REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 99 OF 2018

(Being an appeal from the decision of Hon. D. M. Wangechi in Criminal Case No.25 of 2017)

MOSES WAFULA WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC..... PROSECUTOR

VERSES

MOSES WAFULA WANYONYI.....ACCUSED

JUDGMENT

1. 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 no. 3 of 2006.** The particulars of the offence was that **on the 7th day of February, 2018 within Trans-Nzoia County caused your genital organ namely penis to penetrate the genital organ namely vagina of SK a child aged 9 years.**

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that **on the 7th day of February, 2018 within Trans-Nzoia county intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of SK a child aged 9 years.**

3. The Appellant was convicted and sentence to serve life imprisonment hence this appeal. The Appellant has raised several grounds in his memorandum of appeal and before looking at them it shall be worthwhile to summarise the evidence as presented during trial.

4. **PW1** the complainant testified in her unsworn evidence that she was 9 years old and a class one pupil at [Particulars Withheld] primary school. She said that on the 7/2/2018 at around 2.00 pm she was going to collect milk from one Kituyi when she met the Appellant on the way who asked her to hope on his bicycle. She obliged as she knew him and he took her to a coffee farm where she told her to collect firewood for her mother. She agreed and as she collected the firewood the Appellant followed her and proceeded to carry and placed her on the ground.

5. She said that the Appellant then defiled her and she felt pain. She screamed but the Appellant warned her that he would slaughter her and that she should not tell her mother. He thereafter dressed her and he remained in the coffee farm as she went to buy milk.

6. She went back home and she was in pain as she was unable to walk properly. She arrived and slept on a sack on the ground and her mother was not at home. When she came back from the posho mill she found her sleeping and she told her that she had a headache. As she undressed to wash her she told her what had happened between her and the Appellant. She washed her and took her to the hospital where she was treated.

7. When cross examined by the Appellant she said that she knew the Appellant who worked for Kituyi as he sells milk to them. She said that it was not the first time she was being carried on a bicycle by the Appellant.

8. **PW2 JN** is the mother of the Complainant. She said that on the material day she sent the Complainant to buy milk from Kituyi as she went to the posho mill. When she came back at around 5pm she found her lying down and she told her that she had a headache. She gave her some painkiller. She took her to the hospital but on the 3rd day when she bathed her she noted some mucus on her private parts as well as some

bloodstains. She went ahead to show the court the minors innerwear which was stained.

9. The minor then told her what had transpired between her and the Appellant the day she went to collect milk and that she had threatened to harm her. She said that she had known the appellant for over two years who worked at the dairy and he was known by the child.

10 . She reported the matter at Endebbes police station where she was given a P3 form which she had it filled and returned. She also took her to the hospital. She produced the child's immunization card.

11 . When cross examined by the appellant she said that the minor knew him very well as she had interacted with him at the dairy.

12 **. PW3 EMMA KEMUNTO ONTILI** a Clinical Officer from Endebbes Sub County hospital examined the Complainant and found both major and minor labia were inflamed and still in pain and that she had difficulty parting her legs. The hymen was freshly broken and there was presence of blood. There was some discharge which were foul and smelly. She concluded that there was forced penetration.

13 **. PW 4 PC MARGARET NAMUSASI** from Chepchoina police Patrol Base carried out the investigation when the complaint was made at Endebbes police stations. She recorded witness statements and preferred charges against the appellant. She also produced as evidence the panty which was worn by the Complainant on the material day as well as the immunization card.

14 . When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he worked at the dairy farm belonging to the late John Kituyi and that the case was fabricated and he was a respected man with 3 children and a wife.

ANALYSIS AND DETERMINATION

15 . The sole duty of this court is to re-evaluate the evidence afresh and come up with afresh and independent finding taking caution however that it did not have the benefit of conducting the trial and thus seeing the demeanour of the witnesses. See **OKENO.V. REP (1972) E A 32,** where the court stated that;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.***

16 . The parties have filed their written submissions which the court has perused extensively together with the attached authorities.

17 . The substantive grounds raised by the counsel for the appellant is that the evidence as presented was contradictory in nature and was unbelievable. He said that the age of the minor was not proved as per the law established since an immunization card was not part of the documents to be relied on in proving the age. He said that the same cannot be equated to a birth certificate.

18 . He further submitted that the Complainant was prompted by PW2, her mother to connect the incident to the Appellant and that were it not so she would not have done that.

19 . The Respondent basically supported the findings by the trial court and that all the ingredients of the offence were proved.

20 . In the case of **DANIEL WAMBUGU MAINA V.REP. (2018) e KLR,** the court clearly summarised the ingredients for the offence of defilement, namely, the age of the victim, penetration and identity of the perpetrator.

21 . In the matter at hand the mother to the minor said that she was 8 years old. The minor said that she was 9 years old. The immunization card which was produced as evidence indicated that she was born on 2/10/2009. One can conclude that at the time of the incident she was about 9 years old. This does not aid the argument by the Appellant that the age was not proved at all. The immunization card although it may not be as official as a birth certificate in my view is a primary document which carries crucial information of a child. The same is so critical as it relates to the actual health growth of the baby from birth and contains other unrefuted details.

22 . The sum total of the above argument is that the minor was about 9 years which falls within the bracket of Section 8(2) of the Sexual Offences Act.

23 . On the question of penetration, this court finds that the minors evidence was corroborated by the evidence of PW2 her mother as well as PW3 the Clinical Officer who examined her. Her mother stated that as she washed the minor there was a foul smell emanating from her private parts and that is when she discovered that she had been defiled.

24 . The Clinical Officer's findings were more clear as the hymen was fresh looking and the injuries on the labia were fresh and visible. She concluded that there was forceful penetration.

25 . Was the appellant the perpetrator? The incident occurred in the afternoon around 2.00 pm. The Complainant explained how she met the Appellant on her way to collect milk from the farm of one Kituyi. The Appellant was a dairy man at the said farm a fact which he did not dispute but confirmed as well in his defence evidence.

26 . The sum total of the evidence therefore is that she was well known to the Appellant and the hiking of a bicycle lift in my view may not have been farfetched. This was not, it appears been the only time the minor had bought milk from the said dairy as was explained by her mother.

27 . In the absence of any other eye witness to the incident, this court shall rely on the provisions of Section 124 of the Evidence Act. The same states that;

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , 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."***

28 . Was the evidence of the minor believable? The Appellant has poked holes into the same and specifically the fact that it took the prompting of her mother to have her reveal what had transpired.

29 . It was her evidence that the Appellant had threatened her not to tell anyone including her mother or else she was going to be slaughtered. The threat was also made when the appellant carried the defilement and threatened to harm her if she did not stop screaming.

30 . Taking into account the age of the victim, and the fact that she told her mother that she had a headache when she found her sleeping, this court takes the view that she was afraid to initially reveal what had happened because of the fear. As it were, the appellant was a person she interacted with whenever she goes to buy milk at Kituyi's farm.

31 . At the same time was there any reason why the minor implicated the Appellant? This court does not see any other reason. There was no family grudge or differences between the Appellants and the minor. The Appellant did not demonstrate any such differences or at all. In the premises, this court agrees with the finding of the trial court that it was the Appellant who defile the minor.

32 . The authority of **Paul kanja VS. Rep (.2016) eKLR** relied on by the Appellant is distinguishable as the victim in that case had to be beaten up so that she could reveal what had happened. At the same time, she was 16 years old and the case at hand she was about 9 years. The victim herein may not have the mental capacity to make some discretion as in the afore stated authority.

33 . In the end this court does not find merit in the appeal. The evidence tendered by the respondent clearly placed the Appellant at the scene. For whatever reasons, the Appellant defiled the minor. His unsworn evidence was of no probative value and it did not help his cause despite styling himself as a respectable person in the society. This appeal is dismissed.

34 . On the question of sentencing, the counsel for the Appellant has submitted that should the appeal be disallowed, then the appellant should be sentenced to a minimum period of 10 years.

35 . This court is guided by the decision of the Court of Appeal in **JARED KOITA INJIRI V. REPUBLIC. (2019) e KLR**. The court in taking cue from the directions given by the Supreme Court of Kenya in the now famous case of **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REP NO.15 &16 (2015)** stated inter alia 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.***
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> ***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.***

36 . For the foregoing reasons, the life sentence imposed against the appellant is hereby set aside and substituted with a 20 years' imprisonment.

37 . Orders accordingly.

Dated signed and delivered in open court at Kitale this 4th day of March, 2020.

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H. K. CHEMITEI

JUDGE

4/3/2020

<u>In the presence of:-</u>

Ms Kagali for the Respondent

Appellant – present

Court Assistant – Kirong

Judgement read in open court.