REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 4 OF 2018

MUSA SADDY HUSSEIN----------APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ---------- RESPONDENT

(Being an appeal against the original conviction and sentence from Adult Criminal Case Number 272 of 2014 by Hon. Y.I. Khathambi at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. On 12th January 2018 Musa Saddy Hussein was sentenced to fifteen (15) years imprisonment for the offence of **Defilement Contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act.** He had also been charged with the alternative charge of **Indecent Act with a child Contrary to Section 11(1) of the same Act.**

2. The particulars were that on diverse dates in the month of July 2015 at [Particulars Withheld] Estate within Nakuru County he committed an act of penetration by inserting his male genital organ into the female genital organ of EM a girl aged sixteen (16) years old. In the alternative, that he committed an indecent act with a child by touching the breasts, vagina and buttocks of the same.

3. Upon conviction and sentence the appellant filed his own Amended Grounds of Appeal, together with submissions. Later on, he instructed counsel. Who filed fifteen (15) Grounds of Appeal. I have read the fifteen (15) Grounds of Appeal viz:

> *1. THAT the learned trial Magistrate erred both in law and fact by displaying un-meted open biasness against the appellant during the cause of trial hence occasioning her to pass a conviction and sentence against the appellant that that does not meet the threshold of equity and fairness.*
>
> *2. THAT the learned trial Magistrate erred both in law in fact by convicting the appellant on a charge that was not supported by the facts adduced by the prosecution and its witnesses.*
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> *3. THAT the learned trial Magistrate erred both in law and in fact in failing to make observation that there were glaring discrepancies on the face of record which was not limited to the documents adduced and presented by the prosecution witnesses during the time of trial.*
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> *4. THAT the learned trial Magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.*
>
> *5. THAT the trial magistrate erred both in law and fact in holding that the appellant person.*
>
> *6. THAT the trial magistrate erred in both law and fact in holding that there was overwhelming evidence in court to support the case yet the entire evidence was contradictory.*
>
> *7. THAT the trial magistrate erred both in law and fact in sentencing the accused person (sic) person to serve a sentence of 15 years on a charge sheet that was defective.*
>
> *8. THAT the trial magistrate erred both in law and fact in holding that evidence adduced in court was corroborated by the doctor's evidence yet the medical report produced in court as an exhibit did not reveal that an offence was committed.*

9. THAT the trial magistrate erred both in law and fact in giving an excessive and severe sentence to the appellant for an alleged committed the offence, yet no evidence was adduced to support the offence at all.

10. THAT the learned trial magistrate erred in fact and in law in failing to consider glaring inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.

11. THAT the Learned trial magistrate completely misunderstood the case that was before her, misconceived the issues and as a result came to a wrong decision.

12. THAT the Learned trial magistrate erred in fact and in law in failing to take into consideration that the prosecution had shifted the burden of proof to the Appellant and in turn letting the accused to proof his proof of guilt to the charge preferred against him.

13. THAT the Learned trial magistrate erred in law and fact in wholly premising his finding and conviction on his own personal views and opinions which were neither supported by the evidence before him not the applicable law.

14. THAT the learned magistrate erred in both facts and law by failing to see that there was no proof of penetration and that the medical report tendered did not support the existence of such a charge or an act of defilement.

15. THAT the learned trial Magistrate erred both in law and in fact to consider the appellant's mitigation thereby meting out a sentence that was excessive in the circumstance.

and found that they are aptly summarized in the three that the appellant filed:- That the trial magistrate erred in law and fact by;

(i) Failing to appreciate that defilement as an offence should not be limited to age and penetration.

(ii) Failing to appreciate several issues came into focus after hearing the evidence which should be determined in the judgment.

(iii) Failing to invoke Section 8(5) and 8(6) of the Sexual Offences Act.

4. Counsel also filed written submissions and cited the following cases; **Elias Kiamati Njeru Versus Director of Public Prosecutions (2015) eKLR, Kiilu & Another Versus Republic (2005) eKLR 174, Peter Saikapor Naiyoma Vs Republic (2019) eKLR, Albert Kinyua Ngari Vs Republic (2015) eKLR, Mohammed Farah Vs Republic (2017) eKLR, Ismael Ibrahim Kofa Vs Republic (2012) eKLR, Rashid Adan Vs Republic (2017) eKLR, Ndoro Chaka Vs Republic (2017) eKLR and Eliud Ouma Agwara Vs Republic.**

5. The appeal was argued by Mr. Kemboi for appellant and Ms. Kibirui for state.

6. Mr. Kemboi put out four issues for determination: **whether;**

- The essential elements of defilement were proved.
- Medical evidence supported the charge.
- Burden of proof was shifted to the appellant
- Main charge was substantially supported.

6.1 He submitted that the fact that a child was born as the case was ongoing it was necessary for a DNA test to have been conducted as required by **Section 36(1) of the Sexual Offences Act**. That this test would have established whether the appellant was responsible for the pregnancy.

6.2 That the alleged defilement happened in July 2014 and the medical examination was in December 2014. He relied on **Albert Kinyua Ngugi v Republic [2017] eKLR**, where failure to conduct DNA was found to be fatal to the case for prosecution.

6.3 That the trial court relied on **Section 124 of the Evidence Act** but did not record any reasons for so doing as required and the mere statement that the complainant did not look like an adult was subjective and unreliable.

6.4 That the conduct of the complainant was questionable as it was not the conduct of a child, visit the meeting place between 8.00 p.m. and 10.00 p.m. That the fact that received money from appellant was evidence she was paid for sex.

6.5 That there was no proof of penetration; that the medical report by the medical doctor came six (6) months after alleged defilement and only proved that there was a pregnancy, that due to the intervening period someone else could have been responsible.

6.6 That the burden of proof was shifted to the appellant. He was put on the defence to prove that he was not the perpetrator.

7. Ms. Kibirui opposed the appeal on the grounds that the elements of defilement were proved

7.1 On **age**: that complainant was seventeen (17) years old, and she even produced certificate of birth hence age was not in dispute. That the courts comment that complainant did not look like an adult meant that the appellant too ought to have noticed.

7.2 That **penetration** was proved; complainant's pregnancy was sufficient proof. That the appellant said he had sex twice with her. Prosecution proved and the appellant admitted.

7.3 That under Section 109 and 111 of the Evidence Act the burden of proof may shift.

7.4 On the sentence. That it was lawful.

8. In his rejoinder Mr. Kemboi submitted that the state conceded that burden shifted, that the appellant had made sworn testimony that entire conviction was erroneous. Sentence was unmerited.

9. Guided by **Okeno vs Republic (1972) EA 372 where it was stated**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."***

I have carefully considered the evidence on record.

10. The complainant testimony clearly demonstrates that there was a relationship between her and the appellant. They texted each other and had sex. In her own words she said:

> *"Musa …said he wanted to know me well. He gave me his number to text him. I text him on 0715… I was 0725… We communicated on several occasions. He told me he loved me. On Saturday, he told me to meet him. We met at 8.00 p.m. He told me the road was not safe. He gave me direction to his cousin's place. I went, inside the house. We talked...He asked me to have sex. I told him I have never had sex, he told me that we can have sex even if am a virgin. He removed my clothes, he kissed me. I do not know what happened. I found myself on the bed. I asked him to use protection, he did not. He came on top of me. He removed my top. I removed the other clothes. He removed his clothes, we had sex (penetration)... At 10.00 p.m. I told him I wanted to go home. He allowed me to go.. we continued chatting. The 2nd time I went to his cousin's house, he came and we also had sex again in the same month of July. I conceived, I realized when I was examined. I went back home, after sex and slept. In August I started feeling dizzy, I was taken to hospital in September. The Doctor told me I was pregnant..At home, I told my Aunt what had transpired. I showed my cousin, where Musa stays, I showed him who Musa was. My aunt told me to inform Musa I was pregnant… I informed him, he looked shocked and disowned the pregnancy. On Sunday, Musa came home, he found my aunty at home... He owned up the pregnancy. He started supporting me. I texted him we meet. We met, while standing; his wife approached us and asked me what relationship he had with the accused. The accused started a fight with his wife…The wife reported us to the police station that I was destroying her marriage. Were summoned when they realized I was a minor the accused was arrested."*

11. In his defence the appellant told the court:

> *"I am MUSA SADI HUSSEIN. I stay at [Particulars Withheld]. I am a car washer. I know EM. I am charged with defiling her. I had known her for about 6 months before this case. I knew her aunt. Their house is not far from ours. She was my friend (EM) for 6 months. I used to meet her at my friend's place. I didn't know her age. She didn't know my age. I was 23 years then. I didn't know she was in school. She said she wasn't going to school. She just stayed at home. I had sex with her twice. I didn't force her. She consented to the act. I used a condom the 1st time. I am the one who said we use a condom and she consented. She wasn't a virgin from my perspective. The 2nd time she refused to use a condom. She said her aunt knew we wanted to marry so we shouldn't use protection. I was planning to marry her. She said they are poor so if I marry her I will have helped them. They couldn't afford food/rent. Her aunt sells furniture. I used to visit her at their home (auntie's) she used to visit me too. I am now married. I have 4 children and a wife. I was sued because my wife knew EM so she went to the girl's place and started complaining and saying she will go to the chief. I was summoned to the chief and the aunt said E should take a pregnancy test. It came out positive and I was arrested and charged. The aunt complained that I had impregnated the girl. I didn't know the reason for my arrest. I only got to know after I was charged. Her aunt had called me and told me that the girl was pregnant. I gave her Shs. 2000/= to pay rent. The aunt at that time told me she herself had delivered while in school. I never spoke to EM about the pregnancy. I wanted to marry her. She had delivered.*
>
> *No DNA was done. I know the child, he comes to my place, he's called Hussein. We have tried talking because we wanted to withdraw the case so that I marry her but the aunt declined. The aunt want to be paid 1 million first and she gets a house in pipeline. When she refused to withdraw the case, Nyakundi threatened me that if I talk to that child I will be imprisoned. That child Hussein is my son but I shifted away after the officer threatened me. My parents give her food. I love EM. E didn't look like a child to me by looking at her... I had sex with her …I never knew she was in school. She delivered my baby. I see the child"*

12. From the testimony of both the complainant and the appellant it is evident that this is one of those cases that may fall into the so called *Romeo & Juliet* categories considering the circumstances of the case. Two young neighbours who fancied each other and agreed to have sex. Of course by the law does not recognise EM's consent because she did not have the capacity to consent.

13. In as far as the ingredients of defilement are concerned, the same were admitted and proved. There was penetration, the complainant was below the age of eighteen (18).

14. There is no evidence that the appellant went out of his way to ask the age of the complainant but only that at that time she was not going to school. Hence **Section 8(5) and (6) of the Sexual Offences Act** would not be applicable.

15. The only issue is whether the sentence was appropriate in the circumstances of the offence. **Section 8(4) of the Sexual Offences Act** states *"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years **is liable** upon conviction to imprisonment for a term of not less than fifteen years''*

16. The trial magistrate in imposing the fifteen (15) year sentence stated; *''I have considered the offence committed by the accused person. I note that a child was born out of the relationship. Notwithstanding, I note that this nature of offence is rampant in this court's jurisdiction. Men are luring young girls into having sexual intercourse thus disrupting their education. I am of the considered view that the fact that the accused is willing to take care of the child is not sufficient to impose a non-custodial sentence. In view of the foregoing and the absence of aggravating factors I am inclined to impose the minimum mandatory sentence"*

17. This position of the so called mandatory minimum sentences was discussed by the Court of Appeal in **Dismas Wafula Kilwake v R.** The court stated:

> *"Since the enactment of the Sexual Offences Act, the above provisions have been interpreted and applied by all the levels of the courts as imposing mandatory minimum sentences. The effect is that irrespective of the circumstances under which the offence is committed and irrespective of any mitigating circumstances, the Act purports to tie the hands of the courts, so that in all cases they must pass the same sentence predetermined by the legislature, based only on the age of the victim.*
>
> *We have no doubt in our minds that the legislature has the power and legitimate interest to signal the seriousness of an offence by prescribing stiff penalties. The issue however, that is raised in this ground of appeal is whether the legislature can legitimately tie the hands of the judiciary by prescribing rigid and mandatory sentences in all cases without any regard to peculiarities of each individual case. (emphasis mine)*

18. This case is the classic example of the principle, is that of the negation of the principle of ***''individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.*** [where] ***…The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. (State v. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA, cited in Dismas Kilwake)***

19. And in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**, also quoted in **Dismas Kilwake** ***"Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives 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 accused persons under Article 25 of the Constitution; an absolute right."***

20. In addition, the provisions of **Section 33 of the Sexual Offences Act** which states:

> *" Evidence of surrounding circumstances and impact of sexual offence Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—*
>
> *(a) whether a sexual offence is likely to have been committed—*
>
> *(i) towards or in connection with the person concerned; (ii) under coercive circumstances referred to in section 43; and*
>
> *(b)* ***for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned. (emphasis mine)."***

21. From the foregoing it goes without saying that the imposition of the minimum sentence resulted in an unjust outcome taking into consideration the circumstances of the offence. It is cases like this one that demonstrate the criminalisation of some of adolescence conduct which we are told by experts is about raging sexual hormones, the desire to discover and explore one's self and body at certain stages in the development of the human being. It is only by taking keen consideration of the circumstances of the offence, that the appropriate sentence or orders can issue.

22. In this case, I agree with the appellant that the sentence was harsh. Hence the appeal succeeds on sentence.

23. To arrive at an appropriate sentence, I order that the Probation Officer, Nakuru County do avail a pre-sentence report within 30 days hereof.

Dated *an*d signed at Nakuru this 15th day of July, 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Edna Court Assistant

Kemboi S. L. & Company Advocates for appellant

Appellant present

15th of July 2020

SENTENCE

Following the order for a probation officer's report on sentence pursuant to **Dismas Kilwake vs R [2018] eKLR** and Section of the Sexual Offences Act which states that a court ought to take into consideration the circumstances of the offence *inter alia* in arriving at the appropriate sentence. It states:

> ***"Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove—***
>
> ***(a) …—***
>
> ***(i) …***
>
> ***(ii) …; and***
>
> ***(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."***

The Report clearly indicates that the appellant is alive to the magnitude of the offence that he committed, though he believed he was dealing with a person of mature age. The victim and her family had no intention of complaining and had it not been for the appellant's wife's complaint, the sexual relations between the appellant and the complainant in this would never have come to light.

The report shows that the complainant also take responsibility for her role in the appellant's incarceration and does not consider herself a victim of the offence. The child born out of their tryst needs his father, and the appellant even before his arrest was taking responsibility and still cares for his child.

The Probation Officers states:

> *"Our social inquiry has revealed that a child was born out of this ''relationship''. The child is now under the custody of the victim and her auntie. What comes out clearly is that the victim has continued her relationship with appellant even after imprisonment and apparently she is waiting for him to come out for them to be married. On his part the appellant takes responsibility of his actions and pleads for a review of his sentence.*
>
> *Having regard to the above facts and putting in consideration of the welfare of the child the honorable court may make appropriate orders s it deems fit."*

Taking into consideration its circumstances, this is a case that is deserving of a non-custodial sentence.

I therefore accept the recommendations by the Probation Officer and order that the appellant be placed on probation supervision for three (3) years.

Delivered, dated and signed at Nakuru this 10th September, 2020.

Mumbua T Matheka

Judge

Via ZOOM;

Edna CA

Appellant Present

Ms. Vena for state