REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 41 OF 2019

BETWEEN

AUGUSTINE OMARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. N. Makila, SRM delivered on 5th April 2019 at the Magistrates Court in Kisii in Criminal Case No. 110 of 2018)

JUDGMENT

1. The appellant, **AUGUSTINE OMARI,** was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8 (2)** of the ***Sexual Offences Act*** *("the **Act**").* The particulars of the offence were that on 12th October 2018 in Kisii Central Sub-County within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of AH, a child aged 4 years.

2. The appellant appeals against both conviction and sentence on the grounds set out in his petition of appeal and expounded in his written submissions. He contends that the prosecution did not prove the case against him beyond reasonable doubt. He complained that the prosecution case was riddled with irregularities and inconsistencies. He contended that trial magistrate did not consider his defence that he was framed. Counsel for the state opposed the appeal. He submitted that the appellant had been clearly identified and the elements of the offence proved.

3. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion all the time bearing in mind that it did not see or hear the witnesses testify as to form its own opinion on their demeanour. (see ***Okeno v Republic*** **[1972] EA 32**).

4. The child, (PW 1) testified through her mother, PW 2, as an intermediary. She gave unsworn testimony and narrated what happened to her as follows:

> *Something bad happened at K's home. His wife is Leah. Omari (points to the accused) did bad things to me. He put me his thing between my legs (points between her thighs). I had gone to Leah's house. The said Omari asked me not to tell anyone. He removed my clothes and put his thing on me. I told my mother what Omari did to me. I felt pain after the incident. I was taken to hospital.*

5. PW 2 testified that on 12th October 2018, PW 1 went to a neighbour's home where the accused was. When she returned home from the farm, she recalled that PW 1 ran towards her. When she asked her what she was doing, PW 1 told her that she was taking porridge with the appellant. On that night, PW 1 told her that she was feeling pain in her private parts. PW 2 applied oil on the child that night and in the morning to alleviate her pain. The pain did not subside on the next day and when she checked the private parts, she observed that the vagina was very red. She was alarmed and asked PW 1 what happened. It is when PW 1 told her that the appellant had sexually assaulted her and that the he had warned her not to tell anyone. She took PW 1 to hospital and reported the matter to the police.

6. The Investigating officer, PW 4, confirmed that on 14th October 2018, PW 1 was brought to the police post to report an incident of defilement. She was also brought with the appellant. He issued the P3 medical form and accompanied PW 1 to the hospital where she was examined and treated.

7. The clinical officer, PW 4, produced the P3 medical report and the Post Rape Care Form (PRC) on behalf of the doctor who examined PW 1. According to the report, PW 1 was examined 3 days after the incident. The doctor recorded that the child was in great pain and observed

bruises on the labia majora and the hymen was torn. She concluded that the child was subjected to an act of penetration.

8. In his sworn defence, the appellant stated that on 12th October 2018, he was working for Leah where he used to live. He recalled that he worked as usual on that day. On Sunday, he was informed that he had been accused of defiling a child whereupon he was arrested. He denied that the he saw PW 1 on the material day in the kitchen.

9. Under **section 8(1)** of the ***Act***, the prosecution must prove that an accused did an act of penetration with a child. *"Penetration"* under **section 2** of the *Act* means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

10. Although PW 1 gave an unsworn statement, her testimony was clear that she was subject to an act of penetration. Her testimony on this aspect of the case was corroborated first by the evidence of her mother, PW 2, who saw her in state of distress on the day she was sexually assaulted. She also examined her private parts and noted that her vagina was inflamed and she was in pain. Second, the medical evidence produced by PW 4 confirmed that she was in great pain and her vagina had bruises and her hymen was broken. I agree with the trial magistrate that it is unusual for a child of tender years to have such injuries in her private parts. I therefore find and hold that PW 1 was subjected to an act of penetration.

11. The next issue is the identity of the appellant. I find that there was sufficient evidence to show that the appellant was a person well known to the child as he was worker at the homestead of PW 2's neighbour. He admitted as much in his defence and since the incident took place at daytime, I am satisfied that the appellant was properly identified.

12. When the appellant cross-examined PW 2, he suggested to her that they had differed over Kshs. 1000/- but she rebuffed this suggestion. He also did not elaborate on this issue in his defence. In light of the clear evidence of PW 1 which was duly corroborated, the appellant's defence which was a bare denial was properly dismissed by the trial magistrate.

13. Finally, the age of the child was proved by production of the birth certificate which showed that she was born on 27th May 2014 meaning that she was 4 years old at the time the offence was committed. I also find that PW 1 was a child and the sentence of life imprisonment imposed on his under **section 8(2)** of the ***Act*** was within the law.

14. I am aware that the Court of Appeal has, in several cases, declared that the mandatory sentences under the ***Act*** are unconstitutional. In ***Christopher Ochieng v Republic*** **KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR,** the Court of Appeal held that:

> *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.*

15. In the circumstances, I find that the life imprisonment meted upon the appellant was excessive and cannot stand given the circumstances of the case. I therefore substitute the term of life imprisonment with an imprisonment for a term of **thirty (30) years** to run from the date of conviction before the trial court.

16. Save for the sentence, the conviction is affirmed and the appeal thereon dismissed.

DATED and DELIVERED at KISII on this 4th day of JULY 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.