REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 64 OF 2019 [SO]

VINCENT OUMA SHIRAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence of Bondo Principal Magistrate

Hon. E. N. Wasike, Senior Resident Magistrate in Bondo Principal Magistrate's Court

Criminal Case No 29 of 2018 delivered on 8/8/2019)

JUDGMENT VIA SKYPE

1. The appellant herein **Vincent Ouma Shirama** was convicted of the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the same Act. The offences are alleged to have occurred on the 14th day of June, 2018 in Bondo Sub County within Siaya County. The complainant child was SAO [full name withheld] aged 15 years. The conviction was after a full trial. The appellant was upon conviction sentenced to serve 20 years imprisonment on the main charge.

2. The prosecution called five witnesses to establish their case.

3. Aggrieved by the conviction and sentence imposed on him by the trial court, the appellant filed this appeal through his counsel B.I.Otieno setting out the following grounds of appeal:

1. That the learned trial magistrate erred in law and fact in convicting the appellant disregarding the circumstances of the matter

2. That the learned trial magistrate erred in law and fact in disregarding evidence of the complainant

3. That the learned magistrate erred in law and fact in meting out a harsh sentence in the circumstances

4. That the learned magistrate erred in law and fcat in concluding that there was penetration yet there was none

5. The leaned magistrate erred in law and fcat in disregarding evidence of the appellant

6. The learned magistrate erred in law and fact in failing to consider that the complainant's action was voluntary.

4. This being a first appeal, this court is obliged to reassess and re-evaluate the entire evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither saw nor heard witnesses as they testified.

5. Revisiting the evidence before the trial court, the complainant SAO. Testified as PW1 after voire dire examination and stated that she was a class seven pupil at [particulars withheld] Primary School. That on the 29th day of May 2018 she was on her way to [particulars withheld] Primary School for sports when she met the appellant herein and they talked and that the appellant asked her to accompany him to his home. She accepted the invitation and went with the appellant and stayed there until 4th June 2018 when she returned to her home.

6. The complainant narrated further that on 10th June 2018 she was supposed to go to church near the appellant's home so she carried along

her clothes and met him on the way and again accompanied him to his home where she stayed at his request and that at night they slept on the same bed. He removed her pants, inserted his penis in her vagina and they had sex. The following day they went to church and returned to the appellant's house and at night they had sex again and they lived together until 14th June 2018. That on 15th June 2018 somebody went to the home and took them to the Chief's Office. She was interrogated and both were taken to Usenge Police Station after which they were taken to hospital where she was treated and examined and a p3 form filled.

7. In cross examination by counsel for the appellant, the complainant stated that she used to go to the accused person's home and that she met him for the first time in April 2018. She stated that the appellant was her boyfriend and that her father was not aware of what she was doing with the appellant.

8. She stated that she had been defiled by another boy when she went to collect her clothes from the appellant's house after his arrest. She stated that she told the appellant that she was 15 years old. Further, that on 4th June 2018 the appellant went to her home and left a note containing his details and that she used to call him. She stated that the appellant had sex with her between 10th and 14th June 2018. She did not know why the appellant was taken to court.

9. PW2 Maruti Lawrence a Clinical Officer at Got Agulu Sub County Hospital testified that the complainant went to the facility with a history of being defiled and was examined. She was found to have a torn hymen, with no bruises or discharge. Lab tests showed no pregnancy but male spermatozoa was seen. VDRL was negative. It was concluded that penetrative sexual defilement had occurred. He produced the treatment notes and P3 form as exhibits.

10. In cross examination the witness stated that he examined the patient on 16th June 2018. That he did not examine the complainant and that there was a possibility that the hymen was torn prior to the date of alleged incident.

11. PW3 ROO the complainant's father testified that the complainant was born in 2003. He identified her birth certificate which had been marked as PEX 1. He recalled that on 29th May 2018 the complainant disappeared from home so he reported the matter to the Assistant Chief and on 4th June 2018 when he went to the Lake he received information that the complainant had returned home. He found a written note from a person who claimed to have been with his daughter, Mr Ouma Shirama. After interrogating the girl she confirmed being with the appellant so he returned her to school but four days later she again vanished so he searched for her without success. He reported the matter to the Chief and later he heard that she had been seen at Bar Konyango and was taken to the police in company of a person.

12. In cross examination, He stated that his daughter left home without permission on the 29th May 2018. He acknowledged that the girl had issues at school and that she had also fought with her brother and so she disappeared with her clothes. He stated that his daughter told him that she was not engaged in any sexual intercourse. He stated that the appellant portrayed himself as an honest person and even left a note behind with his details.

13. PW4 Julius Aluoch a village of Bar Konyango village recalled that on 14/6/2018 at about 8 am he received a report that someone was harbouring a school child in his home so he went to the suspect's home and found him with the child and his employer. He took the suspect-Ouma, his boss and the child to the chief's office and that upon being interrogated, the suspect claimed that the child was his wife so the chief called the police who went and arrested the suspect and took him to Usenge Police Station.

14. On being cross examined, PW4 reiterated his testimony in chief and added that it was the accused person's employer to tell the witness that the appellant was living with a school girl.

15. PW5 No. 67045 PC Charles Obade of Usenge Police Station testified that he took over from PC Kossen who was transferred to Embu. He recalled that on 15/6/2018 he took over investigations that were complete and that he was handed over the P3 form and birth certificate for the complainant.

16. In cross examination, PW5 stated that he was not the investigating officer and that from the statement of the investigating officer, both the complainant and the suspect were booked at Hot Agulu hospital for examination and were treated as prisoners with the minor assisting the police with investigations. He stated that it is the village elder who complained on behalf of the minor and reported to the chief.

17. At the close of the prosecution case the appellant gave unsworn evidence in defence and stated that he was a caretaker at BAR Konyango and that on 24th April 2018 he met the complainant on the road as he was going to Usenge and they had a conversation and agreed to be friends. On 29th May 2018 they again met at Ramogi during a sports event when she inquired where the appellant lived and they went together to where he lived. They stayed together for one week.

18. That on 4/6/2018 the complainant told the appellant that she was scared of going back to her home so he escorted her and met her brother and left his identification details and his phone contacts. That after one week the complainant called the appellant and told him that she wanted to go back to him which she did after three days, carrying her clothes and that on 15th June 2018 they were both arrested by a clan elder who took them to the area chief and were eventually escorted to Usenge Police Station where they were placed in cells. The following day they were taken to hospital where the complainant was examined but he was not, Later he was arraigned charged with the offence. He stated that they had sex on 12th June 2018 and that he did not know the complainant's age. He stated that he was born in 1994.

SUBMISSIONS

19. In support of his appeal, the appellant through Mr B.I. Otieno Advocate filed written submissions dated 18th November 2019 which he highlighted orally. The emphasis by the appellant's counsel is that the complainant and the appellant had an intimate relationship and that the complainant behaved like an adult and that she followed the appellant to his home on different occasions prior to their being arrested, had sex

with him on several occasions and that she was of unbecoming behaviour and was sexually active as her hymen was already torn before the alleged incident. Counsel submitted that the appellant should also have been examined. Further, that the circumstances of this case paint a picture of someone who voluntarily went to have sex in the appellant's house. He submitted that the offence of defilement should not be limited to age and penetration as that would encourage young girls to engage in sex and after they disagree with their boyfriend, they report to the police.

20. Counsel relied on the decision by Chitembwe J in **Malindi HC Cr. Appeal No. 32 of 2015 Martin Charo V Republic [2016] e KLR** and urged this court to acquit the appellant and set aside sentence imposed.

21. Opposing the appeal, counsel for the Respondent Mr Okachi Senior Principal Prosecution Counsel submitted that there was evidence that the offence took place and that the victim was a child who had no capacity to consent to the defilement. Counsel urged the court to dismiss the appeal.

22. In a brief rejoinder, counsel for the appellant urged this court to look at the circumstances and behaviour of the complainant and find that the sentence imposed was harsh.

DETERMINATION

23. I have carefully considered the evidence adduced before the trial court, the grounds of appeal and the submissions for and against this appeal.

24. What is not dispute as far as this appeal is concerned is that the appellant and the complainant had an intimate relationship and that they even lived together as if they were married to each other for about one week and they kept meeting and having sex in the house of the appellant. It is also not in dispute that the complainant was arrested in company of the appellant and prior to their arrest they had had sexual intercourse that is why upon examination of the complainant, she had male spermatozoa in her vagina. Her hymen was also torn although she had no bleeding or discharge. The Clinical Officer who examined her concluded that penetrative sexual intercourse had taken place. He added that there was a high possibility that the complainant had had sex before the material date subject of the charge of defilement.

25. It is also not disputed that the complainant was born on 21/3/2003 as per the Birth Certificate NO. [....] produced as exhibit 1, for that reason, the complainant as at between 10th June 2018 and 14th June 2018 the complainant was precisely 15 years, five months and seven days old. She was therefore a child as defined under section 2 of the Children's Act and therefore the charge of defilement was properly brought under section 8(1) as read with section 8(3) of the Sexual Offences Act.

26. The appellant's defence is that he did not know the age of the complainant whereas the complainant stated in cross examination that she told the appellant that she was 15 years old. According to the appellant and the complainant, they engaged in sexual activity on several occasions and this was voluntary as the complainant used to run away from her home without the knowledge of her parents and go to the appellant's home where he worked as a caretaker and it was not until the village elder reported them to the chief that both of them were arrested.

27. In his mitigations before sentencing, the advocate for the appellant stated:

> ***"The accused is remorseful. The complainant was 15 years and the accused was 20 years at the date of the offence. The complainant [sic] (should be accused) is a first offender and he did not know the consequences of his actions. There was an element of friendship. The accused is an orphan. He got married last month. He is a casual labourer; we pray for a non-custodial sentence. He is a young person who has a bright future ahead. We pray for leniency. He promises never to repeat this offence again. He has a young family."***

28. In the submissions in support of this appeal, counsel for the appellant insisted that the complainant's conduct was that of a mature adult and that her actions of following the appellant to his home to have sex with him was voluntary hence the court should have considered all the circumstances of the case and evidence by the complainant and the appellant that they were in a relationship and acquit the appellant or be lenient to him in terms of sentence.

29. The appellant's submissions were heavily influenced by the decision by Chitembwe J in **Martin Charo v Republic [supra]** where the complainant child aged 13 years old had been going to the appellant's house purposely for sex and return. The learned Judge on appeal held that the evidence by the complainant was not that of a person who had been defiled as she had behaved like an adult who voluntarily left her parent's home to go and have sex with the appellant, hence the appellant should not be condemned for the voluntary acts of the complainant who enjoyed the relationship.

30. Those circumstances are exactly the same as what transpired in this case and the appellant's counsel wishes this court to adopt the holding of the learned Judge to this case.

31. A similar scenario arose in **Eliud Waweru Wambui v Republic [2019] e KLR.** The Court of Appeal commenced the judgment with the following statement:

> ***"This appeal epitomizes for the umpteenth time the unfair consequences that are inherent in an critical enforcement of the Sexual Offences Act, No. 3 of 2006 (the Act) and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation. The case poses one more time whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality.***

The appellant, Eliud Waweru Wambui, in this second appeal protests, essentially, that he is like Shakespeare's King Lear, a man more sinned against than sinning. He was arrested nearly a decade ago, and arraigned before the Chief Magistrate's Court at Thika on 1st December, 2010 on a charge of defilement, contrary to section 8(1)(4) of the Act. The particulars of the charge were that;…"

32. However, there were more serious issues raised in that case than in this appeal. For example, the prosecution did not prove the age of the complainant to be 17 years, the complainant was coerced to give evidence yet she believed she was of marriageable age and the appellant had raised a defence under section 8(5) and (6) of the Sexual Offences Act.

33. In the instant case, albeit the appellant stated that he did not know the age of the complainant, the complainant testified that she told him that she was 15 years old. Further, there was proof of the complainant's age by production of a birth certificate. In addition, albeit the appellant claims that he did not know the consequences of his actions, the law is clear that ignorance of the law is no defence. Furthermore, the appellant only raised the defence under section 8(5) and (6) of the Sexual Offences Act in this appeal and through submissions that the complainant's behaviour was that of an adult. He does not state that the complainant deceived him or made him to believe that she was over 18 years of age. That being the case, this court is unable to find that a 15 year old child conducted herself as if she was an adult and that she made the appellant believe that she could be an adult. The fact that when she met the appellant she was not in uniform or that she was escaping from her home to go and live with the appellant is not proof of the complainant deceiving the appellant that she was of age. The appellant did not say that he was deceived that the complainant was of age. Neither did he testify that he reasonably believe that the complainant was an adult. In his own defence, the appellant stated that he did not know her age. He did not say that she deceived him that she was aged 18 years. The appellant does not say that in the circumstances of the case, he reasonably believed that the complainant was 18 years or above.

34. In the above **Eliud Waweru Wambui v Republic [supra]** case, the Court of Appeal stated:

"***We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years."***

35. The complainant in this case was 15 years old as evidenced by the birth certificate produced as exhibit. It is true that the complainant testified that she went to the appellant's house and stayed there and they had sex. She was also waylaid by some boy who took her to his house at night on the date she went to collect her clothing from the appellant's house and defiled. The Appellant too conceded that he stayed with the complainant and that they had sex not just on the named date in the charge sheet but also prior to that date.

36. On being examined upon being arrested in the company of the appellant the complainant was found to have spermatozoa in her vagina, indicative of sexual intercourse accompanied by ejaculation. Her hymen was obviously absent as she had had sexual intercourse on several occasions with the appellant, a fact which was admitted by the appellant. In my humble view, the Sexual Offences Act was enacted with the objective of protecting vulnerable children and persons who are forced into sexual activity without their consent. On the part of children, the Act creates the offence of defilement whereas for adults there are various offences including rape and gang rape. Children are incapable of consenting to being defiled and that is why section 8(5) and 8(6) was enacted to serve as an exception and a defence on the part of an offender where a person who is under the age of 18 and who by their conduct or deception makes the offender to reasonably believe that they are over 18 years. The Court of Appeal has acknowledged in the above **Eliud Waweru Wambui v Republic** [supra] decision that the age at which a child can be said to deceive the offender is 16 to 18 years.

37. I reiterate that there is no evidence to show that the appellant was deceived to believe that the complainant was over 18 years. The fact that she took herself to the appellant's home and voluntarily had sex with him is not evidence of deception. Defilement need not be by force as a child has no capacity to consent to being defiled.

38. The prosecution proved beyond reasonable doubt all the elements of defilement of the complainant namely that she was aged 15 years old, that there was penetration of the appellant's penis into her vagina and that the perpetrator was positively identified and that is, the appellant herein.

39. The decision in the ***Martin Charo*** case is persuasive. It is not binding on this court and unless the appellant availed himself of the legal defenses in section 8(5) and 8(6) of the Sexual offences Act, he cannot claim that voluntary sexual activity by a child over a long period of time renders age to be a non-issue. To hold so would expose young children to sexual abuse and sexual exploitation.

40. Accordingly, iam satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. The conviction of the appellant was sound and safe. I uphold it.

41. The appeal against conviction is hereby dismissed.

42. On sentence, the trial court meted out mandatory minimum sentence of 20 years imprisonment as stipulated in section 8(3) of the Sexual offences Act. This was despite the mitigation by the appellant through his counsel Mr. B.I. Otieno. In the view of the trial magistrate, the sentence specified in law is very strict and ought to be adhered to. This was on 8/8/2019. That is not the position. The Court of Appeal applying the principles settled in the Supreme Court decision of **Francis Karioko Muruatetu v Republic [2017]e KLR in Jared Koita Injiri v Republic [2019]e KLR** stated that there are no minimum mandatory sentences as they offend the discretionary powers of the trial court in sentencing and violate the accused person's right to mitigation before being sentenced.

43. On the basis of the above decisions, I find that the mandatory minimum sentence imposed on the appellant is amenable to interference by this court or the trial court, having regard to circumstances of each case and mitigations by the appellant which are on record. In the premises, I hereby exercise discretion and resentence the appellant to serve fifteen years imprisonment.

44. In the end, the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent that the 20 years imprisonment is set aside and substituted with fifteen years imprisonment.

45. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May 2020 via skype due to the Covid 19 situation.

R.E.ABURILI

JUDGE