REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 14 0F 2018

DOUGLS KARIUKI KINYANJUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon Z Abdul RM delivered on 30th August, 2018 in Naivasha CM/ SO No 20 of 2018)

JUDGMENT

Background

1. The appellant was charged with defilement contrary to section 8(1) as read with **section 8(2)** of the **Sexual Offences Act**, 2006. The particulars were that on diverse dates between 11th and 24th March 2018 at [Particulars Withheld] Village in Naivasha he intentionally and unlawfully caused his penis to penetrate the genital organ, namely anus, of KNK, a boy child aged 8 years. After a hearing the trial court convicted the appellant and sentenced him to life imprisonment.

2. Dissatisfied, the appellant has filed this appeal on the grounds that:

> *"1. THAT the learned trial magistrate erred in law and fact by failing to find the appellant's right to a fair trial was violated as he was not accorded a chance to recall witnesses after the charge sheet was substituted.*
>
> *2. THAT, the learned trial magistrate erred in law and fact by failing to appreciate that the medical evidence adduced did not corroborate the charge and the evidence as presented in court.*
>
> *3. THAT, the learned trial magistrate erred in law and fact by failing to find the prosecution did not discharge their duty to required standards proving their case beyond reasonable doubt.*
>
> *4. THAT, the learned trial magistrate erred in law and fact by failing to consider the appellant's defence in relation to the rest of the evidence adduced by instead treated in isolation.*
>
> *5. THAT, the learned trial magistrate erred in law and fact by sentencing the appellant to the mandatory minimum sentence as provided by the statute instead of considering the recent developments in law which permits the court to exercise discretion in sentencing, as the supreme court had declared mandatory sentences to be unconstitutional."*

3. The state has opposed the appeal. Both parties filed written submissions which were highlighted. The issues emanating for determination are:

a. *Whether the appellant's right to fair trial were violated*

b. *Whether the offence was proved beyond reasonable doubt*

c. *Whether the mandatory minimum sentence meted was lawful.*

4. The role of this court on first appeal is to re-evaluate the evidence and to come to its own conclusions not disregarding the conclusions

reached by the trial court (See **Okeno v R (1972) EA 32**).

5. The parties fileSg

Analysis of evidence and Determination

6. PW1, the complainant gave unsworn evidence after undertaking a voir dire examination as the trial magistrate concluded that he does not understand the importance of an oath. He testified that he was in class two. His age was later assessed and he was found to be eight years old. He testified that he had gone to quarry area where his grandmother works to check whether some ballast had been delivered by a lorry. He had been sent by his grandmother.

7. Whilst there, the accused whom PW1 knew, chased him and caught him up. He took the boy to his shack made of polythene paper. There, he removed the complainant's trouser and underwear, made him lie down on the ground, and defiled him in the anus with his "kachuchu" which is used to urinate, meaning his penis. The accused then threatened him with death if he told anyone. Later, whilst at home, he did not tell his grandmother with whom he lived, because of his fear of the threats he had received from the accused. He said that this was not the first time the accused had done this to him. His cross examination by the accused yielded a tart: *"You are the one who defiled me"* response.

8. PW2, RWM, is the complainant's grandmother. She testified that at around noon on 24th March 2018 she was at the quarry with her two grandsons including the complainant. She noticed his torn trouser and that he did not have his inner wear, which she had helped him dress with earlier. She asked him and where his underwear was and he started crying saying it was at home. At home she approached the complainant again to tell the truth, and it was then he spilt the beans: that Daggy (the accused) had chased him and thrown his underwear away when she had earlier sent him to the quarry.

9. PW2 testified that she knew Daggy since his childhood and feared the worst – that he had defiled the complainant – since he, the complainant, had told her that Daggy had made him lie down. So she took the complainant to hospital. Later, accompanied by some hospital staff she went where Daggy smokes bhang and went on to Naivasha Police station to report. They also reported at their AP camp. The accused was later arrested. Through her the PRC and P3 forms and an age assessment report were identified for later production. In cross examination, the witness denied framing the accused.

10. PW3 Jane Wambui Njoroge was the Clinical officer at Naivasha District Hospital. She had worked for five years at the Clinic. Being conversant with the signature of Tabitha Ndungu who had attended to the complainant and signed the PRC and P3 forms, the court allowed her to testify for Tabitha Ndungu. She produced the PRC Form, P3 form and age assessment reports as P. Exhibits 1-3, respectively.

11. PW3 noted that, on examination, the complainant was found to have been defiled several times by anal penetration. His buttocks were inflamed at the inner part. Lab tests of a high vaginal swab showed epithelial cells which are produced after inflammation. No spermatozoa or pus cells were seen. The P3 form was filled and indicates that the anal region was loose with stool coming out, and the inner part of the anus inflamed. The child indicated that this was not the first time for the assailant to defile him. An age assessment of the complainant done by the dental clinic showed he was about 7-8 years old.

12. In cross examination PW3 explained that the absence of spermatozoa could be because either a condom is used or ejaculation was done outside of the anus

13. PW4 PC Boniface Aboki of 21 years police experience, testified as the Investigating Officer. He said he was assigned the case on 26th March, 2018 the day after the report. The accused had been detained and he called the grandmother, PW2, for interrogation. She stated that she noticed the complainant was having difficulty sitting. When she checked him, he had no inner wear, yet she had dressed him up. She persisted in questioning him, and though he was afraid at first, he later opened up and narrated that he had been defiled by the accused at the quarry, which was secluded and deserted. His assailant threatened him with death hence his silence. When he visited the scene with the child, he opened up and said this was not the first time he had been defiled by the accused.

14. PW4 further testified that he was shown the accused's makeshift shack, which was a mere 50-100 metres from the quarry. The underwear was not recovered. The complainant appeared very relieved after the accused was arrested by AP officers from Kabati. He identified the accused as the one in the dock.

15. In cross examination, PW 4 said he went to the makeshift polythene house lived in by the accused; that there was a shamba nearby which accused said he was guarding; that he did not interrogate people around to find out about the accused's behavior; that the accused had threatened to kill the complainant if he reported; and that the complainant was traumatized.

16. I have carefully considered the evidence on record and other documents on the court file. I have also considered the parties submissions.

Whether the appellant's right to fair trial were violated

17. The appellant complains that his right to a fair trial was violated. He asserts that the after two witnesses had testified, the charge sheet was substituted, and he was asked to plead against the new charge sheet. Further that the record does not show the alterations made. He asserts that he was not given an opportunity to adduce his own evidence against the amended charge sheet or challenge the evidence of the prosecution on the amended charges.

18. The state countered by citing **Section 214** of the **Criminal Procedure Code** which allows amendments to the charge sheet at any time before the close of the case. The provision is cited below.

"214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

19. On perusal of the proceedings, I note that the appellant did not object to the amendment, that he pleaded to the amended charge, but that he was not given an opportunity to recall witnesses. Citing **Harrison Mirungu Njuguna v R CR Appeal No 90 of 2004 (UR)** which I have not seen, he argued that ***"the right to hear the witness give evidence afresh on the amended charge or cross examine the witness further is a basic right going to the root of a fair trial".***

20. I have perused the original and amended charge sheet. The amendments made were: First, that in the original charge, the charge was indicated as defilement contrary to **Section 8(1)(3)** as read with **Section 8(2)** of the Sexual Offences Act. No such **Section 8(1)(3)** exists in the **Sexual Offences Act**. The second amendment was that the complainant's age which had been indicated as 6, was amended to read 8, years.

21. The critical question is whether the failure to give the appellant the option to recall witnesses who had testified was violative of his rights in the circumstances.

22. In **Josphat Karanja Muna v R [2009] eKLR** which was referred to by the DPP, the Court of Appeal stated as follows where similar circumstances as in the present case pertained:

"On non compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant." (Emphasis added).

23. The above principles were adopted and confirmed by the Court of Appeal more recently in **M N v Republic [2017] eKLR** where the Court said:

"It is settled that a charge sheet can be amended at any stage of the proceedings before the conclusion of the trial. However, there are safeguards set in place to ensure that the rights of an accused person are not violated by such amendments. Of relevance to this case is Section 214 (1) of the Criminal Procedure Code

…….

11. It is clear from the record that the charge sheet was amended to reflect that the offence in question was committed on divers dates between March, 2010 and the 29th December, 2012. It is also not in dispute that after the amendment the appellant was called upon to take a fresh plea which he did. The bone of contention is whether the failure by the trial court to inform the appellant of his right to re-call the witnesses who had testified prior to the amendment was fatal. This Court, in Josphat Karanja Muna vs. R [2009] eKLR considered the issue…."

24. As already indicated, the first amendment deleted a non-existent section of statute, and nothing could arise from this. The second amendment corrected the age of the complainant from 6 years to 8 years. The two witnesses who had already testified were the complainant (PW1) who had not stated his age; and PW2, his grandmother, who had said the complainant was 8 years old on the basis of an age assessment and had been cross examined by the accused on the age question. Accordingly, I do not consider that the failure to give the

appellant the option to recall the witnesses was prejudicial to the appellant or violative of his fair trial rights.

Whether the offence was proved beyond reasonable doubt

25. The appellant argues that there were inconsistencies in the evidence including: that the P3 was filled on 27th March, 2018 whilst the offence was said to have been committed on 19th February, 2018 yet the P3 shows the approximate age of injuries to be one hour later; that PW4 did not conduct any effective investigations; that PW3 testified that the complainant's under pants were soiled despite other witnesses saying he had no inner wear after the incident.

26. I have perused the charge sheet carefully and note that the offence was stated to have been committed on divert dates between 11th and 24th March 2019. The P3 was issued on 25th March, 2018 but indicates that the complainant was *"sent to hospital" on 27th March 2018 under escort of parent"*. The P3 was signed on 27th March by the doctor. Thus, it is logical that the record in the P3 Form would show that the complainant's under pant was soiled when he was being examined on 27/3/2018, as the examination was not conducted on 24th March, 2018 which was the date PW2 found the complainant without an under pant.

27. The key evidence for proof of defilement was provided in the medical report, namely the inflammation of the anus showing penetration; the evidence of the complainant that he was defiled by someone well known to him; and the age of the victim which was confirmed by dental test and issuance of the medical certificate of age Exb 3.

28. I see no basis for interfering with the trial court's finding and determination as to proof of the offence with which the appellant was charged.

Whether the mandatory minimum sentence meted was lawful.

29. The appellant argues that the trial magistrate stated at the time of sentencing that:

> ***"The law provides for one punishment which I hereby impose, that of life imprisonment"***

He submits that the famous case of **Francis Karioko Muruatetu & Anor v R [2017]eKLR** declared mandatory sentences as unconstitutional. As a result, he argued citing several cases where the life sentences of accused persons were reduced, the sentence ought to reflect the information available on mitigation and the circumstances of the accused.

30. The DPP argued that the Supreme Court declared the mandatory nature of the death penalty as unconstitutional but not the sentence itself. Thus, that a court has to exercise discretion when meting a sentence worded in mandatory terms and take into account the nature of the offence and other circumstances, before sentencing. The DPP stated that the trial court did take the mitigation into account and exercised discretion in meting the sentence.

31. In **Muruatetu**, the following passage in respect of the mandatory death penalty is poignant:

> ***"48] 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 the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

32. **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*.** *Under the reasoning in the* ***Muruatetu case****, a trial court must demonstrate that it has clearly exercised its discretion when considering sentencing even where the words of the statute are clearly mandatory as to the sentence*

33. The reasoning in the ***Muruatetu Case*** was extended to sentences imposed by the Sexual Offences Act – and possibly all other statutes prescribing minimum sentences by the Court of appeal in its decision in ***Dismas Wafula Kilwake v R [2018] eKLR.*** The Court of Appeal there stated concerning the mandatory minimum sentences prescribed in the Sexual Offences Act:

> ***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.***

34. It follows that the ***Muruatetu*** decision would apply *mutatis mutandis* to the provisions of **Section 8(2)** of the **Sexual Offences Act** which imposes the sentence of mandatory life imprisonment for the offence of defilement. Muruatetu indicated the guidelines for

sentencing to include (a) age of the offender, (b) being a first offender, (c) whether the offender pleaded guilty, (d) character and record of the offender, (e) Commission of the offence in relation to gender-based violence, (f) remorsefulness of the offender, (g) the possibility of reform and social-re adaptation of the offender, (h) any other factor that the court considers relevant. These factors should also be taken into account prior to sentencing the accused where the sentence is life imprisonment.

35. In addition, the trial court is entitled to compare the sentences awarded for defilement by the superior courts on appeal so as to ensure uniformity of sentence in tandem with the Judiciary sentencing guidelines. So that, for example in ***Guyo Jarso Guyo v Republic [2018] eKLR*** Chitembwe J, re-sentenced the petitioners to 20 years imprisonment; in **Baraka Safari v Republic [2018] eKLR**, Odunga J substituted life imprisonment with 15 years; and the Court of Appeal in **Johana Lwebe Muyugo v Republic [2019] eKLR substituted the** life sentence with a sentence of 25 years. I think this court can be guided by the said authorities.

36. Hav*ing carefully perused the trial court's treatment of sentencing, I also note that in the face of the serious sentence to be meted, the learned magistrate did not seek a pre-sentence probation report to enable it to fully consider the circumstances of the accused.*

37. Taking all the considerations above into account, I am satisfied that the sentence of the accused needs to reflect the current practice where a probation report assists by bringing to the attention of the court the full circumstances of the accused.

38. Accordingly, the sentence imposed on the accused is hereby set aside, and it is ordered that a probation report be availed to the court within thirty (30) days to enable the court to consider the appropriate substituted sentence to mete in this matter. A sentencing hearing shall be scheduled upon the probation report being availed to court.

Administrative directions

39. 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 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.

40. 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.

41. Except as abovementioned, the appeal fails in all other respects.

42. Orders accordingly.

Dated and Delivered at Naivasha this 8th Day of October, 2020

_____

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. Douglas Kariuki Kinyanjui - Appellant in person in Naivasha Maximum Prison
3. Court Assistant - Quinter Ogutu