REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 159 OF 2016

KEITI MUTISYA.....................APPELLANT

VERSUS

REPUBLIC.........................RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Kwale Criminal Case No. 1121 of 2015 by Hon. P. K. Mutai (RM) dated 25th November 2016)

Coram: Hon. Justice J. Nyakundi

Mr. Muthomi for the Respondent present

Appellant in person

JUDGMENT

The Appellant was charged with defilement 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 were that on the 15th October 2015 in Kwale County within the Coast region intentionally caused his penis to penetrate the vagina of ANN a child aged 7 years.

He was charge with an alternative count of 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 15th October 2015 in Kwale County within the Coast region intentionally touched the vagina of ANN a child aged 7 years with his penis.

At the end of the trial, the Appellant was convicted and sentenced to 30 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an amended appeal on the against the sentence:

Background

PW1 EK, the complainant gave her unsworn evidence after voir dire examination. She told the court that on 15th November 2015 she was sent to Jackson's posho mill where she met the Appellant, who was a worker there. That the Appellant wanted them to have sex but she refused. The Appellant pushed her into his house and gave her his phone. He then removed his short and the complainant's biker and inserted his penis in her private parts at which point the complainant felt pain.

The complainant stated that her mother, PW2 came calling for her and she responded. That she came out of the Appellant's house holding her biker. PW2 started shouting for help and ran to get the complainant's father. She was later taken to Shimba Hills Police Station then Shimba Hills dispensary.

The complainant told the court that she knew the Appellant as Jackson's worker at the posho mill as had been grinding maize before the date and she used to see him often.

PW2 SN, was the complainant's mother. She informed the court that the complainant was 7years old and she identified the complainant's birth certificate.

She told the court how on 15th November 2015 she had sent the complainant to Jackson's posho mill but that the complaint took long. She decided to go to the posho mill but did not find anybody there. She called the complainant in a loud voice who emerged from one of the

rooms holding a black mobile phone and her biker. That upon inquiring what she was doing in the house, the complainant informed her that the Appellant had forced her to have sex.

PW2 closed the door from outside and went for husband. When she returned and opened the door, the Appellant had escaped through a window. She alerted the village chairman who organized and arrested the Appellant. PW2 took the complainant to hospital where she was issued with a P3 form.

In cross-examination by the Appellant, PW2 stated that she knew the Appellant as he worked in the posho mill and took care of the animals. Further, she stated that she decided to look for the complainant as she had taken a long time than usual.

PW3 Francis Mwangangi, the village chairman told the court that PW2 was informed of PW2 what had happened. He took members of community policing and arrested the Appellant before handing him over to Kubo Police Station.

PW4, Corporal David Oyier, based at Kubo Police Station was the investigating officer. He reiterated the evidence of PW1 and PW2. He stated that both the Appellant and the complainant were taken to hospital for examination where it was established that the complainant was defiled. He produced a white inner wear (P. Exh1), a telephone make Itel (P. Exh2) and the complainant's birth certificate (P. Exh3)

PW5 Jackline Nyaboke was a clinical officer at Shimba Health Centre. She produced the P3 form (P. Exh4) on behalf of Bridgette Amumo who she was familiar with her handwriting and signature. She informed the court that the complainant's hymen was broken and she had lacerations in the vaginal canal. The complainant also had discharge on her private parts. It was the medical opinion that the complainant had had been defiled.

At the close of the prosecution case, the Appellant was placed on his defence. He gave an unsworn statement and told the court that on 16 th October 2015 working the whole day he returned to his house at around 5:00pm but did not find his telephone. That at about 7:00pm members of community policing went to his house and arrested him without any explanation and taken to Shimba Hills.

The Appellant stated that there was a woman who had tried to persuade him to leave his employer and work for her from March to June but he kept turning her down. That when he was arrested, he saw the said lady who told him that he would face serious consequences. He stated that he was staying in the girls in the same house and he did not defile her.

Submissions

<u>Appellant's written submissions</u>

On appeal, the Appellant relied on his written submissions. His submissions were on the sentence where he stated that he was remorseful and stated that in his 5years in custody, he had reformed. He also asked the court to consider the time he had spent in custody pursuant to section 333(2) of the CPC. In support of his submissions, he relied on **State vs Warren Vorster CC No. 125 of 2009 South Gauteng High Court** and **Martin Bahati Makhoka vs Rep (2018) eKLR.**

Respondent's submissions

The Respondent relied on its written submissions dated 27th July 2020 and filed on 28th July 2020. It was the Respondent's submissions that the penalty under section 8(2) of the SOA was life imprisonment and therefore the sentence was not harsh or excessive. The Respondent urged the court to uphold the sentence of the trial court taking judicial notice of the prevalence of sexual offences in the society. The Respondent cited **Criminal Appeal No. 14 of 2014 Charles Ndirangu Kibue vs Republic [2016] eKLR** in support of its case**.**

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record. It is clear that the appeal relates only to sentence, however I shall give the Appellant the benefit of the doubt and re-evaluate the whole evidence before me.

On whether the case was proved beyond reasonable doubt, with respect to the law, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic [2015] eKLR**.

Rule 4 of the Sexual Offence Rules of Court 2014 provides that: -

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

In the present case, PW4, the investigating officer produced the birth certificate (P. Exh3) of the complainant that showed that she was born on 13th May 2008. A simple calculation shows that the complainant was 7 years 5months at the time of the offence and therefore a minor. The age of the complainant was satisfactorily proved.

On the element of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic [2013] eKLR** where the court stated that: -

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

In this case, the complainant (PW1) recounted clearly how the Appellant took her to his house, removed his short and her biker and inserted his penis in her vagina and that she felt pain. Her evidence was corroborated by the medical evidence. PW5 produced the P3 (P. Exh4) which showed that the complainant's hymen was torn and there were lacerations in her vagina canal/ Based on the foregoing I find that penetration was proved.

Evidence of identification was laid out by the complainant who told the court that she knew the Appellant as Kieti and that he was Jackson's worker. She also stated that she had been to the posho mill on several previous occasions and had seen him severally there. Further, when PW2 found her, the complainant mentioned the Appellant by name when explaining what had transpired. The Appellant in his own defence told the court that he lived in the same house as the girls.

From the evidence, it is apparent that the complainant recognized the Appellant and there was no possibility of mistaken identity. It is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

On sentence, the Appellant submitted that the same was excessive and harsh as it was higher than mandatory minimum as provided in the SOA. He further stated that mandatory sentences are unconstitutional and relied on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the Supreme Court held 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 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."***

Many decisions from the Court of Appeal have adopted the decision of the Supreme court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where is stated thus: -

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, 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."***

Section 8(2) of the SOA imposes a sentence of life imprisonment upon conviction. In the present case, the trial magistrate when sentencing the Appellant took into the Appellant's mitigation that he was a first time offender and was a young man but deemed that the nature of the case required a stiffer sentence and sentenced him to 30 years imprisonment.

I am in agreement with the trial magistrate that there was need for a deterrence sentence in the circumstances of the case. Additionally, the trial magistrate was not hamstrung by the mandatory sentence of the Act but after considering all the facts exercised his judicial discretion. I find that the trial magistrate did not act on a wrong principle or overlook a material fact and therefore this ground fails. Consequently, I find that the appeal has no merit and the same is dismissed.

Orders accordingly.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mwangeka for the Respondent present

Appellant in person