**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 10 OF 2018**

*(Being an Appeal from conviction and sentence in Criminal Case S/O No. 11 of 2015*

*at the Chief Magistrates Court at Embu)*

**OBED KINYUA NYAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

**1.** This appeal challenges the conviction and sentence in Embu Sexual Offences Case No. 11 of 2015 where the appellant was convicted of the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act and sentenced to serve life imprisonment.

**2.** The appellant raised six (6) grounds that can be summarized into a single one that the prosecution failed to discharge the burden of proof to the required standards and as such the conviction was unsafe.

**3.** At the hearing the parties elected to canvass the appeal by way of written submissions.

**B. Submission by the parties**

**4.** The appellant submitted that the evidence tendered before court was not sufficient and was below the required standards and as such not sufficient to warrant conviction for the offence of defilement. It was further argued that there was no *voire dire* examination conducted to ascertain the competence of the child to tell truth and the case of **Sahali Omar –vs-Republic (2017) eKLR** and **Patrick Kathurima –vs-Republic (2015) eKLR** were relied on. the appellant contended that the victim ought to have been allowed to testify as she was not insane and since she properly expressed her intentions to have the appellant prosecuted for the offence.

**5.** Further that P3 form did not prove defilement as it did not indicate that the victim was injured or that there existed any evidence of infection, discharge or spermatozoa and no treatment was given to her. Further that the evidence by prosecution witnesses was contradictory and inconsistent and as such the witnesses were not credible and that crucial witnesses were never called to testify. Further that the sentence was unconstitutional as it was the mandatory minimum and which were outlawed by the Supreme Court in **Muruatetu's case** later applied in **Christopher Ochieng' –vs- Republic** and **Jared Koita Njiri –vs- Republic** and as such the same ought to be reviewed.

**6.** Ms. Mati for the respondent filed her written submissions wherein she opposed the appeal in respect of all the grounds except that of the appellant the review of the sentence to which she conceded.

**C. Applicable law**

**7.** It is an established principle that the appellate court has a duty to submit the evidence tendered before the trial court as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. (See **Okeno v. Republic [1972] E.A. 32** and **Kiilu and another vs. R (2005) 1 KLR 174).** Further the court ought not to interfere with a finding of fact made by the trial court unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (S*ee* **Gunga Baya & another v Republic [2015] eKLR)**

**D. Issues for determination**

**8.** The Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)** as was quoted with approval by Odunda J in **Alex Nzalu Ndaka v Republic [2019] eKLR** held that in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court.

**E. Analysis of Evidence application of the law and determination**

**9.** The issues for determination are whether the prosecution proved the offence of defilement to the required standards and in alternative the offence of committing an indecent act with a child.

**10.** It should not be lost that the cardinal rule in criminal procedure on prove is that the burden is always on the prosecution to prove the elements of an offence which an accused is charged with. The standard of prove is always that of beyond reasonable doubt as was held in the case of **Woolington v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273.**

**11.** The appellant was charged with the offence of defilement contrary to section 8(1) as read together with 8(2) and in alternative that of indecent act with a child contrary to section 11(1) of the Act. The victim of these offences was said to be a child of 6 years. 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."***

**12.** As it was correctly held in **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**: -

> "***The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

**13.** As for the age of the victim, the Malindi Court of Appeal in Criminal Appeal No. 504 of 2010 - **Kaingu Elias Kasomo vs. Republic** held that: -

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

**14. I note that t**he P3 form indicated that the complainant was aged seven years at the time of examination while the Health Clinic Card showed the date of birth as 26/08/2009. At the date of the offence on 6/06/2015, the complainant was aged about 6 years. PW2 the victim's mother testified that the victim was aged seven (7) years at the time she testified which was on 17/05/2016. The said documents and the oral testimony of PW2 were not controverted or challenged by the defense at any one time. It is my opinion that the prosecution was able to prove that the victim was a child. Section 2(1) of the Sexual Offences Act adopts the definition of a child as used in Children Act that "a child as a person under the age of 18 years". It is my considered view that the age of the complainant was established as seven (7) years.

**15.** The appellant said that penetration did not occur and that the court erred in making a finding to the contrary. Section 2(1) defines "penetration" as: -

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

Section 124 of the Evidence Act (Cap 80 Laws of Kenya) provides that evidence of a minor needs no corroboration in sexual offences. However, Section 31(10) provides that a court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

**16.** I have considered the evidence of PW1 who testified as intermediary and that of PW4 the doctor and in my view the same was corroborative. PW1 testified that on material day the victim came at 7:30pm and when she asked her where she had come from, PW1 said that the victim was timid at the material time. PW1 told her grandfather the following day that she would report the appellant to the police for he did on her "kitendo mbaya" (a bad thing). The medical evidence was that the hymen was broken.

**17.** In his evidence in court, PW4 the doctor who examined PW1 testified that the hymen of the victim was broken which is evidence of penetration. Evidence was adduced that PW1 was examined by PW4 four (4) days after the incident. Due to this, PW4 evidence was that the hymen was not freshly broken.

**18.** The defense did not tender any evidence to controvert that of the prosecution. The appellant put forth a general alibi. The court of appeal in **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 Mombasa** which was cited with approval in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal No. 661 of 2010, (Eldoret), held that: -**

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"***

**19.** In my view, the prosecution's evidence put together points leads me to the conclusion that the victim was defiled and that penetration

occurred. On the issue of identification, the evidence of PW2 was that the appellant was her farm worker and that he escaped and abandoned work one day after the incident. PW3 testified that the victim led them to the house of the appellant whereas he was arrested upon identification by the victim. The complainant knew the appellant well for he worked for the mother of PW2 in the family farm. PW3 testified that the victim identified the appellant as PW3 arrested him from his house. The evidence of PW2 and PW3 confirms that the appellant was positively identified.

**20.** As for the defense of alibi I am of the view that it was just an afterthought since it was raised at defence stage. The prosecution witnesses would have responded if the defence was raised during cross-examination. This would have helped the court to consider the defence in a different way perhaps. It is an established principle that the defense of alibi should to be raised early enough so as to allow the prosecution call evidence to controvert it.

**21.** The appellant contended that there was contradiction of PW4's evidence with that of PW1. He said that PW2 mentioned that PW1 had a wound on her buttocks while PW4 in his report did not make such an observation. The fact that no observation was made by PW4 of the alleged wound does not amount to a contradiction in my view. Furthermore, I opine that a wound on the buttocks was not relevant to the offence of defilement.

**22.** The appellant raised the issue that the charge sheet was defective. However, the appellant did not address the issue in his submissions. In my view, the charge was in order in that it included all the elements of the offence of defilement.

**23.** The appellant further raised the issue that crucial witnesses to wit the arresting officer and the investigating officer were never called to testify. However, by dint of Section 123 of the Evidence Act, ***no particular number of witnesses should, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

**24.** As the Court of Appeal held in **Richard Munene v Republic [2018] eKLR,** the elementary principle of criminal law is that although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obligated to call a superfluity of witnesses. *What matters is not the number of witnesses who gave evidence the quality and relevance of their evidence. Failure to call a particular witness does not render the* decision of the trial court invalid. The appellant did not demonstrate any prejudice that he might have suffered for failure by the prosecution to call the said witnesses.

**25.** The argument by the appellant that a *voire dire* test was not done is neither here nor there. This is because, in the opinion of the court, the victim was found to be too timid to testify and as such, she did not testify.

**26.** Upon evaluating all the evidence on record, I am of the considered opinion that the prosecution proved all the elements of the offence of defilement and that the trial court did not err in convicting the appellant of the offence. The conviction was therefore based on cogent evidence.

**27.** The appellant challenged the legality of the sentence imposed of life imprisonment imposed upon him. The respondent conceded to this ground of appeal relying on the decision of the **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.** In sentencing the appellant, the trial court noted that the law provided for the sentence of life imprisonment giving the court no other option but to impose the said sentence. However, pursuant to the Supreme Court's decision of **Muruatetu (supra)** the court declared unconstitutional the mandatory nature of death sentence. The dictum in the said case was later applied in offences under the Sexual Offences Act to the effect that provisions of the said Act which provided for minimum mandatory sentence was unconstitutional.

**28.** However, pursuant to the Supreme Court's decision in the Muruatetu petition, it is my considered opinion that the sentence imposed on the appellant ought to be reconsidered as the trial court did not exercise its discretion in sentencing. In my considered view, I find that the appellant ought to benefit from resentencing.

**29.** In resentencing, the court is obligated to take into account both the aggravating and mitigating factors in this appeal. The appellant committed the offence on a minor of seven (7) years being of very tender age. The impact of the offence was traumatizing on the victim who may take long to recover from such trauma. This presents an aggravating factor which ought to be considered in resentencing the appellant herein. Further the court ought to have in mind of the objectives of sentencing is ensuring deterrence and retribution on part of the offender. The sentence to be imposed herein ought to be deterrent but commensurate with the offence and the circumstances of the case.

**30.** On perusal of the record, I note that Section 333(2) of the Criminal Procedure Code was not complied with by the trial court. It provides that any person being sentenced and has been held in custody during the pendency of the trial, the court ought to take into account that period during sentencing. The record shows that the appellant was arrested on 12/06/2015 and admitted to bond on 14/09/2016 having spent one year and three months in prison custody. He was out on bail from 14/09/2016 until the court cancelled his bond for failing to attend court without a satisfactory reason. He remained in custody until the 27/02/2018 when he was convicted and sentenced.

**31.** The only incarceration period this court ought to take into consideration is the initial one of one (1) year and three (3) months which was beyond the appellant's control. As for the second part of one (1) year five (5) months following cancellation of bond the appellant was the author of his own misfortune and cannot be allowed to benefit from that under Section 333(2) of the Criminal Procedure Code.

**32.** In partly allowing this appeal, I hereby make the following orders: -

***a) That the conviction is hereby upheld.***

***b) That the life imprisonment sentence imposed on the appellant is hereby set aside.***

*c) That the appellant is hereby sentenced to serve imprisonment of twenty-three (23) years and nine (9) months this court having taken into consideration the one (1) year and three (3) months spent in custody during the pendency of the trial, and the sentence to commence from the date of conviction 27/02/2018.*

**33. It is hereby so ordered.**

**DELIVERED, DATED and SIGNED at EMBU this 1st day of October, 2020.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through Video Link in the presence of Ms. Mati for Respondent and the Appellant**