REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 3 0F 2017

JARED OMONDI ODIPO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon R Kitagwa SRM delivered on 28th September, 2017 in Naivasha CMCR SO No 33 of 2015)

JUDGMENT

Background

1. The accused was convicted in the lower court 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**. He was sentenced to life imprisonment. The particulars of the offence were that the accused on 21th June 2015, at about 10.00am at [Particulars Withheld]Estate in Gilgil District of Nakuru County, unlawfully and intentionally caused his penis to penetrate the vagina of EA, a child aged 2 years.

2. In prosecuting the case, the state called 4 witnesses who were heard at the trial. As entitled in law, the he accused opted to give an unsworn statement and availed no witnesses.

3. Dissatisfied with the conviction, the accused appeals against both conviction and sentence through his counsel, Mr Tombe. The grounds outlined by the accused are that the prosecution failed to prove the ingredients of the offence set out in **Dominic Kibet Mwareng v R 2013,** namely:

a. That there was positive identification of the assailant.

b. The age of the complainant

c. That there was penetration; and

4. The grounds of appeal are as follows:

a. That the evidence availed did not directly connect the accused with the offence

b. That there was no actual proof of penetration by accused

c. That the evidence leading to conviction was contradictory and uncorroborated

d. That essential witnesses were not availed at the trial

e. That the trial court failed to take into proper account the accused's defence

5. The facts outlined by the evidence of the prosecution were as follows. On 27/6/2015, PW1, the victim's father, came home at around 2.30 pm, to screams from his daughter. He followed the painful screams which led him around the plot. He saw his daughter emerging from the

appellant's house. PW1 I is the appellant's next door neighbour. As she came out crying, she pointed at her private parts saying "baba pain". She kept lifting her legs like she wanted to go for a long call, but when he brought out the potty she bent abit and just got up. She couldn't sit on a chair either, and so misunderstanding her situation, PW1 beat her to put her to sleep.

6. Shortly thereafter, at around 3.00pm, the child's mother, PW2, arrived and found the child screaming. She asked what was going on and the whimpering child cried "BM pain here" pointing to her private parts. PW2 got the idea, and decided to examine her daughter. She found a yellowish discharge in the girl's private parts and suspected rape. PW1 and PW2 then took the child to hospital where she was admitted and the nurse told them the child had been raped. They thereafter reported the matter to the police station.

7. Throughout, the child had been crying and saying "Baba Mam". According to PW1 in cross examination, BM is the name the child calls the accused, because the accused is the father of a child called A. Thus, that was the name the child kept repeating, as she didn't know how to talk. According to PW2, the child was born on 25/3/2013, making her 2 years and three months old at the time of the incident. Indeed, the child could not be called upon to give evidence.

8. PW3 Dr Salim Seif of Gilgil Hospital testified that he filled the P3 form on 29th June, 2015 four days after the incident. He examined the child, who was walking abnormally and exhibited pain. He found that her hymen was torn and she had pain in her birth canal and both the labia minora and majora, with a yellowish discharge emanating from pus cells in her vagina. He determined from his examination that she had been defiled.

9. PW3 also pointed out that the child had earlier been seen at the outpatient department of Gilgil Hospital on 27/6/2015. At that time, he added, the child was examined by Dr Kinyanjui who recorded his findings in the Post Rape Care Form which he filled in. PW3 produced both the P3 form and PRC form as Exhibits 1 and 2 in court.

10. PW4, PC Purity Mbaabu of Gilgil Police station was the investigating officer. She testified that PW1 came to the police station on 30/6/2015 carrying the child. PW1 complained that the child had been defiled on 27/6/2015 and had been taken to hospital on 27th, 28th and 29th June 2015. She asked tobe left with the child, and she cried saying "pain" and pointing to her private parts and pointing outside saying "yule mbaya". The mother informed PW4 that she had left the child with the father and on returning, found her crying. The husband told her he had left the girl outside the plot while he went shopping about 500 meters away, and on returning met her coming out of the accused's house crying. On examining the child, the mother discovered what had happened.

11. Pw 4 investigated the case and found that the accused's wife used to operate a day care centre and the child was often left there. Later the child's mother and the accused's wife disagreed and stopped taking her daughter to the daycare centre. The parents also brought the child's birth certificate to PW4 and she produced it in court as P exhibit 4. At the station, the child was not able to sit and kept saying pain, pain. PW4 went to the child's home and asked her to show the house where she had been and she pointed to the accused's house. On entering the house they left the child outside, but when they came out with the accused, the child run to hide behind her mother saying "huyu mbaya, chungu chungu".

12. In cross-examination, PW4 confirmed that she visited the accused at his house and found him in the sitting room although she couldn't remember how many people were in the house. she also couldn't tell whether the accused had been in the house all day. She however, confirmed that she based the arrest on the fact that the child had identified him, and there was a report that the child had been defiled.

13. When put on his defence, the accused gave a short unsworn statement with no witnesses. He denied having committed the offence. He said that he was a mason and was arrested at work in the evening. He said that he was simply told that he had defiled a child, but he had no idea of such an incident.

14. I now deal with each of the grounds of complaint

15. On evidence directly connecting the appellant with the offence: It is clear that the child appeared to know the appellant. According to PW1 and PW2, who were the appellant's neighbours, the child had visited the appellant's home before and knew the appellant's daughter as A, and referred to the appellant as BM. The appellant did not challenge or dispute that evidence, nor was it controverted by any other evidence.

16. The clearest evidence of the connection between the accused and the child was that adduced by PW 1 said he saw the crying child emerge from the accused's house on the material day. He testified in fairly graphic detail that when he heard her scream, he:

> ***"… went around the plot and noted that the child was at the neighbor's house-next door. She came out and kept on crying. She lifted his curtain and came out from his house. She was saying baba pain and was pointing at her private parts"***

17. He also said he had left the child in his house:

"…but when I went back I found her in his (accused's) house. she used to play with his daughter and also the same age but that day the accused wife had left with their daughter. That day the accused was alone in that house"

18. When PW1 was cross examined he said:

> ***"The girl came from your house when I called her. I didn't remove her from the house she came from there. I don't know what you were doing there. She came out while crying saying BM- Accused child is called A and that is how my daughter calls you BM."***

19. Although PW2's evidence on what happened to her daughter was hearsay from her husband, she did, however, in cross examination say that as she was preparing to take the child to hospital, the accused was at his door. So there is corroborative evidence that the accused was at this house at around the time of the incident, despite the accused stating in his unsworn statement that he had:

> ***"had no idea of such an incident having taken place up to now"***

20. PW 4 in re-examination clarified that when the child pointed out the accused's house she also said:

> ***"huyu mbaya, chungu hapa"***

21. Equally, the trial court analysed the evidence and further noted that when PW4 went to the scene with the child, it was the child who pointed out the accused's house; In addition, the court noted that:

> ***" when the child saw the accused, she dashed behind her mother and stated that 'huyu mbaya, uchungu hapa' meaning 'the accused was bad, that she felt pain…All the testimonies point to the accused"***

22. I am satisfied that the overall uncontested evidence shows that there is a clear connection demonstrated between the child and the accused. In particular, the evidence shows that the child was in the house of the accused on the material day and emerged from there crying in pain whilst pointing to her private parts. She was taken to hospital moments thereafter, where it was medically confirmed that she had been raped. These constitute evidence showing a connecting factor between the accused and the offence against the child.

23. In light of this evidence, it is my view that it was unnecessary for the trial court, whilst analyzing the evidence, to state that the accused merely denied being at the scene but that:

> ***"…he did not tell the court where he was working on the material day and probably provide evidence to support his allegation"***

24. This appears to shift the burden onto the accused to prove his innocence which is wholly against the accused's right to be presumed innocent, and the time-honoured principle that it is for the prosecution to prove the charges against the accused. In **Kioko v R (1983) KLR 289** cited by the appellant, it was held that:

> ***"…the law does not require the accused to prove his innocence, and therefore it is erroneous for a court to refer to certain facts and omissions of the accused as being inconsistent with his innocence"***

To this extent I agree with the appellant on the question of the burden of proof resting always on the prosecution. Nevertheless, there is no basis to hold that by the trial court's statement, it indeed convicted the accused for his failure to offer a proper defence.

25. The appellant cited a plethora of cases asserting the principle that proof must be achieved by the prosecution's evidence, and not by the accused's exculpatory evidence. The authorities include:

- **Philip Nzoka Watu v R [2016]eKLR** asserting that the prosecution evidence must be cogent, credible and trustworthy; not self-contradictory in material particulars or fundamentally differing from one witness to the other;

-**Pius Arap Maina v R [2013] eKLR**-that any evidence gaps in the prosecution's case raising material doubts must be in favour of the accused;

Mbugua Kariuki v R (1976-80) 1 KLR 1085 where the court held that the burden of proof remains on the state throughout to establish, and even where the evidence raises issues such as provocation, alibi, self defence, the burden of proof dose not shift to the accused, and instead the prosecution must negate that evidence beyond reasonable doubt.

26. I have carefully considered the evidence and the authorities, and on my part, I think there is an undeniable connection between the offender and the offence, and I so find.

27. On penetration, the appellant argues that there was no direct evidence to expressly demonstrate and prove that the accused had penetrated the child. As already noted, it is true that there was no eyewitness testimony by anyone who actually saw the event unfold. But that is not unusual in moral offences of this nature perpetrated against innocent children, as they are more often than not committed in extreme secrecy.

28. Section 2 of the Sexual Offences Act defines penetration in the following manner:

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

It is noted that penetration as defined under section 2 of the Act involves penetration of either the vagina or the anus of the victim. It occurs when the penis either partially or wholly enters the vulva or between the labia majora of the female genital organ. In the same vein, when the penis reaches entry to the anal opening penetration is presumed to have taken place. There is no requirement that the victim of need suffer vaginal or anal injury as a condition precedent to prove penetration

29. **Kabale v Uganda (1999) 1 EA 148** it was held that:

> ***"In order to prove the commission of the offence of defilement, it has to be established that there had been penetration of the sex organ of the victim by the sex organ of the assailant and the victim was below the age of eighteen years old"***

30. The case of **E.E v Republic [2015] eKLR** reiterated the meaning of penetration as set out in Section 2 of the Sexual Offence Act as follows: ***"Partial or complete insertion of genitalia organ of a person in the genital organ of another person".***

31. In the case of **Basita Hussein v Uganda SC CR Appeal 35/1995** it was held that penetration can be proved by victim's evidence, medical evidence or other evidence.

32. The evidence in this case around the question of penetration is essentially that the child complained of pain pointing between her leg and cried uncontrollably after she emerged from the accused's house. the mother on examining the child thought she had been defiled. The mother and father then took the child hospital, where Dr Kinyanjui examined her and confirmed the girl had been defiled. His report in the PRC form, filled on 29th June, 2015, states that she cried a lot. The genital examination revealed she had a discharge from the vagina, hymen was torn and missing and she had signs of penetration. His concluding remarks were that her:

"Hymen torn and missing; discharging vagina; and painful groins"

33. Dr Salim filled in the P3 Form on 30th June, 2015. His description of the child's genital injuries and condition were as follows:

> ***"Hymen torn – not present – painful labia minora and majora ….discharge- yellowish from vagina, painful groin…"***

Dr Salim estimated the age of the injuries to be about 4 days.

34. It is important, in my view, to note that evidence of injury, tenderness or pain to the labia majora, labia minora and vulva, as well as external injuries to the victim's non-genital areas, may still provide important details relevant to the determination of whether penetration occurred by supporting and thereby strengthening the other evidence offered by the prosecution. In this case, the evidence taken together supports the prosecution's assertion of penetration, which is the critical element of defilement

35. The foregoing evidence is sufficient to demonstrate penetration in the sense that following the decision in **Twamoi Versus Uganda 1967 EA** the testimony by the complainant and her parents has been corroborated by material evidence of the doctors who prepared the P3 form and the PRC form who examined the child and concluded she had been penetrated.

36. Now of course any single element of the evidence adduced, without more, would not in itself prove that the accused penetrated the child. However, when considered and understood in light of all the other evidence and the circumstances, namely: the child crying as she came out of the accused's house, lifting her legs up in pain and pointing to her private parts; being unable to sit; and wailing that 'BM' was the one who made her feel "chungu' or pain; together with the evidence of the medical reports, leads to the inevitable conclusion that the child's discomfort and pain was emanating from the painful labia caused by act of penetration that also tore the hymen.

37. I am thus satisfied that the evidence availed did, as a whole, show beyond reasonable doubt that there was penetration.

38. On the appellant's argument that the evidence was contradictory and uncorroborated, I have already dealt with the aspect of corroboration. As for contradictions in evidence, the following were pointed out by the appellant. That: the investigating officer said in cross examination there were other people living in accused's house, and it was for prosecution to prove that they were not in the house at the time of the defilement.

39. I have carefully perused the record and do not see any such evidence that there were other people who lived in the accused's house. All I have seen is evidence that when the investigating officer was explaining her visit to accused's house, she said she found accused at in the house and that she could not tell exactly how many people were in the house. This was not on the day of the incident. nor is it

40. PW1 argued that inconsistencies also included that: PW1 said it was while PW2 was breast-feeding the child that she examined the child; whilst PW2 said she came home and found the child crying and then examined her private parts. I note that PW2 did not make any mention of breast feeding, but I do not find that this is a material contradiction that goes to the root of proof of the offence.

41. This was the position taken by the Court of Appeal in the case of **Richard Munene v Republic [2018] eKLR** when it stated:

> ***"We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.***
>
> ***It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and***

fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

42. The other alleged contradiction was that the PW1 and PW2 stated that the child was taken to hospital the same day of the incident, yet PW3 said the P3 form was filled four days later when the child was examined. I have carefully perused the record. The evidence of PW3, Dr Salim, was that:

"….PRC forms were filled on 29/6/2015… I filled P3 after four days

In cross examination, he stated:

"Dr Kinyanjui is the one who filled PRC forms and is the one who examined her….On 27/6/2015 she was seen at outpatient department."

43. I see no contradiction reflected in the evidence of the prosecution witnesses in the record, as alleged on this point, by the appellant's. accordingly, the compliant on this point cannot stand.

44. There is a final matter which was not raised by the appellant on appeal but which is relevant as this court has taken note of it. After the trial court convicted the accused, and the state submitted that the accused may be treated as a first offender, the mitigation was recorded as follows:

"Mitigation: [Accused] The decision is wrong. I did not commit the offence. I am also a father and my family depends on me"

45. In meting sentence, the trial court then stated that it had no discretion in sentencing saying:

"I must point out that as a court, [I] do not think I have discretion having looked at the provisions of section 80 of the Sexual Offences Act. The sentence provided is life imprisonment. I have therefore sentenced the accused to life imprisonment"

46. In the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR** the Supreme Court, although not dealing with a sexual offence or life imprisonment, established the principle that mandatory sentences are unconstitutional to the extent that they do not give the accused an opportunity to be heard on the sentence, as was done by the trial court in this case.

47. In the recent case of **Dismus Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal extended the reasoning in the **Muruatetu** case to mandatory minimum sentences imposed by the Sexual Offences Act. That Court stated:

"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.

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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

48. Although the appellant in this case has not complained that mitigation was not considered, I cannot ignore the obviously wrong position of the trail court as to its inherent discretion on sentencing set out by the Supreme Court and Court of Appeal. On careful consideration, I conclude that the appellant is entitled to be accorded a fair trial in every respect, which includes an opportunity to be properly heard in a hearing on sentencing. I so hold.

Disposition

49. Having carefully considered all the information before me, I am not persuaded that any of the appellant's grounds of appeal have any merit. The appeal is therefore dismissed on all its grounds.

50. However, the accused is entitled to a hearing on sentencing, and I direct that he be given such an opportunity before the trial court.

Accordingly, the file shall be placed before the Chief Magistrate for allocation for fresh hearing on sentencing and for a fresh sentence to be meted. In the meantime, a probation officer's report and a report by the Prisons authorities shall be availed within ninety (90) days to enable re-sentencing.

Administrative directions

51. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams/Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

52. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

53. Orders accordingly.

Dated and Delivered from Nairobi via video-conference this 21st Day of May, 2020

RICHARD MWONGO

JUDGE

Delivered by Videoconference in the presence of:

1. Jared Omondi Odipo in person, the Appellant

2. Ms Nelly Maingi, for DPP

3. Court Clerk - Quinter Ogutu