REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 2 OF 2018

DENNIS KIBAARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an Appeal from the Judgment of the Resident Magistrate at Chuka (HON. L.A MUMASSABBA - RM) delivered on 6/12/2016 at Chuka Chief Magistrate's Court Criminal Case SOA No. 15 of 2015).

****

J U D G E M E N T

1. **DENNIS KIBAARA ,** the Appellant herein was charged with the offence of defilement contrary to **Section 8(3)** of **Sexual Offences Act No.3 of 2006 vide Chuka Chief Magistrate's Court SOA No. 15 of 2015**. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the same Act. The particulars on the main charge, which is relevant to this appeal are that on 10th August 2014 at Mwarego Sub-Location Chogoria within Tharaka Nithi, the Appellant defiled (name withheld) a child aged 13 years.

2. The record from lower court indicates that the Appellant was convicted of the main charge upon trial and sentenced to serve 20 years imprisonment. He was aggrieved by both the conviction and sentence and preferred this appeal where he has raised 4 grounds namely:-

> ***i.*** **That the learned trial magistrate erred in both law and fact by convicting me on the basis of evidence that did not fully support the charge.**
>
> **ii.That the learned trial magistrate erred in law and fact by not conducting voire dire inquiry considering that the complainant was a child of tender age as per Section 19 of Oaths and Statutory Declaration Act.**
>
> **iii.That the learned trial magistrate erred in both law and facts by convicting him on the basis of injuries found on the complainant without establishing the age of the injuries.**
>
> **iv. That his defence was rejected without reasons.**

3. Before I consider the above grounds I will look at the brief facts about the evidence presented to the trial court and the basis for the conviction of the Appellant by the trial court.

4.The victim of the offence was a girl aged 13 years as per the birth certificate (P. Exhibit 1) tendered her father DGM (PW3). The complainant/victim testified that she was waylaid on her way home from the market where she had been sent by her mother (PW2- PN). It was her evidence that the Appellant tricked her into a motorbike which took them to the Appellant's house where she was apparently drugged and thereafter defiled though she could not recall what really happened after being drugged through some spaghetti she was forced to eat. She further told the trial court that after eating the spaghetti by force, she passed out and that when she was woken up by her dad (PW3) that she found herself dizzy and naked. She told the trial court that she put on a skirt and left to report at police station after she failed to locate her panty in the Appellant's house. She went to the police in the company of her father (PW3) and the Area Chief and thereafter to Chogoria Hospital where she was treated and a P3 form filled.

5. The victim's mother PN (PW2) confirmed that she had sent the victim to the market to purchase some food stuffs at around 2.30 pm on a Sunday and that she got worried at 6pm when her daughter (victim) failed to return home from the market. She went to her grandmother's place and two other houses of her friends to check whether she was there but all was in vain. On her way back she met a man who told her that he had seen the victim on unregistered motorbike and she went back home and reported to her husband (PW3). She further told the trial

court that at 2.30 am, she was called and informed that her daughter had been found and went and found her at Chogoria Police Station where the victim appeared confused and complained of pain in her private parts.

6. DGM (PW3) the victim's father also testified on the trial court and corroborated the evidence of the victim and her mother, his wife. He added that he found the victim and the Appellant sleeping naked on thebed at the Appellant's house after being directed there by informers. In the company of relatives and the Area Chief, they arrested the accused and took him to Chogoria Police Station where they were joined by the victim's mother (PW2). He further added that, he accompanied his wife in escorting the victim to Chuka County Referral Hospital where the girl was examined and treated. That evidence and the account on the chain of events on the material date was supported by FK (PW4), a brother to the victim's father.

7. Hillary Kangichu (PW6), a clinical officer at Chuka District Hospital testified and told the trial court the victim was presented to him for examination and treatment. He testified that he examined the victim and treated her. He tendered the P3 (P. Exhibit 2) which indicated that the complainant had been defiled as she had vulvar lacerations on her vagina and the hymen was torn.

8. When placed on his defence, the Appellant faulted the prosecution evidence as lies questioning why the witnesses were all from the same family. He pointed out that the complainant had indicated that she felt nothing after eating and wondered how she could feel being defiled. He further told the trial court that none of the community members or the Chief recorded statements. He asked the trial court to forgive him if he had wronged anyone.

9. The trial court in its Judgment found that the victim was 13 years old as per the birth certificate tendered in evidence (P. Exhibit1). It further found that though the complainant never felt being defiled by the Appellant owing to her state of mind, the circumstantial evidence pointed at Appellant's guilt. The trial court found that there was sufficient evidence to justify the inference of guilt as exculpatory facts presented were incompatible with the innocence of the Appellant. The trial court also found that the Appellant defence was a mere denial as he had not denied drugging the victim or given systematic narrative on where he was on the material date. The trial court further found that the assertion by the appellant that the evidence had been fabricated against was an afterthought.

10. In his written submissions on this appeal, the Appellant has contended that the prosecution did not prove that there was penetration because in his view the doctor's evidence indicated that the hymen was broken but did not conclude that the same was caused by defilement. In addition, the Appellant has pointed out that when the complainant was examined there was no spermatozoa present and that in his view showed that defilement had not been proven. He further contends that the victim being a child would have exhibited other signs such as bleeding if she had been defiled. He has referred to this court to a Court of Appeal decision (particulars not given) which decided that a mere absence of hymen is not prove of defilement as scientifically it has been proved that a hymen can be broken by other factors without intercourse and that some girls are born without a hymen.

12. The Appellant has also submitted that if the complainant had been abducted as alleged, she should have screamed and added that the girl who was accompanying could have notified her parents about the abduction if that was the case. He points out that failure to call JK, the complainant's friend as witness shows that the said witness could have spoilt prosecution's case by stating the truth.

13. He has faulted the learned magistrate for failing to consider this defence noting the trial court just dismissed his defence as an afterthought. He argues that he had no burden to give convincing evidence or defence and therefore his defence should have been considered nevertheless.

14. The Respondent has opposed this appeal through written submissions by the office of Director of the Public Prosecution dated 15th May 2019. The Respondent contends that the prosecution's case was proved beyond reasonable doubt as evidence adduced proved the necessary elements of the offence which in their view are;

a) Penetration

b) Age of the complainant (a minor)

c) Positive identification of the Appellant.

15. The Respondent has contended that it was not necessary to conduct medical examination on the appellant to prove that he had committed the offence. It is submitted that the clinical officer (PW6) established that the complainant had been defiled as indicated from the findings of vulvar lacerations and the broken hymen. They have also relied on the findings of Post Rape Care Form (P. Exhibit 3) which also showed that the minor had been defiled.

16. On the allegations that the trial court erred by failing to conduct ***voire dire*** examination on the complainant, the State has responded the allegations are not true as *voire dire* examination in their view was duly conducted before the trial court was satisfied that the complainant understood the nature of oath and was fit to testify on oath. The Respondent contends that questions were put to the minor before the oath was administered before she testified and in their view that was sufficient contending that there are no hard and fast rules that must be followed in conducting *voire dire* examination citing the decision of ***DWM -vs- Republic [2016] eKLR*** to buttress its contention.

17. On failure to call a vital witness, the Respondent has responded that they used their discretion to choose which witnesses were going to be called to prove their case. They have supported the trial court's finding that the prosecution had called adequate witnesses and failure to call some particular witnesses was justified as prosecution were not required to call superfluous witness just because they had been mentioned by prosecution witness called to testify.

18. On the question of Appellant's defence, the Respondent has contended that the Appellant's unsworn defence was duly considered by the trial court before making its decision.

19. On sentence the State has averred that **Section 8(3)** of the **Sexual Offences Act** prescribes a minimum sentence of 20 years and that the Appellant should not be complaining because in its view he benefitted from the minimum sentence prescribed.

20. This court has considered this appeal and the grounds listed on the petition. I have deliberately left out the additional grounds raised through the amended grounds of appeal as the grounds were raised without leave of this court as provided under **Section 350 (2) (i)** of the **Criminal Procedure Code.**

21. The Appellant has raised as observed above raised four grounds which have been responded to by the State and I will consider them alongside the responses made.

22. (a) **Voire dire Examination**

The Appellant has faulted the trial court for not conducting a *voire dire* examination. I have considered the response made and the record of proceedings from the lower court and the same clearly shows that the Appellant's contention is unfounded.The trial conducted *voire dire*examination before finding that the complainant understood the meaning of the oath and the girl was then sworn in before giving her evidence. The trial court complied with the provisions of **Section 19(1)** of the Oat**hs and Statutory Declaration Act** because it established that the minor understood the meaning of oath before taking her sworn evidence. The minor was aged 13 years and was proceeding to form one in my view a girl of such an age is, unless otherwise proven, possessed of sufficient duty to speak the truth and understands the meaning of an oath. That ground is unsustainable and must fail.

23. (b) **Proof of defilement**

A look at the evidence tendered by the prosecution in my view shows that there is prove beyond reasonable that the victim was defiled. She was found lying naked with the Appellant in his room and infact she was taken to police station and Hospital for examination without a panty because in her own account she could find her panty in Appellant's house. The medical evidence (P3) tendered by Hillary Kangichu corroborated the complainant's evidence that she felt pain in her private parts when she woke up. The medical officer who filed the P3 indicated that he observed vulvar acerations and torn hymen which in my considered view indicates that penetration had taken place.

24. I am however not convicted that the Post Rape Care Form tendered by BK was properly tendered as evidence because of two reasons.

> i. The Post Rape Care report is considered expert evidence it is a medical document. This means that the persons tendering must be an expert in that field to be able to competently tender the evidence as provided under **Section 48(1)** of the **Evidence Act**. The proceedings from the lower court do not show whether Betty Kanana was an expert or competent to tender evidence in the medical field.
>
> ii. The said witness stated that she was not the author of the Post Rape Care report and no basis was sufficiently laid to justify her tendering the evidence notwithstanding the fact that she stated that she was familiar with the author's handwriting. She did not state how the issue of familiarity came about and in my view the evidence on Post Rape Care tendered (P. Exhibit 3) was irregular and improper. The trial court fell into error when it relied on the Post Rape Care report on her finding that the prosecution's case had been proved. The production of Post Rape Care report clearly breached **Section 33(b)** of the **Evidence Act.**

I am however convinced that even if I disregard the evidence on the Post Rape Care report because of omission by both the trial court and the prosecution to adhere to the law, I am still satisfied that the prosecution's case was proved beyond doubt nevertheless. The other medical evidence tendered (P3) was sufficient to prove that defilement occurred.

25. While it is true that the medical evidence tendered (P3) did not indicate the age of the injuries and it could have been more helpful if it had indicated, I am still convinced that, given the fact that the complainant was found lying in bed with the Appellant naked and the P3 indicated that there were lacerations noted on the vagina of the minor, the prosecution's case on the question of penetration (which is a necessary ingredient in the offence of defilement) was proved beyond reasonable doubt. The evidence laid before trial court in my view fully supported the charge facing the Appellant. It was not necessary and indeed there was no legal obligation to subject the Appellant to medical examination like carrying out medical tests like DNA to connect him with the offence for which he was charged and convicted. The prosecution relied on the evidence they had which the trial court found sufficient or adequate to prove the charge and she was correct as I have observed in returning a verdict of guilt.

26. The Appellant has raised an issue in his amended ground which is the fact that the prosecution failed to call crucial witnesses. Though I had found that the ground was raised without leave and therefore would not be considered, I am persuaded to use by discretion to consider it because it raises an important issue which was the subject of substantive finding by the trial.That issue cannot be ignored because to do so would in my view lead to miscarriage of justice.

27. The complainant told the trial court that she was in the company of her friend named JK when they met the Appellant and that he let go of the said friend and block her path before abducting her using a motorbike. That incident was witnessed by the said friend. The victim's mother (PW2) corroborated that fact when she stated that she went to Kananu's home at 6 pm to inquire the whereabouts of her daughter (PW1) after she failed to go back home from the market.

28. The Appellant in his defence questioned why only family members were called as witnesses and why the others did not record statements. The trial court address this issue by holding that **Section 143** of the **Evidence Act** provides that no particular number of witnesses shall in the absence of any provisions of the law to the contrary be required for proof of any fact. It also cited the decision in **Julius Kalewa Mutungu -vs- Republic (Criminal Appeal No. 31 of 2005)** where the court held that as a general principle, the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence. The

trial court found that the prosecution had called witnesses who had given adequate evidence to sustain the charge facing the Appellant and to that extent it cannot be faulted. However on the question of abduction, in my considered view, if the Appellant had been charged with that count as well, then I would not have any hesitation to infer that the prosecution had ulterior motive by failing to summon an eye witness in the person of JK. The Appellant was charged with the offence of defilement and as I have observed the evidence tendered in that regard was overwhelming. However the surrounding circumstances in my considered view was relevant a mitigating factor which is the next issue for consideration in this appeal.

29. The Respondent has insisted that **Section 8(3)** of the **Sexual Offences Act** prescribes a minimum sentence of 20 years for the offence committed by the Appellant and that the Appellant should not be complaining because in its view he benefitted from the minimum sentence prescribed by law. It is true that **Section 8 (3)** of **Sexual Offences Act** prescribes a minimum sentence of 20 years for anyone found guilty under that section and the trial court considered that fact as mitigating factor when determining that the Appellant be jailed for 20 years in prison.

30. This court has considered the surrounding circumstances of the offence committed by the Appellant. It is not in dispute that he was found lying naked with the complainant in his house. I am however not persuaded based on the evidence tendered that the Appellant abducted the complainant or that he used some charms to influence her to go with him. He certainly was not a stranger to the victim because, when he stopped her, she yielded and JK, the friend reportedly accompanying her, did not find anything strange or risky because if that was the case she could have either screamed or gone and reported the incident immediately to the victim's parents or even her own parents. Why would she keep quiet unless she knew for a fact that the Appellant was either an acquaintance or a boyfriend to the complainant? I found what the complainant's mother stated in cross- examination quite telling. This is what she said;

"**I think you chose K because she is bigger than the rest. The others were small bodied even though they are older than her..... you must have used magic to blind her eyes."**

There are two things that crop up from that statement;

i. The complainant appears to have been physically bigger than JK and because she was 13 years the other girl was probably 14 or 15 years. So is there a possibility that the Appellant aged 19 years at the time could have mistakenly thought that the complainant was much older than she actually was?

ii. The allegations of magic charms in my view in neither here nor there. The same was not proved. The complainant also indicated that the food offered to her could have been spiked with drugs but no evidence was tendered to establish that fact because what is apparent is that the girl and the Appellant were both found naked and the victim was awoken through a few slaps from the father (PW3). She could not traced where her panty was and infact went to the police station and to the hospital without any as she was only able to get her dress.

31. There is no evidence to show that the complainant raised alarm as she was being taken by the Appellant on a boda boda. Even if this court was to believe her narrative that she was later drugged upon reaching the appellant's house, the facts presented show that she did not offer any resistance to the Appellant's advances when she met him. She did not scream or ask her friend to help her in anyway. Of course this court is alive to the fact that the complainant had not attained the age (18 years) to consent to sexual intercourse with the Appellant and the Appellant did not specifically plead that he was deceived by either appearance or the complainant about her age. That is why I have found that the trial court was correct to render a conviction but the big question is whether the Appellant deserved such a harsh sentence and whether the trial court's hands were really tied by the mandatory nature of the sentence prescribed under **Section 8(3)** of the **Sexual Offences Act.**

32. In the case of **Francis Karioko Muratetu & Another -vs- Republic [2017] eKLR** the Supreme Court held that the mandatory death sentence prescribed by **Section 204** of the **Penal Code** was unconstitutional. The Supreme Court made the following guiding observations;

" 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 an appropriate case. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenents of fair trial that accrue to the accused person under Article 25 of the Constitution, an absolute right..... Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the penal code, it becomes clear that the section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically Articles 25(c) 27, 28, 48 and 50(1) and 2(9)."

33. The decision in the above case has elicited debate as to whether the principles enunciated in that decision applies in cases of murder or all other cases where the statute prescribes a mandatory minimum sentence thereby depriving the trial court with discretion to consider the mitigating circumstances and hand an appropriate sentence. In my considered arising from the decision of **Muruatetu,** it is clear that the emerging jurisprudence is that court's hands should no longer be tied by mandatory nature of a prescribed sentence. Courts should be guided by sentencing policy guidelines 2016 which states that sentences are imposed to meet the following objectives;

i. **Retribution**: To punish the offender for his/her criminal conduct in a just manner.

ii. **Deterrence**: To deter the offender for his/her criminal conduct in a just manner.

iii. **Rehabilitation**: To enable the offender reform and discourage or prevent him from committing similar offences.

iv. **Restorative Justice**: To address the needs arising from the criminal conduct such as loss and damages. Further to promote sense

of responsibility through the offender's contribution towards meeting the victims' needs.

v. **Community protection**: To protect the community by incapacitating the offender.

vi. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

34. Before considering which appropriate sentence to impose guided by the above principles, courts must also consider mitigating circumstances and it is now trite going by the decision in **Muruatetu** consideration of mitigating factors constitutes an element of fair trial enshrined under **Articles 25** and **50** of the **Constitution**. It is therefore clearly apparent that if courts were to continue being bound by prescriptive nature of minimum sentences, mitigation would be rendered superfluous because at the end of the day, it would matter less if a convicted person spends a whole hour giving mitigating circumstances or just 30 seconds to simply pray for leniency. Invariably a court would record the mitigating circumstances and hand in the minimum sentence even if it feels that the prescribed minimum is way too harsh in some given circumstances such as the circumstances obtaining in this case.

35. This court takes the view that the emerging jurisprudence that flows from **Muruatetu** case is that a provision in a statute that prescribes a mandatory sentence whether it is a death sentence or a minimum sentence, is unconstitutional for depriving a trial court the exercise of its judicial discretion in handing out an appropriate sentence. This view is embolded by the recent decision of the Court of Appeal in the Case of ***JARE KOITA INJIRI -VS- R [2019] eKLR*** where the Court of Appeal while dealing with an appeal arising out of mandatory life sentence handed to an Appellant had this to say while allowing the appeal:

> **" 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..... 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."**

36. In the appeal, the Appellant is a young man aged 19 years. He certainly made a costly mistake by sleeping with an underage girl but given the circumstances he may have been mistaken about the age of the complainant but ended up committing an offence under **Section 8(3)** notwithstanding the fact that the girl may have been a willing partner and I have found based on the evidence tendered that she was a willing partner. However it must not be lost that defilement is one of the most heinous crimes against children and they must be protected. It is however not in dispute that sentences must be commensurate with the offence committed as per the cited sentence policy guidelines and each case must be determined on its own merit. Taking everything into consideration I am persuaded not to allow this appeal on conviction but on sentence, based on the unique circumstances in this case, I am convinced to allow the appeal on sentence.The sentence of 20 years imprisonment is hereby set aside and in its place I will substitute it with a sentence of 5 years imprisonment, from the date of sentence in the lower court.

Dated, signed and delivered at Chuka this 17th day of July, 2019.

R. K. LIMO

JUDGE

17/7/2019

Judgment dated, signed and delivered in the open court in presence of the Appellant in person and Momanyi for the Respondent.

R.K. LIMO

JUDGE

17/7/2019