REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 77 OF 2017

(BEING AN APPEAL FROM THE DECISION OF HON. P W WASIKE ON 10TH OCTOBER 2017 IN CRIMINAL CASE NO. 178 OF 2016)

MARTIN WAFULA MASAFU.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement of a child 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 diverse dates between 1st November, 2016 and 19th November 2016 at [particulars withheld] estate within Trans-Nzoia County intentionally caused your penis to penetrate into the vagina of LI a child aged 8 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 diverse days between 1st November, 2016 and 19th November, 2016 at [particulars withheld] estate within Trans-Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of LI a child aged 8 years.**

3. The Appellant was convicted and sentence to life imprisonment hence this appeal. The grounds he has raised in his appeal are that the evidence tendered by the respondent was contradictory in nature and thus the charges against him were not proved and that his defence which was strong was not taken into account by the trial court.

4. The summary of the evidence as presented during trial was that PW1 the Complainant testified that she was 8 years old and a class 2 pupil at [particulars withheld] primary school. She said that on the 1st of November, 2016 she was alone at home as her parents had gone to work. The Appellant who was a neighbour and a person she knew came and covered her mouth and told her not to cry or he will kill her.

5. He then took her to a maize farm where he proceeded to remove her skirt and her panty and defiled her. He also gave her *kangumu* which she threw away. She went away after the appellant had dressed her up. She met one JN whom she narrated to her what had transpired. The mother to the said J came and told the Complainant's mother what had happened.

6. Her mother interrogated her and she told her what had happened and that it was the appellant who had defiled her. She further testified that the Appellant would defile her also in his house when his family members are not there. She said that the appellant defiled her also in his bedroom and gave her biscuit and lollipop but she would throw them away.

7. She was thereafter taken to the district hospital by her mother where she was treated and she identified in court the treatment documents.

8. When cross examined by the appellant she maintained that it was the Appellant who had defiled her and so that there was no one else when he did in his house. She said that the appellant put her panty on her after the incident and she noticed some watery substance on it.

9. **PW2 SL** is the mother to the Complainant. She said that she was at her work on 19th November, 2016 when she was called by her sister Alice who told her that PW1 had some problems. Alice told her that her child J had told her what the appellant had done to PW1. She then went and took her to the hospital although she had noticed her always unwell and would Complaint of headaches and she would give her some painkillers.

10. The child told her that it was the appellant who had defiled her and she had done so four times both in the house and in a maize field. She made a report at the police where the appellant was arrested by the vigilante group led by one Anthony and the child treated at the district hospital.

11. **PW3 JN** a minor testified that she was a class 4 pupil at [particulars withheld] primary school and that PW1 was a child to her aunt whom they use to play together although they lived separately. She said that pw1 told her that the appellant removed her panty and skirt and defiled her in his house. She could not however remember the date.

12. After getting the information she went and told her mother Lydia who in turn went ahead and told PW2. She further said that PW1 told her that she was feeling some pain in her vagina. When cross examined by the Appellant she said that pw1 did not tell her whether the incident occurred during the day or night.

13. **PW4 ANTHONY LUMWACH** testified that he does community policing and on the 21st November, 2016 he was at the chief's office at Lessos when a report was made by PW2 concerning the incident. He knew the appellant who was his neighbour. Together with his friends and under the instructions of the chief they went and arrested the Appellant whom they found in his home. He later brought him to Kitale police station when the crowd on the ground became hostile and wanted to beat him.

14. **PW5 JOHN KOIMA** a clinical officer from Kitale County Referral Hospital filled the P3 form after examining the Complainant. He also relied on the treatment notes by Dr. Kegode. He concluded that the hymen was torn and labia had bruises and swollen. She had difficulty in urinating and he booked her for surgery for the repair of the injury. The urine was still tripping due to the injury.

15. **PW6 PC MARY UMAZI** from Kitale police station Gender and Children Protection Unit carried out the investigation after the matter had been reported. She was told that the child had been defiled four times. She issued her with a P3 form which was filled and she thereafter preferred charges against the appellant. She also produced the child's clinical card which indicated her age.

16. When placed on his defence the Appellant gave unsworn evidence denying the charges. He said that his mother was sick on the 7th September, 2016 and he attended to her till 21st November, 2016 when he came back to Lessos and he was arrested at around 6pm and taken by a police vehicle. He was later brought to court and charged with the offence which he continued to deny.

ANALYSIS AND DETERMINATION.

17. As stated above the appellant's grounds of appeal are entirely centred on the fact that the Respondent's evidence was not sufficient enough to have led into a conviction and that the same were full of contradictions. He said that the court also failed to take into consideration his defence and it relied on extraneous matters.

18. The parties were then advised to file written submissions which they have complied. Generally, the respondent supported both the conviction and sentence and argued that the appeal has no merit at all.

19. The court has perused the submissions filed by the parties and does not find the need to reproduce them here save to state that each party is gravitating towards its respective directions.

20. The purpose of this court at this juncture is to re-evaluate the evidence afresh and come up with an independent finding as was enunciated in the case of **OKENO.V. REPUBLIC.E. A (1973) . 32**.

21. The three ingredients that ought to be satisfied in the offence of defilement are now clear, namely, the age of the victim, the identity of the perpetrator and penetration. (See **DANIEL WAMBUGU MAINA. V. REPUBLIC (2018) e KLR.)**

22. In this regard the age of pw1 was not in dispute. She was aged 8 years old as exemplified by the production of the clinic card.

23. Was the Appellant the perpetrator? The evidence of the minor clearly pointed out that she knew the Appellant very well as he was a person they stay near each other. The rest of the witnesses did indicate in their testimonies that they knew the Appellant. The appellant on the other hand did not deny that he did not know the Appellant or the witnesses.

24. The incident according to PW1 occurred during the day in a maize field as well as in the appellant's house. The Appellant according to her would give her kangumu, biscuit and lollipop which she threw away. This court does taking the above reasons conclude that the complainant was not mistaken as to identity of her assailant.

25. The evidence concerning penetration was well proved by the production of the treatment notes as well as the P3 form. The Clinical Officer as well as the Doctor had to refer the child for further treatment, namely surgery as she was unable to control her urine.

26. The sum total of the evidence produced in my view placed the Appellant at the scene of the incident. Although it is arguable how many times the child was defiled, the trial courts finding that she was defiled in the appellant's house whether once or twice is sufficient. Indeed, whether she was defiled in the maize farm or the Appellant's house is not very material. The bottom line is that she was defile.

27. There was no suggestion that she may have been defiled elsewhere and by someone else apart from the Appellant. The child appeared to have spoken the truth since she said that she told PW2 who thereafter told her mother and who went ahead to inform PW3. The chain of information was not broken. The period between the discovery of the incident and medication was very short to have caused any discrepancy. She appeared to be truthful and believable and thus benefit from 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. The defence by the Appellant though unsworn did not shake the Respondents case. He laid out an alibi but there was nothing to suggest or buttress the fact that he went to take care of his sick mother. More importantly he did not raise such during the abduction of evidence by the Respondent's witnesses especially during cross examination. Being unsworn the Appellants evidence was not of much probative value as it was not subjected to cross examination.

29. In the premises this court does not find this appeal meritorious and it is hereby disallowed.

30. On the question of sentencing the appellant has submitted that the court ought to have followed the decision by the Supreme Court in **FRANCIS MURUATETU &ANOTHER VERSES REPUBLIC, SC PET NO .16 OF 2015.** Although the said decision was based on the issues regarding death penalty the Court of Appeal adopted principles therein in the case of **JARED KOITA INJIRI V.REP (2019) eKLR**. It went on to state that;

"***This then leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view 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."

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.

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".

31. Taking cue from the above decision, this court is inclined to interfere with the sentence herein. Although the death penalty is provided as per the Sexual Offences Act, it is not the only efficacious penalty.

32. Consequently, the appeal is dismissed and the death penalty imposed against the appellant is hereby set aside and replaced with imprisonment for 20 years from the date of the lower court judgement namely 10th October 2017.

33. Orders accordingly.

Dated, signed and delivered via zoom this 4th day of June 2020.

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H. K. CHEMITEI

JUDGE

4/6/2020