REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 50 OF 2017

ABEL LIKAMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by E. Malesi, SRM in Kakamega CMC Criminal Case No. 2 of 2017 dated 28/4/2017)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are that:-

> 1. The learned trial magistrate grossly erred in law and fact in finding the charge proved without observing that the evidence of PW1 was doubtful, untrustworthy and not free from error and malice.
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> 2. The learned trial magistrate grossly erred in law and fact in finding the charge of defilement proved without observing that the medical evidence tendered was not adequate and watertight enough to uphold the conviction.
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> 3. The learned trial magistrate gravely misdirected himself in law and fact in convicting and sentencing the appellant without observing that the absence of full proof DNA report pursuant to section 2 of the Sexual offences act outrightly disassociated the appellant from the offence.
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> 4. The learned trial magistrate grossly erred in law and fact in shifting the burden of proof on the appellant and further in failing to note that PW1 had multiple boyfriends according to the evidence.

2. The state opposed the appeal.

3. The particulars of the charge against the appellant were that on the 6th January, 2017 in Kakamega East District within Kakamega County he intentionally caused his penis to penetrate the vagina of JS (herein referred to as the complainant) a girl aged 15 years.

Case for prosecution –

4. The case for the prosecution against the appellant was that the complainant was at the material time a standard 6 primary school pupil. She was staying with her father, JB PW2. That on the 6/1/2017 the complainant left home to go to the home of her aunt at Shinyalu. That on reaching Shinyalu stage she met the appellant who was a motor cycle operator and a member of her church. The appellant offered to take her to where she was going. He however said that he wanted to pick a jacket at his home. They went to his home. On getting there he detained her in his house for 2 days during which time he was having sexual intercourse with her. On the third day he took her to a movie room at Shinyalu market and left her there with a certain man called J. He promised to come back for her but he did not. When night reached J took her to his home. She slept at his house. On the following morning she went with him back to his movie room. She then told him that she wanted to go home. J asked a motor vehicle rider to take her to his (J's) home. She was then taken there. Her mother then went to the home of J and found her there. She took her to Shinyalu Police Station and then to Shinyalu Health Centre. She went with policemen to the home of the appellant and he was arrested.

5. The complainant was examined by a clinical officer at Shinyalu Health Centre. A vaginal swab was done that revealed presence of spermatozoa. PC Hassan Dogo PW4 of Shinyalu Police Station investigated the case. He was given the complainant's baptismal card that indicated that the girl was born on 13/6/2003. He charged the appellant with the offence. During the hearing a clinical officer at Kakamega County General Hospital PW3 produced the treat notes, the P3 form and the Post Rape Care form from Shinyalu Health Centre as exhibits, P.Ex 1-3 respectively. The investigating officer PW4 produced the baptismal card as exhibit, P.Ex 4.

Defence Case –

7. When placed to his defence the appellant gave sworn evidence in which he stated that he is a motorbike (boda boda) operator at Shinyalu market. That the complainant is a member of his church where he is a youth leader. That on 6/1/2017 he was doing his usual work. He did not meet the complainant on that day. He denied that he detained her in his house for 2 days.

8. The appellant further said that the person called J who was referred to in the prosecution case is his neighbour. That he operates a movie shop at Shinyalu market. He ferries him to work. That on the evening of 8/1/17 he was at a bar at Shinyalu market. J entered into the bar and called him to take him home. On getting out of the bar he found J with the complainant. He asked the complainant what she was doing with J. She became annoyed. J warned him that if the girl's mother came to learn about the matter he would know that he is the one who had informed her of the matter.

Analysis and Determination –

9. This is a first appeal. The duty of the court is to re-examine afresh the evidence adduced at the lower court, re-evaluate it and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify – See **Okeno –Vs- Republic (1972) E.A 32**.

10. The appeal is on 5 grounds – that the charge was defective; that there was no medical evidence adduced to support the charge; that the case was full of contradictions; that some crucial witnesses were not called to testify in the case and that the appellant was not accorded a fair trial.

11. The appellant submitted that the charge was defective in that it was drafted to read that the appellant was charged under section 8 (1) (3) of the Sexual Offences Act. That there is no such a section in the Sexual Offences Act. That the charge sheet also did not bear the stamp nor is it signed.

12. The charge sheet clearly reads that the appellant was charged under section 8 (1) as read with section 8 (3) of the Sexual Offences Act. It was therefore mischievous for the appellant to urgue that the charge sheet indicates otherwise.

12. Under the provisions of Section 89 (4) of the Criminal Procedure Code a charge can be signed by either a magistrate or by a police officer. In this case the charge sheet bears the signature of the magistrate who took the plea on 12/1/2017. There is thereby no defect in the charge.

13. The appellant contends that there was no medical evidence to support the charge. That the clinical officer who produced the P3 form is not the one who completed it. That the P3 form captures two ages of the complainant – 15 and 18 years. That it was not explained why this was so. That the P3 form indicates that the complainant was sent to hospital on 11/1/17 yet the evidence of the investigating officer PW3 was that she was sent to hospital on 10/1/17. That the appellant was not examined. Therefore that the medical evidence tendered was doubtful, incredible and unsafe to be relied on to convict him.

14. The prosecution counsel **Mr. Ng'etich**, on his part submitted that the clinical officer who testified in the case proved that there was penetration on the complainant.

15. The clinical officer who produced the medical documents PW3 stated that he is based at Kakamega County Referral Hospital. That the medical documents were completed by a clinical officer called Don Boss Mboli at Shinyalu Health Centre. He said that he knew the said person as he studied with him in college. That he was familiar with his handwriting. That on examination the girl had normal external genitalia with whitish discharge. That there was spermatozoa seen on high vagina swab.

16. The Post Rape Care form indicates that it was filled on 10/1/17 while the P3 form was completed on 11/1/17. The investigating officer PW4 stated that the age of the girl that he indicated on the P3 form is 15 years but that his digit for numeral "5" looks like an "8". That the girl's baptism card indicated that she was born on 13/6/2003.

17. The age of a person can be proved in various ways as was held by the Court of Appeal in **Edwin Nyabaso Onsongo –Vs- Republic (2016) eKLR** (cited in the case of **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR)** where it was held that:-

> ***"..the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

18. In this case a baptismal card was produced that indicated that the girl was born on 13/6/2003. At the time of the offence she was thereby aged 13 ½ years. Though the charge sheet indicated that the girl was aged 15 years her actual age was proved at 13 ½ years. The supposed contradiction in the PW3 form on the age of the girl was explained by the investigating officer PW4 that it is his handwriting which appears to suggest that the age is written as 18 when it is infact 15. The explanation was satisfactory as can be seen in the P3 form. In any case the age of the girl was proved by the production of the baptismal card.

19. The clinical officer who completed the medical documents said that he went to college with the person who completed the P3 form and that he was familiar with his handwriting. A person who is familiar with the handwriting of another person is competent to produce a document in court made by the other person as laid down in section 33 of the Evidence Act (Cap. 80 Laws of Kenya). The medical

documents were therefore procedurally produced in court.

20. The treatment notes indicated that spermatozoa were seen on high vaginal swab. However the clinical officer who attended to the complainant did not include this in the Post Rape Care form nor in the P3 form. The only thing the clinical officer noted in the Post Rape Care form and in the P3 form was that there were "hymenal" remnants. The clinical officer who produced the P3 form PW3 said that he did not know what these are. There were no laboratory results attached to the treatment notes to show that there was spermatozoa seen on high vaginal swab. Was there then spermatozoa seen on high vaginal swab? Taking note of the fact that the clinical officer who produced the documents in court is not the same one who made the documents and considering that the laboratory results were not attached to the medical documents, the court cannot say categorically that there was presence of spermatozoa seen on high vaginal swab. In the premises there was no medical evidence to support the charge of defilement.

21. However the position of the law is that defilement can be proved even without medical evidence in support thereof. It is not necessary that there be medical evidence to connect the accused person with the offence. In **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010 (**cited in **Dennis Osoro Obiri Vs Republic (2014) eKLR)** where the Court of Appeal held that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to 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 …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

The question in the case of the appellant was whether even without medical evidence there was sufficient evidence to prove the charge against him.

22. The appellant submitted that there were some crucial witnesses who were not called in the case. That the person called J was not called to explain his involvement in the case. That it was reported in court that the said J was bonded to appear in court but disappeared fearing arrest. The appellant questioned why the witness would disappear if he is not the one who had committed the offence.

23. The complainant testified that she spent one night at the house of J. She did not say that J defiled her.

24. The prosecution counsel submitted that it is the appellant and not J who defiled the complainant. That the appellant was a person well known to the complainant. That she spent two nights with him. That there was no possibility of mistaken identity.

25. There is no requirement in law as to any particular number of witnesses required to prove a certain fact – section 143 of the Evidence Act. A fact may be proved by even a single witness unless the law provides otherwise. Only where the evidence of the witnesses called by the prosecution is not sufficient can the court make an inference that had those witnesses not called been availed their evidence would have tended to be adverse to the prosecution case – See **Bukenya & Others –Vs- Uganda (1972) EA 549**.

26. The appellant submitted that there were material contradictions in the evidence of the prosecution witnesses. That the complaint's father PW2 said that his daughter disappeared from home on Friday. That on the next Sunday he found her at her aunt's place. That in cross-examination he said that it is his in-law who went for her at the place where she was which could be at J's place.

27. The appellant submitted that contrary to the evidence of her father, the complainant stated that it is her mother who picked her at the home of the movie shop owner. The appellant took issue with as to who found the complainant and whether she was found at her aunt's home as stated by her father or at the movie person's home.

28. The appellant submitted that the complaint's father said that he had reported the disappearance of the girl to the police yet when PW4 reported he did not indicate that there was such a report. PW4 instead said that the matter was reported to him on 10/1/17 by the complainant's father while in company of the complainant herself. The appellant submitted that the evidence of the witnesses was not credible.

29. Indeed, it is not clear as to where the complainant was found and who found her. Her father gave contradictory evidence as to where she was found and who found her. He at first said that he is the one who found her at her aunt's home then said in cross-examination that it is his in-law who went for her at the place where she was. The complainant herself contradicted her father's evidence as to who found her. She said that it is her mother who found her at the home of the movie person.

30. The manner of treating contradictions in a case were stated by the Court of Appeal in **Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

31. The evidence as to where the complainant was found did not go to the root of the case. There was evidence from the complainant and her father that the complainant had disappeared from home for two nights on the 6th and 7th January, 2017. The question was whether it was proved that she had spent the two nights at the home of the appellant.

32. The proviso to section 124 of the Evidence Act allows a court to convict on the basis of the evidence of the victim of the offence in cases involving sexual offences where the court is satisfied that the victim is telling the truth. The trial court in this case assessed the credibility of the complainant and believed that she had spent two nights at the home of the appellant. The court believed her evidence that the appellant had defiled her. Upon my own evaluation of the evidence, I have no reasons to differ with the finding of the trial magistrate. The appellant was a person well known to the complainant. She had no reason to lie against him. The fact that she had spent the nights away from her parents' home put credence to her evidence that she had spent the nights at the home of the appellant. The fact that J was not called in the case was not fatal to the prosecution case. Similarly that there was no medical evidence in support of the case was not fatal to the case. The evidence of the complainant by itself coupled with the fact that she had spent the nights away from home were sufficient to prove the charge of defilement. The upshot is that the prosecution had proved the charge against the appellant beyond all reasonable doubt. There is no basis of interfering with the conviction.

Sentence -

33. The appellant was charged under the provisions of section 8 (1) and as read with section 8 (3) of the Sexual Offences Act that provides that:-

> ***8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

34. Sentencing is a discretion of the trial court. In **Francis Muthee Mwangi –Vs- Republic (2016) eKLR**, the court was of the view that:-

> ***"Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously."***

35. In **Denis Kinyua Njeru –Vs- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under section 8 of the Sexual Offences are "*straight jacket*" penalties that left no room for the exercise of discretion by a sentencing court. However, recently in **Evans Wanjala Wanyonyi –Vs- Republic [2019] eKLR**, the court held that:-

> ***"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.***
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> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."***

36. Going by the above cited Court of Appeal decision it means that the sentence provided under Section 8 (3) of the Sexual Offences Act is a discretionary maximum sentence. The court has discretion to impose a lesser sentence.

37. In the instant case the appellant was sentenced to serve 20 years imprisonment. He was aged 27 years at the time of sentence. He was a first offender. I am of the view that a sentence of 10 years imprisonment is sufficient sentence for the offence committed. I thereby set aside the sentence of 20 years imprisonment imposed by the trial court and reduce it to 10 years imprisonment.

Delivered, dated and signed in open court at Kakamega this 10th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for state

Appellant - present

Court Assistant - George

14 days right of appeal.