REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 32 OF 2018

BETWEEN

DANSON NTHIGA NJERU....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Murang'a Cr. Case No. 1 of 2015 delivered by Hon. V. Ochanda (RM) on 10th May, 2018).

JUDGMENT

Background

1. Danson Nthiga Njeru, the Appellant herein was charged in count 1 with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between the 10th and 15th November 2014, at Mlolongo area of Machakos County intentionally caused his penis to penetrate the vagina of **JWN.**, a child aged fourteen (14) years old.

2. In the alternative, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that he unlawfully and intentionally caused his penis to touch the vagina of **J. W.N.**, a child aged fourteen (14) years old.

3. In count 2, he was charged with abducting with intent to confine contrary to **Section 259** of the **Penal Code**. The particulars were that on diverse dates between 10th and 15th November 2014 at [particulars withheld] location within Murang'a County, with intent to cause **JWN** to be secretly and wrongfully confined, abducted the said **JWN.**

4. He pleaded not guilty to all counts. Upon trial, he was convicted of defilement and abduction. He was sentenced to serve twenty (20) years imprisonment in count 1 and three (3) years imprisonment in count 2. The sentences were ordered to run concurrently. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

5. The Appellant raised the following three (3) grounds of appeal in his Petition of Appeal filed on 29th May 2018:

> **a. That the learned trial magistrate erred in both law and facts when he sentenced him to 20 years imprisonment which was very cruel, harsh and stiff without considering his defence.**
>
> **b. That the learned trial magistrate erred in both law and facts by relying on the circumstantial evidence from prosecution witnesses only.**
>
> **c. That his rights were violated when he was denied a chance to defend himself.**

Summary of Evidence

6. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See **Okeno v Republic (1972) EA 32).**

7. The prosecution's case can be summarized as follows: On Sunday 9th November, 2014 at about 4.00 pm, the complainant, **PW2, JWN,** left home to escort a friend. On her way back, she met the Appellant who was well known to her as he was her neighbour and friend. The Appellant asked her to accompany him to a nearby shopping centre. She resisted his request at first but the Appellant told her that they were not going to take long at the shopping centre so she agreed. They walked for a short distance then the Appellant convinced her that they needed to board a matatu so as to reach the shopping centre fast to enable her get back home in good time. As such, they boarded a matatu and alighted at Murang'a town. The Appellant went and shopped then they went to the bus stage to get another matatu to return to the village.

8. Meanwhile, PW2's mother, **PW1, LN** had been told that the two had been seen boarding a motor vehicle. PW1 obtained the Appellant's number from a neighbour and called him but he did not pick the call. She reported the matter at Karweru police station.

9. Before the Appellant and PW2 could board a matatu back to the village from Murang'a town, the Appellant received a phone call that PW1 had made a report to the police. They boarded a matatu anyway and the Appellant suggested that they alight at Kaibugi shopping centre, about 1 kilometre away from PW2's home. Upon alighting PW2 asked the Appellant to escort her home since it was late but he refused. The Appellant told her that they were going to spend the night at his friend's house instead. PW2 insisted that she needed to go since she had never spent a night away from home but the Appellant refused to let her go.

10. When PW2 failed to return home, PW1 informed PW2's father **PW3, AMM.** PW1 and PW3 reported the matter at Gaturi Police Post. The police advised them to look for the Appellant's identity card number and report the matter to Murang'a Police Station. Their neighbour Mr. Kihara who was the Appellant's employer gave them his identity card number as well as another cell phone number which PW1 used to call the Appellant. He answered and admitted that he was with PW2. PW1 pleaded with him to bring back PW2 as she was still a pupil but the Appellant switched off his phone.

11. The following morning, PW1 and PW3 reported the matter at Murang'a Police Station. The OCPD referred them to CID officers who tracked the Appellant at Gathuthini area in Gakurwe and referred them to Gakurwe Administration Police Post. They went there and found two administration police officers who accompanied them to one Kariuki who had brought the Appellant to their area. The police asked the said Kariuki to call the Appellant with his cell phone and tell him to bring back PW2. The Appellant answered the call. He admitted that he was with PW2 and would take her back home. On the same day however, the Appellant decided to go with PW2 to Mlolongo where his brother and sister in law were living. That evening, the Appellant called PW1 using a new number and asked her not to involve the police in the search for PW2 as he would bring her back home.

12. On Tuesday, 11th November, 2014, PW3 called the number that the Appellant had used the previous night. A lady answered and told him that she was housing the Appellant and PW2 in Embu. PW3 went back to Murang'a CID Office and informed them about the developments. The CID tracked the cell phone number at Mlolongo. They informed their area MCA who assisted them with a motor vehicle that took them together with CID police officers from Muranga Police Station to Mlolongo Police Post. They however did not manage to trace the Appellant that day.

13. The Appellant continued staying with PW2 in Mlolongo and told her that she was going to be his wife. PW2 told her that it was impossible as she was just fourteen (14) years old and still a pupil. The Appellant would leave her in the house with his brother's wife while he went to work. One day, the Appellant returned home earlier than his brother then sent his brother's wife out. He remained in the house with PW2 then told her that he wanted them to have sex. She refused but the Appellant told her that she had no option since she knew no one there so he was free to do whatever he wanted to her. The Appellant forcefully had sexual intercourse with her. His sister in law came back and found the door closed and asked him why he was sleeping with PW2. The Appellant replied that they were just resting. They had sex on yet another day when the Appellant returned home early and found that his sister in law was not around. They stayed in Mlolongo for over a month.

14. On 15th December, 2014, PW3 drove to Athi River to collect cement. His motor vehicle broke down at Mlolongo area on his way back. He went to Mlolongo Police Station to ejnquire whether the police had found PW2 since he had given them her photograph. The Deputy DCIO of Mlolongo asked him whether he had some money so he could help him. PW3 gave him Kshs. 50,000/=. The officer went to Safaricom offices while PW3 waited at Mlolongo. The officer returned about an hour later and led PW3 and three other officers to a house which the officers at Safaricom were directing her. They did not find the Appellant that day as it was late.

15. The following morning, the deputy DCIO led them again to the house that was suspected to be the Appellant's hideout. They found a lady in the plot who informed them that the Appellant and his brother were residents there. She led them to their house but they did not find the Appellant or PW2 there. PW3 and the police officers went back to the said house at about 2.00 pm on the said day and found PW2. On their way out, they saw the Appellant seated by the roadside but he fled. The police escorted PW2 to Mlolongo Police Station and advised PW3 to go back with PW1 to collect her.

16. On 17th December, 2014, PW1 and PW3 travelled to Mlolongo Police Station whereupon PW2 was released to them. They were advised to escort PW2 to Murang'a CID office which they did. The investigating officer, **PW5, Corporal Sioi Chilonzo** of Murang'a Police Station took PW2 to Murang'a District Hospital for examination in the company of PW1. On genital examination, she had no tears or lacerations. She had a foul smelling discharge from her vagina. Her hymen was perforated. No spermatozoa were seen on conducting a high vaginal swab. Urine test revealed the presence of yeast cells and pus cells. Pregnancy test was negative. She was given analgesics and antibiotics.

17. On 2nd January, 2015, the Appellant was arrested by a mob at Gaturi and taken to Murang'a Police Station. He was booked in by **PW6, Corporal Peter Manase** formerly of Murang'a Police Station and charged him with the offences in question.

18. On 5th January, 2015, **PW4, Limus Muturi**, a Clinical Officer in charge of Murang'a Hospital Level 5 examined and filled PW2's P3 orm. He produced the same in evidence together with a Post Rape Care form and treatment card which had been prepared by Kirimi who had treated PW2 at the said facility but was transferred to Embu. PW5 on the other hand produced PW2's birth notification showing that she was

born on 23rd July, 2000.

19. Upon being placed on his defence, the Appellant elected to give an unsworn statement. He stated that he had been employed as a shamba boy by PW1's neighbour called Nancy. PW1 told her to stop working there and go and work for him instead but he refused and reported the same to the said Nancy. His employer confronted PW1 about it. PW1 told him that he would know that that was Murang'a and not Meru where he hails from. PW1 also told him that he would not return home in one piece.

20. On 4th January, 2015 at about 6.30 pm, a friend of his called him to the road. He went there and saw a group of boys coming towards him. He did not know what was happening. PW1 appeared and accused him of something he did not understand. As they were heading to the police station, PW1 gave the boys money. When they arrived, PW1 said he was at Mlolongo with PW2 yet he did not even know where that is. PW1 told PW2 to say that she was at Mlolongo with him.

Analysis and determination

21. The Appeal was canvassed by way of both written and oral submissions. The Appellant filed his written submissions on 1st September, 2020 and appeared in person during the oral highlighting of the same. The Respondent on the other hand was represented by the learned State Counsel, Ms. Gichuru who tendered oral submissions. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that only one issue for determination arises, namely whether the prosecution proved both offences of defilement and abduction respectively beyond a reasonable doubt.

22. In his hand written submissions, the Appellant seemed to have abandoned the appeal against his conviction. However, during the hearing of the appeal, he stated that he would be relying on his Petition of Appeal as well as his handwritten submissions. The Petition of Appeal took issues with both his conviction and sentence. The court will therefore proceed to determine whether the conviction was safe and the sentence proper.

Whether the prosecution proved the offence of defilement beyond a reasonable doubt.

23. According to learned state counsel Ms. Gichuru, all the elements of the offence were accordingly established meaning therefore that it was proved to the required standard.

24. On this, the prosecution is bound to prove the following:

a. Whether the Appellant was positively identified;

b. Whether there was penetration; and

c. Whether the victim was a child?

25. As to whether the Appellant was positively identified, the record reveals that he was well known to PW2 as they were neighbours as well as friends. His identification was therefore not in doubt as it was by way of recognition.

26. On the issue of penetration, PW2 testified that during their stay in Mlolongo, the Appellant had sexual intercourse with her on more than one occasion. Her evidence was corroborated by the medical evidence tendered by PW4. The evidence shows that on genital examination, she had a foul smelling discharge from her vagina and her hymen was perforated. Notably, in his handwritten submissions on appeal, the Appellant does not deny that he had sexual intercourse with PW2. I am therefore satisfied that penetration was accordingly established.

27. PW2's age was also satisfactorily established. Her birth notification which was produced in evidence by PW5 indicated that she was born on 23rd July, 2000. This shows that she was fourteen years old when she had sexual intercourse with the Appellant.

28. In his written submissions, the Appellant stated that PW2 made him believe that she had attained the age of majority. This was not raised in his defence in the trial court. Be that as it may, **Section 8(5)** and **(6)** of the **Sexual Offences Act** provides as follows:

> **"(5) It is a defence to a charge under this section if-**
>
> **(a)it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
>
> **(b)the accused reasonably believed that the child was over the age of eighteen years.**
>
> **(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."**(Empasis).

29. The Appellant submits that his belief that PW2 had attained the age of majority can be deduced from her testimony that he was her neighbour and friend. From the record, I note that PW2 was categorical that when the Appellant told her that she was going to be his wife, she told him that she was only fourteen (14) years old and still a pupil. Further, both PW1 and PW3 called the Appellant on different occasions and begged him to take back PW2 home since she was still a school going child. Taking into account the totality of the circumstances of this case, I am not convinced that the Appellant reasonably believed that PW2 was over the age of eighteen years. His

belated defence cannot therefore stand.

30. In the premises, I find that the prosecution proved beyond any reasonable doubt that the Appellant defiled PW2. His conviction for the offence was therefore safe and is accordingly upheld.

31. On sentence, the Appellant submitted that he was only twenty (20) years when he committed the offence. He stated that he has now reformed as he engaged himself in various rehabilitation programs in prison through which he has acquired new skills which will help him in life. He urged the court to give him a second chance, adding that he will endeavour to teach young men to be law abiding citizens and not engage in criminal acts such as the one he was convicted of. He also urged that his sentence be reviewed and the least severe one be imposed in the circumstances taking into account the period he spent in remand custody.

32. In rebuttal, learned state counsel Ms. Gichuru submitted that the sentence should be upheld.

33. The Appellant was sentenced to a custodial sentence of twenty (20) years imprisonment. That is the penalty prescribed for the offence under **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. In the past, the sentences prescribed under Section 8 of the Act were considered as minimum mandatory sentences thereby leaving no room for the exercise of discretion by the sentencing court. (See **Dennis Kinyua Njeru v Republic [2017] eKLR**. However, that approach changed following the Supreme Court decision in **Francis Karioko Muruatetu & Anor v Republic [2017] eKLR** which declared mandatory sentences unconstitutional.

34. Just recently, the Court of Appeal *in* **Evans Wanjala Wanyonyi v Republic [2019] eKLR**, held as follows:-

> **"24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:**
>
> **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. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.**

35. This therefore means that the sentence prescribed under **Section 8 (3) of the Sexual Offences Act No. 3 of 2006** is a discretionary maximum sentence. Courts therefore have discretion to impose lesser sentences depending on a case by case basis.

36. In the present case, I have considered the fact that the Appellant was a first offender. I have also noted that he was only twenty (20) years old at the time he committed the offence. It is my considered view that the maximum sentence of twenty (20) imprisonment imposed by the trial court was excessive and harsh in the circumstances. I therefore set it aside and substitute it with ten (10) years imprisonment.

Whether the prosecution proved the offence of abduction beyond a reasonable doubt

37. The offence of abduction is provided for under **Section 259** of the **Penal Code** as follows:-

> **"Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years".**

38. Section 256 of the **Penal Code** further provides as follows:

> **"A person will be guilty of abduction if he forcefully compels, or by any deceitful means induces any person to go from any place".**

39. PW2's evidence was that the Appellant asked her to escort him to Murang'a town to do shopping. He convinced her to board a matatu so that they could get there fast to enable her return home in good time. On their way back, the Appellant suggested that they alight at Kiabugi about 1 kilometer away from PW2's home yet it was already late. PW1 told him to escort her home but he refused claiming that he feared that he would be arrested by the police since the matter had already been reported. Instead, he told PW2 that they were going to spend the night at his friend's house in Kiabugi which they did despite PW2's pleas that she had never spent a night away from home.

40. The following day, the Appellant told her that he would go with her to Mlolongo then would take her back home when PW1 stops calling the police about their case. They left for Mlolongo at about 11.00 am. From the foregoing, it is clear that the Appellant deceived PW2 to move from their home, to his friend's house at Kiabugi where they spent a night then Mlolongo, by making her believe that he would take her back home.

41. Further, PW1 and PW3's efforts to trace them proved futile until they had to seek the services of the CID in tracking the Appellant and PW2. The Appellant confined PW2, who was a child, at his brother's house in Mlolongo for a period of over one month against both her wishes and her parents. I am therefore satisfied that the Appellant abducted PW2 with intent to cause her to be secretly and wrongfully confined so that he could have sexual intercourse with her. In the circumstances, I find that the offence was proved to the required standard hence his conviction for the same was safe.

42. On sentence, the penalty prescribed for this offence is up to a maximum of seven (7) years. The Appellant was sentenced to serve three (3) years. I find that the same was reasonable and will not interfere with it.

Conclusion

43. In the upshot, the Appellant's conviction for both offences is affirmed. The sentence of twenty (20) years imprisonment imposed in count 1 is set aside and substituted with ten (10) years imprisonment. The sentence in count II is upheld. The sentences shall run concurrently. The period of 1 year 2 months and 17 days spent in remand custody prior to sentencing shall be taken to constitute part of the sentence. It is so ordered.

DATED AT MURANG'A THIS 4TH DECEMBER, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Mr. Waweru for the Respondent**.**