REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.67 OF 2018

CLINTON KASYOKI MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. J. Kamau RM delivered on 20th February 2018 in Kibera CM Cr. Case (S/O) No. 15 of 2015)

JUDGMENT

The Appellant, Clinton Kasyoki Muli, was charged with the offence of **defilemen**t contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** The particulars of the offence were that on 2nd June 2015 at around 1100 hours in Ongata Rongai within Kajiado County, the Appellant intentionally and unlawfully penetrated by inserting his penis into the vagina of SW, a girl aged nine (9) years. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(A)** of the **Sexual Offences Act.** The particulars of the offence were that on 2nd June 2015 at around 1100 hours, in Ongata Rongai within Kajiado County, the Appellant intentionally touched the vagina of SW, a child aged nine (9) years old. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of **defilement** and sentenced to serve life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that his right to a fair trial was violated by the trial court since he was not informed of his right to have legal representation. He faulted the trial court for convicting him on the basis of a defective charge sheet. He was of the view that the prosecution failed to establish the element of penetration to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial court failed to properly evaluate his alibi defence in arriving at its decision. He was aggrieved by his sentence stating that the trial court failed to consider his mitigation in meting out the life imprisonment sentence.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Ms. Kibathi for the State opposed the appeal. She made oral submission to the effect that the prosecution established the elements of the offence of defilement to the required standard of proof beyond any reasonable doubt. She averred that the prosecution produced in evidence the complainant's birth notification, which established that the complainant was nine (9) years of age at the time the offence was committed.

With regard to penetration, Learned State Counsel submitted that the complainant narrated to court how she went to visit the Appellant together with her two siblings. She averred that while they were sleeping, the complainant stated that the Appellant removed his trouser and inserted his penis in her anus. The Appellant applied petroleum jelly on her anus before he penetrated her. Learned State Counsel stated that the complainant was examined by PW5, a clinical officer at Nali Medical Centre, on the same day the incident is alleged to have occurred. PW5 told the court that upon examining the complainant, he noted that her vaginal walls were reddened and her hymen was absent. There was also presence of sperm deposit in her vagina. She further submitted that the complainant was also examined by PW6, who made the same observations as PW5. Ms. Kibathi averred that although there was a discrepancy between the complainant's oral evidence and the medical evidence with regard to which organ was penetrated, the evidence on record established that the complainant was defiled by the Appellant. She opined that vaginal penetration was established to the required standard of proof beyond any reasonable doubt. She was of the view that the error in description of the genital organ by the complainant may be attributed to her tender age. To this end, she cited the case of **Peter Ndungu Muraguri vs. Republic [2017] eKLR**.

Learned State Counsel further submitted that the evidence of identification was by recognition. She averred that the Appellant was well known to the complainant since he was the keyboard player at their church. The complainant referred to him by his name. She stated that the offence occurred in broad daylight. She was of the view that the Appellant was properly identified by the complainant. She asserted that the discrepancy in the charge sheet, in citing **Section 8(3)** as opposed to **Section 8(2)** of the **Sexual Offences Act,** was not prejudicial to the Appellant. She stated that the same was curable under **Section 382** of the **Criminal Procedure Code.** With regard to the sentence, Ms.

Kibathi submitted that the court ought to set aside the life imprisonment and sentence the Appellant to serve a custodial sentence of thirty (30) years. In the premises she urged this court to dismiss the Appellant's appeal on conviction.

The facts of the case according to the prosecution are as follows. The complainant, SW, told the court that she was nine (9) years of age at the time she gave evidence in court. She resided in Ongata Rongai with her parents and four siblings. She stated that the Appellant was their neighbour. He also played the keyboard at their church. On 2nd June 2015, the complainant together with two of her younger siblings went to visit the Appellant. They wanted to play the keyboard. The complainant told the court that the Appellant's house was a single room. He had a mattress on the floor. After they played the keyboard, the Appellant told them to sleep on the mattress.

The complainant stated that she and the Appellant slept on top side of the mattress. Her siblings slept on the bottom side of the mattress with their heads at her feet. She stated that she was wearing a pair of white trousers. The Appellant removed her trouser and underwear. He was wearing a pair of black trousers which he removed. He applied petroleum jelly on her anus. He then inserted his penis in her anus. She stated that she felt pain in her anus and private parts. She told the court that the Appellant asked her whether she was feeling good as he penetrated her. After he was done, the Appellant asked her to apply the petroleum jelly on her anus.

The complainant then told the Appellant that she wanted to use the toilet. She used this opportunity to escape. She ran to her aunt's house but was too scared to tell her what had happened. She then went back to the Appellant's house to pick up her siblings. They went to her aunt's house. Later that evening she went home and told her mother what the Appellant had done to her. Her mother took her to the hospital. They also reported the incident at the police station. The complainant testified that they had been introduced to the Appellant by their pastor Daniel. The Appellant played the keyboard at their church. He also taught them how to dance in preparation for music festivals. She stated that the incident occurred between 9.00 a.m. and 11.00 a.m.

PW2, MAO, is the complainant's mother. It was her testimony that on the material day of 2nd June 2015, she left for work at about 8.00 a.m. and came back home at 5.00 p.m. When she got to the house, she found the complainant lying in bed. She was crying and was complaining of a stomach ache. The complainant told her that they had gone to visit the Appellant who had promised to teach them how to play the keyboard. The Appellant stayed at the church store. The complainant informed her that the Appellant defiled her on the mattress that was in the said room. She examined the complainant's private parts and noted that her vagina was inflamed. She also had difficulty walking. She informed the church pastor as well as her husband of the ordeal.

PW2 took the complainant to Nalis Medical Centre for examination. The doctor informed her that the complainant had been sexually assaulted. He advised her to report the incident to the police. The following day, her husband asked the Appellant to come to their house. They confronted him about what had happened. PW2 called the police when she realized that the situation was getting out of control as an irate mob was beating up the Appellant. The next day, she took the complainant to Nairobi Women's Hospital for further medical checkup. PW2 testified that the complainant was born in year 2005. She further stated that she had known the Appellant for close to two weeks as he had just joined their church.

PW3, DN, was at the material time the head pastor at [Particulars withheld] Church, where the incident is said to have occurred. It was his testimony that he employed the Appellant to play the keyboard at the said church sometime in May 2015. The Appellant stayed in a room where the church stored their instruments. On 2nd June 2015, he received a call from PW2 who informed her that the Appellant had sexually assaulted her daughter. PW3 went to PW2's house. He found the complainant crying. He accompanied PW2 to Nalis Medical Centre where they took the complainant for medical examination. The doctor informed them that the complainant had been sexually assaulted. The next day, he went to PW2's house. He found an irate mob beating up the Appellant. He informed the police who came and arrested the Appellant.

PW4, Dr. Joseph Kimani, was a government analyst based at the Government Chemist in Nairobi. He told the court that on 5th August 2015, he received exhibits from the investigating officer in this case. They included a vaginal swab belonging to the complainant and a blood sample extracted from the Appellant. After his analysis, he noted that there was no presence of blood or semen from the complainant's vaginal swab. He stated that no other DNA was found from the vaginal swab. He produced a report of his findings in evidence.

PW5, Simon Kibogo, was a clinical officer based at Nalis Medical Centre in Ongata Rongai. He stated that he examined the complainant on 2nd June 2015 at about 8.00 p.m. The complainant was in a lot of pain and had difficulty walking. Upon examination, he noted that her hymen was missing. Her vaginal wall was reddened. There was also a whitish discharge which seemed like deposits of semen in her vagina. It was his view that the complainant's vagina had been penetrated.

PW6, Safina Njagi, was a clinical officer based at Nairobi Women's Hospital in Ongata Rongai. She stated that she examined the complainant on 3rd June 2015. She was alleged to have been sexually assaulted. PW6 testified that the complainant's external genitalia was normal. Her vaginal wall was reddened, tender and inflamed. Her hymen was also broken. She was of the opinion that the complainant's vagina had been penetrated, based on her findings. PW6 also examined the Appellant on the same day. He had bruises on his body. She produced the complainant's Post Rape Care Form into evidence.

PW7, PC Julius Odondo, based at Gataka Police Post in Ongata Rongai, was the arresting officer. He told the court that on 3rd June 2015, PW3 came to the police post and reported that there was an irate mob beating up the Appellant. The Appellant was alleged to have sexually assaulted a minor. He rushed to the scene accompanied by his colleague. They discovered that the mob had used a different route and were headed to the police post. They rushed back to the police post where they arrested the Appellant. They took him to hospital for medical treatment. They afterwards escorted the Appellant to Rongai Police Station.

PW8, Cpl. John Getonto then attached to Rongai Police Station, investigated this case. He was assigned the case on 3rd June 2015. The Appellant was already in custody. He escorted the Appellant and the complainant to Nairobi Women's Hospital for medical examination. Blood samples and a vaginal swab were recovered from the Appellant and complainant respectively. He forwarded the same to the government chemist for analysis. He also interrogated the witnesses and recorded their statements. The complainant told him that she had gone to visit the Appellant at the church when the incident occurred. He had promised to teach her how to play the keyboard. PW3 confirmed

that the Appellant had been employed by the said church to play the keyboard. After his investigation, he preferred the present charges against the Appellant. PW8 produced into evidence the complainant's clinic card.

The Appellant was put on his defence. He gave an unsworn statement. He stated that he resided at Gataka Area in Ongata Rongai. He admitted that at the material time, he was employed by PW3 to play a keyboard at his church. On the material day of 2nd June 2015, the Appellant stated that he was at Pastor D's house. He spent the time there the entire day. He left the pastor's house at about 6.00 p.m. He got home an hour later and went to sleep. The next day, he noticed that a crowd had gathered outside his house. They took him to another house where they started physically assaulting him. He was being accused of having sexually assaulted the complainant. He denied sexually assaulting the complainant. He stated that he had been at the church for about a week and did not know PW2 or the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses. (See **David Agwata Achira –vs- Republic [2003] eKLR)**.

In the present appeal, the issue for determination by this court is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with Section 8(3) of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case**. Section 8(1)** of the **Sexual Offences Act** provides that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The prosecution is required to establish three ingredients; the age of the complainant, the act of penetration and the identity of the perpetrator. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof beyond any reasonable doubt. In the present appeal, the complainant stated that she was nine (9) years of age at the time she adduced evidence before court. Her mother (PW2) told the court that she was born in the year 2005. The complainant's clinic card which was produced into evidence indicated that the complainant was born on 3rd August 2005. The same confirmed that the complainant was nine (9) years of age at the time the sexual assault occurred. This evidence was not challenged by the Appellant on cross-examination or in his defence statement. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act.**

This court now turns to the ingredient of penetration. **Section 2(1**) of the **Sexual Offences Act** defines penetration as:

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

It was the complainant's testimony that she with her two younger siblings when she went to visit the Appellant on the material day. They played the keyboard with the Appellant. Afterwards, the Appellant told them to sleep on a mattress that was on the floor of his room. The complainant stated that she and the Appellant slept on top side of the mattress. Her siblings slept on the bottom side of the mattress with their heads at her feet. She stated that she was wearing a pair of white trousers. The Appellant removed her trouser and underwear. He was wearing a pair of black trousers which he removed. He applied petroleum jelly on her anus. He then inserted his penis in her anus. She stated that she felt pain in her anus and private parts.

The complainant told the court that the Appellant asked her whether she was feeling good as he penetrated her. After he was done, the Appellant asked her to apply the petroleum jelly on her anus. PW2 testified that when she got home that evening, she found the complainant crying. The complainant was in pain and complained of a stomach ache. She had difficulty walking. She informed her that the Appellant had sexually assaulted her. PW2 immediately took her to the hospital for medical treatment.

The medical evidence adduced by PW5 and PW6 established that the complainant's vagina had been penetrated. PW5 who examined the complainant on the same day the incident was alleged to have occurred, stated that **t**he complainant was in a lot of pain and had difficulty walking. Upon examination, he noted that her hymen was missing. Her vaginal wall was reddened. There was also a whitish discharge which seemed like deposits of semen on her vagina. It was his view that the complainant's vagina had been penetrated. PW6 examined the complainant the next day on 3rd June 2015. She testified that the complainant's external genitalia was normal. Her vaginal wall was reddened, tender and inflamed. Her hymen was also broken. Based on the findings, she was of the opinion that the complainant's vagina had been penetrated.

Although the complainant stated that the Appellant inserted his penis in her anus, she also told the court that she felt pain in her anus and vagina. Penetration as defined by **Section 2** of the **Sexual Offences Act** encompasses both the vagina and anus. The fact that the complainant stated that she felt pain in her anus and vagina goes to show that the Appellant may have penetrated her anus and vagina. The medical evidence of the hymenal tears, reddened vaginal walls and inflamed labia established that the complainant's vagina had been penetrated. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is whether the penetration was perpetrated by the Appellant. The Appellant was well known to the complainant. He played the keyboard at the church that they attended. She referred to him by name. She informed her mother (PW2) that it was the Appellant who had sexually assaulted her. PW3, who was the pastor at the said church, confirmed that the Appellant was employed to play the keyboard at the church. When he was employed, he was introduced to the congregation. He had been employed for about two weeks prior to that fateful day. PW3 told the court that on the material day, PW2 called him and informed him that the Appellant had sexually assaulted her daughter. PW3 stated that the complainant attended his church.

The Appellant in his defence admitted that he was indeed employed to play the keyboard by PW3 at his church. He however told the court that on the material day he was not at his house. He stated that he spent the day at Pastor D's house where he left at about 6.00 p.m., and went home. He stated that he did not know the complainant. This court is of the view that the Appellant's defence was a mere denial and did

not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. The incident occurred in broad daylight, at about 11.00 a.m. The complainant referred to the Appellant by his name. She stated that he played the keyboard at the church, a fact which was admitted by the Appellant. The Appellant was therefore well known to the complainant. The evidence of identification was by recognition. There was no chance of a mistaken identity. The Appellant's defence was properly dismissed as being of no evidential value.

The Appellant in his grounds of appeal argued that the charge as drafted was fatally defective since the charge sheet indicated that the Appellant was charged under **Section 8(3)** which applied to minors aged between 12 and 15 years. The complainant was nine (9) years of age when the offence was committed. As observed by the learned trial magistrate, the applicable sentencing section was **Section 8(2)** and not **Section 8(3**) of the **Sexual Offences Act.** This court is of the view that the said section provides for the sentence, and therefore does not affect the Appellant's conviction on the charge of defilement contrary to **Section 8(1)** of the **Sexual Offences Act**. The error is curable under **Section 382** of the **Criminal Procedure Code**.

The upshot of the above is that the Appellant's guilt was established to the required standard of proof beyond any reasonable doubt**.** This court, having re-evaluated the evidence adduced before the trial court and the submission made by parties to this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards sentence, **Section 8(2)** of the **Sexual Offences Ac**t provides a sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. However, the recent decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** held that the mandatory death sentence prescribed for the offence of **murder** by dint of **Section 204** of the **Penal Code** was unconstitutional and that the mandatory nature of the sentence deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the **Muruatetu** case was also extended to sentences imposed under the **Sexual Offences Act** in recent decisions by the Court of Appeal in **Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR**. The Court of Appeal in **Jared Koita Injiri (supra)** held thus:

> ***"...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. 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."***

Guided by the aforestated decisions of the Supreme Court and the Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the sentence of life imprisonment that was meted on him was deserved or another sentence ought to be imposed.

In the present appeal, the Appellant is a young man. He is also a first offender. The court has taken into consideration the entire circumstances the offence was committed. In the premises, this court sets aside the sentence of life imprisonment meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve twenty-five (25) years imprisonment with effect from the date he was convicted by the trial court *i.e.* ***20th February 2018.*** This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JUNE 2020

L. KIMARU

JUDGE