REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 24 OF 2018

EVANS MORARA NYAKWEBA......................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 88 of 2017

at Ogembo Law Courts before Hon. J.K. Mutai (RM)

delivered on the 6th day of April, 2018)

JUDGMENT

1. The appellant, **Evans Morara Nyakweba**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The particulars of the offence were that on the 24th day of December, 2017 at [particulars withheld], Chitago location in Gucha South Sub-county within Kisii County, he intentionally caused his penis to penetrate the vagina of MMK a child aged 8 years old.

2. The appellant has preferred this appeal against both conviction and sentence on the following grounds;

a. The learned trial magistrate failed totally to consider the evidence on record as a whole;

b. The learned trial magistrate failed to note that the evidence of the independent witnesses was contradictory;

c. The trial magistrate misdirected himself by considering hearsay evidence of PW2 and hence occasioned a miscarriage of justice;

d. The trial magistrate erred in law and in fact by finding the appellant guilty for the offence charged while the evidence on record never supported the said charge;

e. That the trial magistrate misdirected himself in relying on the evidence of PW 3 while he did not tender any medical evidence to connect the Appellant to the offence of defilement;

f. The trial magistrate failed to consider the evidence adduced by the Appellant by merely dismissing it without considering and giving its due effect.

3. To prove its case against the appellant, the prosecution called 4 witnesses. The complainant gave her unsworn statement after *voir dire* examination. She recalled that she had been sent by her grandmother, PW2 to buy sugar at around 6p.m. on 24th December, 2017, when she met the appellant whom she described as her grandfather. She recounted how the appellant had held by the hand, told her he loved her and taken her to a rocky part of their land. He then took of her pants, removed his trousers and inserted his penis in her vagina, where she used to urinate. She tried to scream but the appellant covered her mouth and warned her that if she told anyone he would kill her. She testified that she met PW2 on her way back home after the ordeal but was too terrified to tell her what she had gone through and only told her what had happened the following day. PW2 had examined her genitalia and taken her to hospital. She was later taken to Etago police station where she recorded her statement.

4. PW 2 confirmed that she had sent the complainant to buy sugar on the material evening. She got concerned when the complainant took about an hour to get back from the kiosk and went to inquire about her from the kiosk owner who told her that he had given the complainant

the sugar a while ago. PW 2 testified that she had met and talked to the appellant on her way back. When she got to the house, PW 2 asked the complainant where she had been and the complainant told her that she had been to her mother's house. The following morning, PW 2 noticed that the complainant had difficulty walking. She pressed her into speaking out and the complainant told her that the appellant had taken her to a bush with rocks, covered her mouth and defiled her. PW2 examined the complainant's vagina and saw a discharge oozing out of her. She took her to Moticho hospital where they were issued with a clinic attendance card. They recorded their statements at Etago and were issued with a P3 form and Post Rape Care form which were both filled.

5. The P3 form was filled in by Victor Muga and produced by his colleague Godfrey Monyoro (PW3) under section 77 of the Evidence Act. PW3 testified that on examination of the complainant, the medical officer observed that she had difficulty walking and her pants were blood stained. There were bruises on her genitalia and her hymen was freshly torn. No spermatozoa were seen but there was evidence of bleeding. PW3 also produced the clinic attendance card, Post Rape Care form as well as an Age Assessment form and further testified that according to the assessment, the complainant's age was estimated to be about 8 years. On cross examination, PW3 could not tell whether the appellant had been taken to hospital for examination to confirm his connection to the defilement.

6. Sgt. Bernard Komen (PW4) recalled receiving the complaint from MMK and her grandmother, PW2 on 26th December, 2017. He remembered that he had issued a P3 form and sent them to Etago Level 4 hospital for examination. He investigated the matter and arrested the appellant for the offence.

7. The trial court found that the prosecution had established a *prima facie* case against the appellant and placed him on his defence. In his an unsworn testimony, the appellant testified that on 24th December 2017, he had a quarrel with the complainant's parents as they had encroached and cultivated on his land. He testified that later that evening, members of community policing called him out to the road and arrested him but did not inform him why he had been arrested. He was taken to Etago police station and arraigned in court where the charges were read to him. He denied committing the offence and stated that the charges against him had been fabricated due to the land disputes.

8. The appellant filed written submissions in support of his appeal. In them, he reiterated that he had been framed by the complainant's family to get rid of him due to the land dispute between them. He argued that the absence of spermatozoa and the bleeding of the complainant two days after the alleged offence were questionable and showed that the evidence had been planted on the complainant.

9. The appellant also complained that the sentence infringed on his constitutional rights and argued that the law was unconstitutional as it mandated the imposition of a life sentence for the offence. He urged the court to commute the life sentence to a specific number of years likely to meet the purposes for the imprisonment such as correction and rehabilitation. the appellant relied on the cases of ***Paul Ouma Otieno alias Collera & Another v Republic KSM CA Criminal App. No. 616 of 2010 (2018) eKLR, Robert Achapa Okello v R Petition No. 63 of 2018*** and ***Charles Ogero Bosire v Republic Petition No. 13 of 2018*** where the courts commuted the death sentence to 20, 14 and 18 years imprisonment respectively in support of his position.

10. Counsel for the State opposed the appeal and submitted that the child knew and identified the appellant as the person who had defiled her. He argued that the complainant told PW 2 about the ordeal and PW2 had also seen the appellant at the scene. The medical evidence also confirmed the child was defiled and ascertained the age of the child as 8. He urged the court to uphold the conviction and sentence.

11. Having analysed the evidence, the record of appeal as well as the appellant's submissions. The issues arising for this court's determination are whether the trial court was right in finding that the prosecution proved its case against the appellant and whether the sentence imposed upon the appellant was unconstitutional and therefore excessive.

12. The appellant faced the charge of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences** Act which provides;

> *8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

13. As observed by the trial court the prosecution needed to establish the age of the complainant and the identity of the perpetrator to prove the commission of the offence.

14. The age of the complainant was not in dispute. PW 3 testified that an assessment of the complainant's age had been conducted and it had been established that she was aged 8 years at the material time.

15. The commission of the offence was proved through the oral evidence of the complainant. She testified that she had been lured into a rocky part of their land and defiled by the appellant. According to the complainant, the incident took place between 6 p.m. and 7 p.m. Although the conditions of light could be argued to be less than favourable for a positive identification, evidence of recognition is considered more reliable than the identification of a stranger.(See ***Anjoni v Republic (1980)KLR 59***) Hence, the likelihood of a mistaken identity was lessened by the fact that complainant knew the appellant as her grandfather.

16. Further, the complainant's testimony was corroborated by the evidence of PW 2 which placed the appellant within the vicinity at the material time. PW 2 testified that she had met the appellant on her way from searching for the complainant. The complainant then divulged to her what she had suffered in the hands of the appellant the following day when she noticed that the complainant had difficulty walking. PW 2 had examined the complainant and noted that she had a discharge oozing out of her genitalia.

17. The medical evidence adduced by PW 3 further confirmed that the complainant had been defiled. The medical officer observed that she had bruises on her genitalia, her hymen was freshly torn and there was evidence of bleeding. The appellant's argument that the lack of spermatozoa disproved penetration is rejected as there was overwhelming medical evidence in support of the penetration of the

complainant's genitalia which was corroborated by the evidence of PW 2 who examined the complainant a day after the act. I am also guided by the decision of the Court of Appeal in ***Mark Oiruri Mose v Republic CA No. 295 of 2012 [2013] eKLR*** where the court held as follows;

> *Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ*. [Emphasis mine]

18. All the evidence adduced pointed to the appellant as the complainant's assailant. The trial court found the complainant's testimony believable based on her demeanour she was a stable and credible witness. The trial court found that the prosecution's case displaced his defence and I therefore reject the appellant's argument that the trial court failed to consider his defence. I find that the prosecution proved its case against the appellant beyond reasonable doubt.

19. Turning to the sentence imposed, the appellant argued that the objectives of imprisonment including rehabilitation and correction are not met with the imposition of a life imprisonment. He contended that the life sentence passed by the trial court infringed on his constitutional rights as protected under **Article 24 (2) (c)** and **Article 29 (a)** of the Constitution which provide as follows;

> ***24 (2)*** *Despite clause (1), a provision in legislation limiting a right or fundamental freedom—*
>
> *(c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*
>
> ***29.*** *Every person has the right to freedom and security of the person, which includes the right not to be—*
>
> *(a) deprived of freedom arbitrarily or without just cause;*

20. The Supreme Court in the case of ***Francis Karioko Muruatete & Another v Republic [2017]eKLR Petition No. 15 of 2015*** dealt with this issue as follows;

> ***[94]*** *We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.*
>
> ***[95]*** *We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.*
>
> ***[96]*** *We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.*
>
> ***[97]*** *We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of the Constitution which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya.*

21. In the above decision, the Supreme Court, while not out rightly declaring the life sentence unconstitutional, recommended that the Attorney General develop legislation to define the life sentence and bring it within the essential objectives of sentencing which is reformation and social rehabilitation. The proposed legislation has not been enacted. However, the Court of Appeal in ***Jared Koita Injiri v Republic CA KSM No.93 of 2014 [2019]eKLR*** applied the above decision of ***Francis Muratete*** to a similar case and set aside the life sentence substituting it with a sentence of 30 years' imprisonment as follows;

> *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.*
>
> *The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*
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> *Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.*

22. The act committed by the appellant was disgusting and abhorrent crime from which the community particularly vulnerable children need to be protected against. I have however considered the above authorities. The appellant had an opportunity to mitigate in the trial court. He pleaded for leniency. I therefore affirm the conviction and set aside the sentence of imprisonment for life imposed on the appellant and substitute it with a sentence of **30 years 'imprisonment** from the date of sentence by the trial court.

Dated, signed and delivered at Kisii on this 13th day of June 2019.

R.E.OUGO

JUDGE

In the presence;

For the Appellant In Person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Rael   Court Clerk