REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 29 OF 2019

BETWEEN

PETER SAIKIPOR NAIYIOMA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.M. Oanda, PM delivered on 22nd February,2019 at the Magistrates Court at Kilgoris in Criminal Case No. 1250 of 2016)

JUDGMENT

1. The appellant, **PETER SAIKIPOR NAIYIOMA**, was charged, convicted and sentence to 20 years' imprisonment for the offence of defilement contrary to **section 8 (1)** as read with **section 8(3)** of the ***Sexual Offences Act*** ("the ***Act***"). It was alleged that on the evening of 22nd July 2016 in Transmara West Sub county within Narok County, he intentionally caused his penis to penetrate the vagina of JKS, a girl aged 15 years. He faced an alternative charge of indecent act with a child contrary to **section 11 (1)** of the ***Act*** based on similar facts.

2. Being aggrieved by the conviction and sentence, the appellant has appealed based on the grounds set out in his amended petition of appeal which were supported by the submissions of his counsel, Mr. Matoke. He singled out the evidence of PW 3 which he complained was inconsistent with the evidence of PW 1 regarding the time when the offence had been committed. Counsel contended that no DNA test had been carried out after the complainant's child was born. The appellant urged the court to allow his appeal as the prosecution had not proved its case beyond reasonable doubt.

3. Counsel for the respondent took the position that the prosecution had proved all the elements of the offence. He pointed out that the evidence showed that the appellant and the complainant had had sexual intercourse several times hence the issue of pregnancy or the DNA test was not material to prove the offence.

4. As this is a first appeal, I am required to evaluate the evidence before the trial court and reach an independent decision as to whether or not I should uphold the decision of the trial court. In so doing allowance must be made for the fact that I neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

5. The complainant, JKS (PW 1) recalled that on 22nd July 2016, she was at her aunt's shop when the appellant paid her a visit. She did not know him at the time. He took her into a maize plantation and persuaded her to have sex with him. On 20th September 2016 the appellant asked her to take a motorcycle and meet him in town. The assistant chief, PW 4, who had had previously been informed that the appellant was having a relationship with PW 1, found them that day in a shop with a gathering of people who asked him to intervene. He arrested both of them and took them to the police station. Afterwards, PW 1 was taken to hospital where she was found to be 4 months pregnant. She testified that she had had sex with the appellant on several occasions and that he had promised to marry her once she finished school.

6. The investigating officer, PW 5, was in his office when PW 4 brought PW 1 and the appellant. He recorded PW 1's statement and took her to hospital where the P3 medical form was filled. He also had an age assessment conducted for both of them.

7. A business lady, PW 2, told the court that she once met the appellant escorting PW 1 and warned him about the issue but he came to her shop the following day. She told PW 1's father about it. PW 4 called and informed her that he had found and arrested them. She testified that she met them at the police station.

8. The clinical officer, PW 3, examined PW 1 on 21st September 2016 and confirmed by an ultra sound that PW 1 was at least 25 weeks pregnant. He also testified that PW 1 was aged between 13 to 15 years and produced the age assessment report together with the P3 medical

form, treatment notes and ultra sound results.

9. When placed on his defence, the appellant gave an unsworn statement and called two more witnesses. The appellant denied knowing PW 1 and stated that the charges against him were untrue. On cross examination, he told the court that he had paid Kshs. 45,000/= to PW 1's father for medical expenses and an additional 2 cows when PW 1 gave birth to a baby girl. The appellant's grandfather, DW 2, asked the court to forgive him and let him talk over the matter at home. His uncle, DW 3, testified that as elders, they had decided to resolve the matter when they had found out that the appellant had been arrested and charged with defilement. It was agreed that two cows and some money be paid to forestall the court case. DW 3 testified that he believed the appellant when he told them that he had not committed the offence.

10. In order to prove the offence of defilement under **section 8(1)** of the ***Act***, the prosecution needed to prove that it was the appellant who caused the act of penetration to the 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."*

11. The main thrust of the appellant's appeal is that the medical evidence failed to link him to the commission of the offence. PW 3 conducted an ultra sound on 21st September, 2016 and found the complainant to be 25 weeks pregnant at the time of the examination. On her part PW 1 testified that she met the appellant on 22nd July 2016 and first had sexual intercourse with him that day, a period of 8 weeks before the test by PW 3. The appellant contended that the prosecution did not adduce evidence to show that the appellant and PW 1 had met before, hence the argument that a DNA test to establish the paternity of PW 1's child during the course of the trial would have exonerated the appellant.

12. The trial court is empowered to direct that the DNA test be conducted on the accused. **Section 36 (1)** of the **Act** stipulates;

> *36. (1) Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence.*

13. The Court of Appeal in ***Robert Mutungi Muumbi v Republic*** **MLD CA Criminal Appeal No. 5 of 2013 [2015] eKLR** held as follows regarding the aforesaid provision;

> *Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.*

14. At the end of the day, the main ingredient of the offence of defilement is penetration and not the fact of pregnancy and where there is sufficient evidence of penetration, the court may proceed to convict. In the case of ***Ambrose Mwawindo Ngwatu v Republic MLD CA Criminal Appeal No. 54 of 2013 [2016] eKLR*** where the minor had admitted to having an affair with another boy other than the appellant, the Court of Appeal held;

> *In a defilement case, it is not an essential ingredient of the offence that the complainant must conceive a child. In the instant case, conception was a factual matter that is not part of the actus reus in a charge of defilement. Section 36 (1) of the Sexual Offences Act allows the trial court to direct that a DNA test be conducted. In the instant case, the trial court directed that a DNA test be conducted and none was done. We are satisfied that no prejudice was occasioned to the appellant by absence of the DNA test because penetration was proved by the testimony of PW1. Neither the appellant nor defence witnesses controverted the evidence on penetration. In a charge of defilement, what is required is proof of penetration not proof of paternity. We agree that proof of paternity may be proof of penetration when fertilization and sexual intercourse takes place in accordance with the order of nature. However, paternity is not proof of penetration in in-vitro fertilization. In the instant case, from the testimony of PW1, we are satisfied that there is direct evidence on record to the required standard that proves penetration of the appellant's genital organs to the complainant's genital organs.*

15. No DNA test was carried out in this case to confirm the paternity of the baby. As already noted above, the medical evidence tendered by PW 3 did not corroborate PW 1's testimony that the appellant was the perpetrator. In fact, PW 3's testimony proved that PW 1 had conceived before the time she said she met the appellant. PW 2 and PW 4 simply confirmed that the appellant was known to PW 1 but did not catch them *in flagrante delicto*. This left the direct evidence of PW 1 as the only evidence implicating the appellant.

16. The *proviso* to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** entitles a trial court to rely on the evidence of the child if for reasons to be recorded, the court is satisfied that the child was telling the truth. In the present case, the trial court did not record in its decision the reasons it believed PW 1's testimony. The court was content that the prosecution had proved its case through PW 1's testimony that she had sex with the appellant on several occasions and that he had been in fact arrested with PW 1. The appellant's defence that he had paid money to the minor's father for medical expenses and two cows for the baby undermines his defence that he did not know PW 1 or that he did not have a relationship with her.

17. In as much as a DNA test would have clarified the issue of paternity, a failure to conduct the test did not weaken the prosecution's case as PW 1 gave a clear account of the relationship she had with the appellant which was not weakened on cross-examination or explicitly denied by the appellant. Therefore, her evidence proved that the appellant had sexually assaulted her. The totality of the evidence is that the prosecution proved the case beyond reasonable doubt. I affirm the conviction.

18. I now turn to the sentence. The mandatory sentence for defilement of a child aged between 12 years and 15 years is 20 years' imprisonment under **section 8(3)** of the ***Act***. The Court of Appeal has in several cases considered the constitutionality of mandatory

minimum sentences under the Act; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014. It adopted what the** Supreme Court held in ***Francis Karioko Muruatetu & another v Republic*** **SC Petition No. 16 of 2015 [2017]eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and 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**.**

19. Since the mandatory minimum sentence has been declared unconstitutional, I am bound to re-examine the sentence having regard to the fact that the legislature had taken the view the offences of defilement are serious offence that merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by the legislature. In ***Dismas Wafula Kilwake v Republic*** **[2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the ***Act***. It observed as follows:

> *[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*
>
> *The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.*

20. **Section 354** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, *"in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence"*.

21. I have considered the fact that the complainant and the appellant were in a relationship. At the time the appellant was charged, he was aged 19 years old according to the charge sheet. He is a first offender and considering the totality of the circumstances, a long custodial sentence would not serve the interests of justice. On the other hand, the law recognises the seriousness of the act of defilement. I therefore sentence the appellant to **one (1) year imprisonment** to run from the date of conviction before the trial court, that is on 22nd February 2019.

22. Save to the extent of the sentence, the appeal is dismissed.

DATED and DELIVERED at KISII on this 1st day of JULY 2019.

D.S. MAJANJA

JUDGE

Mr Matoke, Advocate for the appellant.

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