REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 96 OF 2018

STANLEY KIMELI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Eldoret Chief Magistrate's Criminal Case No. 5935 of 2015 by Hon. C. Obulutsa, SPM, delivered on the 11th day of June 2018)

JUDGMENT

[1] The Appellant, **Stanley Kimeli**, was the accused person in **Eldoret Chief Magistrate's Criminal Case No. 5935 of 2015** wherein he was charged, in the main, 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 **16 October 2015** at Koisagat Location in Eldoret West Sub-County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **LK,** a child aged 14 years.

[2] Alternatively, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** It was alleged that on **16 October 2015** at Koisagat Location in Eldoret West Sub-County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of **LK,** a child aged 14 years.

[3] The Appellant denied those allegations; and upon hearing the respective cases presented by the Prosecution and the Defence, the lower court was satisfied as to the guilt of the Appellant in respect of the alternative charge and convicted him thereof. The Appellant was consequently sentenced to 15 years' imprisonment on **11 June 2018.** Being aggrieved by his conviction and sentence, the Appellant preferred this appeal, with the leave of the Court, on **26 October 2018,** citing the following grounds:

> **[a]** That he did not plead guilty at the trial;
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> **[b]** That the Learned Trial Magistrate erred in law and fact by not holding that the matter was never proved beyond reasonable doubt;
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> **[c]** That trial court erred in law and fact by not holding that some of the witnesses mentioned were not called to testify before court;
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> **[d]** That the trial court erred in law and fact by failing to observe that the provisions of **Section 26 and 36** of the **Sexual Offences Act** were not adhered to;
>
> **[e]** That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant;
>
> **[f]** That the trial court erred in law and fact by failing to hold that the provisions of **Section 26** of **the Evidence Act** were not adhered to.

Hence, the Appellant prayed that his appeal be allowed, the conviction quashed, and the sentence set aside.

[4] The Appellant urged his appeal by way of written submissions. He raised the issue of identification, contending that in the circumstances given by the Complainant, she was unable to identify her assailant. The Appellant accordingly posited that she was couched by her mother, **PW2,** to implicate him. He further impugned the evidence of the Prosecution in respect of its allegations that there was penetration. The Appellant was of the submission that penetration was not proved beyond reasonable doubt. He relied on **Zahira Habibullah Sheikh &**

Others vs. State of Gujarat & Others for the proposition that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned; adding that his constitutional rights under **Article 50** of the **Constitution** were violated.

[5] The Appellant cited **Sections 26 and 36** of the **Sexual Offences Act** for the submission that it was imperative for him to be subjected to medical examination to prove whether or not he committed the alleged offence; and therefore, to the extent that this was not done, it cannot be said that penetration was proved beyond reasonable doubt as by law required. He also faulted the lower court for convicting him and yet not all the witnesses were called to testify against him. He therefore submitted that the case against him was a frame-up; granted that no visit to the scene for purposes of investigation was ever made by the Investigating Officer. The Appellant accordingly urged for the quashing of his convicting and the setting aside of the sentence of 15 years, which he considers excessive.

[6] On behalf of the State, **Mr. Mulamula,** opposed the appeal and submitted that evidence was adduced before the lower court to show that the Complainant was a special needs child, born on **8 August 2000**; that medical evidence was availed to support her evidence that there was indecent contact for purposes of **Section 11(1)** of the **Sexual Offences Act;** and that the offence was committed by the Appellant. He accordingly prayed for the dismissal of the appeal.

[7] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State in the light of the proceedings and Judgment of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[8] Before the lower court, the Prosecution called 4 witnesses, the first of whom was the Complainant's mother **(PW1).** Her evidence was that, on the **16 October 2015**, she was looking after her cows with the Complainant; and that she sent her to a neighbouring home for drinking water. She added that, as the girl did not return immediately, she followed her to check on her. She found the kitchen locked and when she knocked the door, the Appellant, who was in the process of zipping up his trousers, opened the door. On asking him about the Complainant, he denied having seen the girl; but on entering the kitchen she found the Complainant putting on her clothes. She then locked them inside the house as she called for help. The two were thereafter taken to hospital for examination. **PW1** added that the Complainant is a special needs child.

[9] The Complainant was **PW2** before the lower court. She told the lower court that she was 15 years old at the time; and that she was herding cows with her mother when she decided to go the home of Mama Mitchell for water. It was her testimony that while there, the Appellant got hold of her and threw her down before inserting his penis inside her private parts after removing her clothes. She added that her mother went looking for her and found them in the process of putting on their clothes; and that she was thereafter taken to hospital.

[10] PW3, Joseph Korir, told the lower court that he was then working at **Ziwa Sub-County Hospital** as a Clinical Officer; and that in that capacity, he attended to the Complainant herein on **16 October 2015** following allegations that she had been defiled. His evidence was that he checked the body and there was nothing detected, save that **"…the hymen was not there…"** He added that laboratory analysis showed that the Complainant's urine was bloodstained. He therefore reached the conclusion that the girl had been defiled. He produced the P3 Form that he filled and signed as the **Prosecution's Exhibit 2** and the Treatment Notes as the **Prosecution's Exhibit 1.**

[11] The Investigating Officer, **PC Simon Nyongesa (PW4),** testified that he was on duty at **Ziwa Police Post** when the Complainant and her grandmother reported a case of defilement. He issued the Complainant with a P3 Form and referred her for medical examination. He thereafter arrested the accused and charged him after completion of investigations. He produced the Complainant's Certificate of Birth which he obtained in the course of his investigations as the Prosecution's Exhibit No. 3 before the lower court. And, with that the Prosecution closed its case.

[12] In his defence, the Appellant told the lower court that he was outside the house when the Complainant's mother went looking for her. That as he had not seen her, he informed **PW1** accordingly. He denied the allegations against him; though he conceded that the Complainant and her parents were their neighbours at **Mafuta** and that they had no dispute or differences prior to the alleged incident.

[13] Having considered both sides of the matter, the Learned Trial Magistrate came to the conclusion that:

> **"The p3 form that was presented has been seen when she was examined, there was no presence of bruises on her genitalia both labia appeared normal that it was noted that she had no hymen. It is not clear if it was recent or sometimes back. There is no evidence from the p3 for recent sexual attack. The charge of defilement would not be sustainable as was held in the case of ROD VS REPUBLIC (2015) eKLR when there is no medical evidence to support the charge.**
>
> **The circumstances under which he was found zipping up and the girl dressing up does confirm that there was contact between his penis and vagina of the girl. Otherwise why would he be zipping up and the girl dressing..."**

[14] It was in the light of the foregoing that the Appellant was found guilty of the Alternative Charge of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. Accordingly, the key ingredients that required proof beyond reasonable doubt are:

[a] That the Complainant was, at the material time, a child for purposes **the Sexual Offences Act**;

[b] That there was indecent contact involving her genitalia;

[c] That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[15] In **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal stressed the point thus:

> ***"Age of the victim of 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".***

[16] Accordingly, **Rule 4** of the **Sexual Offences Rules of Court Rules** recognizes 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."**

[17] The Complainant told the lower court that she was 15 years old as at **25 February 2016** when her evidence was taken by the lower court. Her mother confirmed this by availing the girl's Certificate of Birth, which was marked the **Prosecution's Exhibit 3**. It confirms **PW2's** date of birth as **8 August 2000**. Since that evidence was uncontroverted, the lower court cannot be faulted for coming to the conclusion that the girl was 15 years old at the time of the alleged offence. In **<u>Hadson Ali Mwachongo vs. Republic [2016] eKLR,</u>** the Court of Appeal explained that:

> **"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus, a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."**

[18] Hence, it is my finding that there was cogent evidence to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2 and 11(1)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] <u>On whether Indecent Contact Occurred:</u>

[19] The Complainant narrated the events of **16 October 2015** and told the lower court that she was herding cows with her mother **(PW1)** when she decided to go the home of Mama Mitchell for some water to drink. It was her testimony that while there, the Appellant got hold of her and threw her down before inserting his penis inside her private parts after removing her clothes. She added that her mother went looking for her and found them in the process of putting on their clothes; and that she was thereafter taken to hospital. Her evidence was corroborated by the evidence of **PW1**. **PW1**, told the lower court that she found the door of the kitchen locked; and upon knocking, the Appellant opened. He was zipping up his trousers and on being asked about the whereabouts of the Complainant, he denied having seen her. **PW1** thereupon entered the kitchen and found **PW2** dressing up; and it was the evidence of **PW2** that the Appellant did cause his penis to get into contact with her vagina. Accordingly, there was sufficient basis for the trial court to conclude that there had been indecent contact in the manner specified in the particulars of the Alternative Count.

[c] <u>On whether the indecent contact of the Complainant's genital organ was perpetrated by the Appellant</u>:

[20] The evidence aforementioned placed the Appellant at the scene of crime. Indeed, it was the evidence of **PW1** that she had to close the door on them as she called for help. Moreover, when it comes to credibility, this Court, as an appellate court, is expected to defer to and be guided by the impression formed on the trial court by the witnesses. Hence, in **<u>Shantilal Maneklal Ruwala vs. Republic [1957] EA 570,</u>** it was held, *inter alia*, that when the question arises which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses. The trial court saw the Complainant and **PW1** and believed their testimony. I therefore find no reason to discredit the two witnesses or find fault with the lower court for believing their respective testimonies.

[21] The Appellant urged the Court to find that he was being fixed for a crime he did not commit and questioned why the provisions of **Section 26 and 36** of the **Sexual Offences Act** were not complied with. However, it is trite that, whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **<u>Evans Wamalwa Simiyu vs. Republic [2016] eKLR</u>** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her..."**

[22] This is because, **the fact of defilement, unlike, say, paternity, is not proved by DNA test, but by evidence. (see AML vs. Republic [2012] eKLR . In the premises, the fact that the DNA test result was not availed did not have any adverse effect on the Prosecution Case. The same principle was restated by the Court of Appeal in *Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010*, as follows:**

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

[23] Hence, the assertions by the Appellant that he was not accorded a fair trial or that the allegations against him were not proved beyond reasonable doubt are untenable. Similarly, the contention that the Prosecution case was riddled with contradictions has no traction. The guidance given by the Court of Appeal in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** is that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"**

[24] In my careful consideration, the contradictions mentioned at pages 2 and 3 of the Appellant's written submission are not in any way material to the key issues before the trial court; and are, in my considered view, inconsequential to the finding of the lower court that he was the culprit and that he was arrested at the scene of crime. Indeed, in ***Philip Nzaka Watu vs. R* [2016] eKLR,** the Court of Appeal expressed the view that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

[25] As pointed out hereinabove, in the circumstances hereof, I am not convinced that the inconsistencies cited are pertinent or that they could have affected the outcome of the trial before the lower court. I therefore find no merit in the Appellant's appeal against his conviction for the offence of indecent act with a child.

[26] As for the sentence, the trial court proceeded on the premise that the offence involved a special needs child; and that it entailed a minimum penalty of 10 years. The Court of Appeal has since pronounced itself in **Jared Koita Injiri vs. Republic [2019] eKLR,** thus:

> **Arising from the decision in** *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**
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> *"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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*
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> **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."**

[27] It is on that basis that I would reduce the sentence imposed on the Appellant to 8 years imprisonment with effect from the date he was sentenced by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2019

OLGA SEWE

JUDGE