyondi vs Republic Cr. App. 404 of 2010.** He submitted that the evidence of the PW1, PW2 and PW3 was contradictory. He argued that PW3 gave evidence that the complainant was alone in the house and he (the Appellant) never entered the house and therefore there was no basis to claim that he defiled her.

20. The Appellant finally submitted that the medical evidence adduced at trial did not prove penetration. He argued that there were no injuries noted in her genitalia and that the complainant's hymen could have been broken by something else or someone else. He submitted that he was HIV positive and that tests should have been carried out to determine her status. He stated that he was 54 years old.

21. Mr. Kasyoka, learned counsel for the Respondent opposed the appeal in its entirety. In his oral submissions he submitted that all the elements of defilement had been proved to the required standard. That the age of the complainant was proved through the production of her birth certificate which showed that she was 10 years old. He submitted that the P3 and the treatment notes proved penetration and; that the Appellant was properly identified.

22. Learned counsel further submitted that the evidence of the minor was proper as a *voire dire* examination was conducted before she gave evidence and that the trial court complied with **section 124 of the Evidence Act.** Finally, counsel submitted that the discrepancy between the Appellant's age and the complainant was a relevant factor to consider as the Appellant was middle aged while the victim was only 10 years. He asked the court to uphold the conviction and sentence.

23. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of

the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

24. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination in this appeal is whether the prosecution proved its case beyond reasonable doubt.

25. With respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

26. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and secondly; it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

27. On the age of the complainant, the Sexual Offences Rules of Court 2014 **Rule 4** provides that:-

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

28. In this case, Cpl kiptoo (PW6) produced the complainant's birth certificate (P.Exh 5) which indicated her date of birth to be 12 th October 2007. It is abundantly clear that at the time of the offence on 15th August 2017 the victim was only 9 years of age. The complainant also told the court that she was 10 years old and in class two. Besides, the complainant's father (PW5) testified that she was 10 years. From the birth certificate, she was about 2 months shy of 10 years. I therefore find that the age of the victim was proved beyond reasonable doubt.

29. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

30. In addition, it is well established that a court can convict on the sole evidence of a victim of sexual assault under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief. See **Arthur Mshila Manga v Republic [2016] eKLR.**

31. In this case, the learned trial magistrate in his judgment noted that the complainant's evidence was clear, cogent, and articulate and it was not shaken in cross-examination. He stated that he found the complainant to be an honest person and he was persuaded by her testimony. The learned magistrate recorded his reason for believing the evidence of the complainant as expected by statute. The complainant never mentioned anyone else and her evidence remained unshaken in cross-examination.

32. I have set out *in extenso* earlier in this judgment the evidence of the victim (PW1). The only issue is why the court believed her evidence. I have already observed that a *voire dire* examination was conducted by the trial magistrate. My analysis of the evidence shows that she was candid in explaining what had happened to her. She was called into the house by the Appellant while the other children remained outside. She stated ***"he removed his clothes and was naked. He then put his penis into my vagina. He entered like that without wearing. When he finished he woke up. I did not bleed on that day. I felt pain but I didn't bleed…'***

33. It is apparent from the statement above that the complainant had been defiled before. What is not clear is whether the Appellant was the one who defiled her in the past. From her evidence however, and the evidence of the other children PW2 and PW3, it is apparent that she was quite familiar with the Appellant's house. It is more probable than not that she had been lured into that house many times before.

34. I find that the evidence of PW2 and PW3 corroborates that of the complainant that she entered the Appellant's house on the material day and that the Appellant was within his home at the material time. PW3 told the court that the Appellant did not enter his house when the complainant was inside. However, he also said that they (the children) left and went back to their duty of guarding crops. The question then would be: why would the complainant feel at home in the Appellant's home to the extent of going into the kitchen to cook an egg and roast maize? Why would he leave the other children who were with her outside? Why would he give her a jacket as a gift and caution her not to show any one? It is indeed reasonable for the court to draw the conclusion that the Appellant had a sinister design on the hapless 9 year old and he did succeed in it.

35. Besides, there was the medical evidence produced by Musyoka Kisilu (PW4) the clinical officer at Mpeketoni Sub-County Hospital. He had examined the complainant and found a missing hymen but no fresh laceration. The medical evidence corroborates the complainant's evidence that she was defiled. Indeed I observe that the Appellant tried to make capital out of the medical officer's finding that the complainant must have had sexual intercourse before. She may have, but a previous unlawful action cannot in any way justify a subsequent defilement.

36. The Appellant also contended that the medical evidence did not link him to the offence as he was HIV positive while tests on the complainant showed that she was HIV negative. This is no defence. I can do no better than quote the Court of Appeal's finding in **Wellington Wanyonyi v Republic[2013] eKLR** where, faced with a similar argument, the court pronounced itself thus:-

> ***"The appellant makes heavy weather of the finding by Linus that the complainant was HIV negative while Reuben, another Clinical officer tested him and found him HIV positive. His view was that if he had defiled the complainant, then she would have been infected. In our considered view, nothing turns on those two findings by the Clinical Officers. First, it is not a must that where an HIV positive person has carnal knowledge of an HIV negative person then the HIV negative person must be infected. All we know is that whereas it is likely that such a scenario may ensue, it is not a must and there must be several occasions when infection may not be the consequence of sexual intercourse between the two. Secondly, and in any case there are cases of discordant couples. These are situations where one HIV positive person can live with another who is HIV negative person and yet no infection takes place. We thus do not attach any importance to that piece of medical evidence."***

37. I would add that all that the Appellant's admission of his HIV positive status would do is constitute an aggravating circumstance as he would be deemed to have knowingly put the complainant at the risk of contracting HIV Aids. In the end, it is my finding that the medical evidence corroborated the complainant's evidence and penetration was proved. It is therefore not true that the court relied on the evidence of the complainant alone.

38. On the issue of identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Wamunga –vs- R, [1989] KLR**

39. In this case, PW5, the complainant's father stated that the Appellant was a neighbour and claimed to have known him for over 30 years. He stated that the distance between their houses was about 100 feet and that only a road separated their land. PW1, the complainant, stated that he knew the Appellant by his name and that she could see him leaving and returning to his house from their farm. During cross-examination by the Appellant, she stated that there were three homesteads between their house and the Appellant's house. In addition, the Appellant never denied that he was the complainant's neighbour and when cross-examining PW5 the Appellant alluded to a dispute over his goats trespassing into PW5's farm.

40. It is my finding that the Appellant was the complainant's neighbour and that he was known to her and her parents as well as to the other witnesses PW2 and PW3. The Appellant himself admitted that they were neighbours. This therefore was a case of recognition.

41. The Appellant contended that the charge sheet was defective as the term 'unlawfully' was omitted. It is trite that the test of whether a charge sheet is defective is subjective as to whether the Appellant was prejudiced. In **Benard Ombuna v Republic [2019] eKLR** where the Court of Appeal dealt with a similar issue and rendered itself thus:-

> ***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

42. I agree with the exposition by Ngenye-Macharia J In **Daniel Oduya Oloo v Republic [2018] eKLR**, where she held that:-

> ***"On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective."***

43. In the present case, the Appellant was not prejudiced by the omission of the term unlawful from the charge sheet as he was aware of the charges against him and was able to put up an appropriate defence. He understood the charges he faced and had no difficulty cross-examining witnesses. The omission of the word unlawful in the charge sheet did not occasion him any prejudice as having sex with a minor is in itself an unlawful act. The omission did not cause a material defect in the charge sheet. In any case, if there was any omission it would be curable under section 382 of the Criminal Procedure Code.

44. On the sentence, the Appellant was sentenced to the mandatory sentence life sentence under section 8(3) the SOA. The mandatory nature of sentences under the SOA has however come under scrutiny by the Court of Appeal following the Supreme court decision in **Francis Karioko Muruatetu and Another –V- Republic [2017]eKLR** which held that:-

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."***

45. In **Christopher Ochieng – v- R [2018] eKLR** the Court of Appeal held that:-

> ***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.***

46. I am guided by the above authorities to find that it is not mandatory to impose the maximum sentence. It is my understanding however, that the minimum sentences in the SOA have not been outlawed but rather that the trial court has discretion not to impose them where the peculiar circumstances of the case so dictate. In the circumstances of the present case, there were aggravating circumstances. The Appellant was old enough to be the father if not grandfather to the 9 year old victim. He was a trusted neighbour who lured her and exposed her to the risk of contracting HIV Aids. He robbed her of her childhood and, without remorse, told the court that it was not the first time she was having sex. Those to me are aggravating circumstances which the court must consider in sentencing.

47. I have considered the circumstances of the case and the mitigation by the Appellant. The Appellant is a first time offender and he has stated before this court that he is 54 years old. In the court below he had stated in his mitigation that he had been framed by his neighbour and that he was an orphan and had one child. I observe from the proceedings that the Appellant never raised the issue of a frame up. I would therefore dismiss the same particularly because in my analysis of the evidence, I found the case proved to the required legal standard.

48. In the end, having taken into consideration all circumstances, I find that there were aggravating circumstances in this case to warrant the imposition of the stiff sentence. I uphold the judgment and confirm the sentence. The appeal is dismissed.

49. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 17th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

T. Maro Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent