REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 45 OF 2018

FREDRICK OCHIENG NYASORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 17 of 2018 delivered on 20/08/2018)

JUDGMENT

1. The Appellant herein, **Fredrick Ochieng Nyasoro,** was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of **committing an indecent act with a child**. The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 21st day of January 2018 at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of MAJ a girl aged 8 years old*'.'

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was the victim one **MAJ.** The father to the victim testified as **PW2**. The arresting officer one **No. 526469 APC Kaberei Bernard** attached to Ochodororo AP Post testified as PW3. A Clinical Officer attached to Ongo Health Centre testified as **PW4.** The investigating officer one **No. 52451 Corporal William Kurgat** attached to Okumba Police Post testified as **PW5**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence and called two witness being **MAM (DW2)** and **RO (DW3)**. Thereafter the court rendered its judgment on 20/08/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal through **Messrs. Oduk and Company Advocates** who timeously filed a Petition of Appeal on 30/08/2018 in challenging the judgment on the following seven grounds:-

1. The charges are laid were bad in law and the offences of defilement was not proved to the required standard.

2. The trial magistrate erred in law and in fact in relying on unreliable evidence on identification and/or of dock identification of the appellant which evidence was worthless and not credible in the circumstances of the case.

3. The trial magistrate erred in law in rejecting the alibi defence offered by the defence which evidence was not displaced by the prosecution through cross – examination or otherwise, and which evidence placed the appellant at the church and not at the alleged time and place where the offence was allegedly committed.

4. The trial magistrate erred in law and in fact in convicting the appellant on the uncorroborated evidence of the complainant, but which evidence was in itself not cogent, true or sure enough as to be solely relied upon.

5. The trial magistrate failed to properly and adequately analyze and consider the medical evidence on the issue of penetration, which evidence went to absolve the accused person of the offence charged and there was no penetration, actual or implied, proved, or shown to exist.

6. The learned trial magistrate erred in law in placing reliance on the hearsay evidence of PW5 which evidence was prejudicial to

the appellant and in admissible in law.

7. The sentence was manifestly excessive in the circumstances.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant's Counsel **Mr. Oduk** expounded on the grounds of appeal. In contending that the assailant was not adequately identified Counsel for the Appellant referred to **Walter Abongo Amolo vs. Republic (1991) 2 KAR 254** in urging this Court to even allow the appeal on this ground alone. On the submission that the charges were defective Counsel relied on **Kipkurui Arap Sigilani & Another vs. Republic (2004) eKLR.** On sentence Counsel relied on **Samuel Achieng Alego vs. Republic (2018) eKLR** and **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR**. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and that none of the grounds tendered are holding. Counsel urged this Court to distinguish the decisions referred to by the Appellant and submitted that the decision in **Francis Karioko Muruatetu** (supra) dealt with a capital offence unlike in the present case. Counsel prayed that the appeal be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) On the age of the complainant:

12. The age of the complainant was not contested in this appeal. However, the issue was well settled by the trial court which relied on the complainant's Certificate of Birth No. [xxxx] which gave the date of birth as 03/12/2009. The complainant was hence 8 years and some days old at the time of the alleged offence. The complainant was hence a minor of tender age within the meaning of the law.

(b) On the issue of penetration:

13. **Section 2** of the **Sexual Offences Act** defines '**penetration**' as:

the partial or complete insertion of the genital organs of a person into the genital organ of another person.

14. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….

(emphasis added).

15. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

16. Penetration is hotly contested. The Appellant contends that there was no evidence of penetration and that the trial court erred in relying on the sole testimony of the complainant which was not even corroborated. He further contends that the medical evidence was wanting and could not prove penetration.

17. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence of the witnesses and said the following about the complainant at pages 4, 5 and 6 of the judgment: -

…...I have no doubt that she was telling the truth…….

…The complainant although of tender age, vividly narrated to court how ….

……Her evidence was firm and unshaken……

18. Be that as it may, the complainant narrated the events that unfolded on the 21/01/2018 which was a Sunday. She stated that on the material day she was sent to Kogeyo market by PW2 to sell some firewood and to use the money to buy books and pencils. That, as she returned home she met the assailant who was near his house and who called her and after asking her why she was not greeting her that day. That the assailant told the complainant to go inside the house. The assailant then followed her inside and closed the door behind, pushed her on the bed and removed her clothes and the two engaged in a sexual activity. The complainant narrated vividly how the unveiled and the male and female sexual organs involved and left no doubt that the act was indeed a sexual act. The assailant also touched her breasts and her vagina using his hands. She was later released to go and was given a pencil. On reaching home PW2 interrogated the complainant who had left at around 08:00am and returned around 11:00am. The complainant revealed that she had been taken hostage by an assailant and engaged in a sexual ordeal. PW2 had the complainant taken to hospital by her mother and PW2 returned with her to the hospital the following day.

19. It was PW4 who testified on how the complainant was examined and treated and that he filled in the P3 Form for her. He produced the P3 Form and the treatment notes as exhibits. The said exhibits had the detailed examination conducted on the complainant and the results thereof. The physical examination of the complainant's private parts undertaken on 21/01/2018 revealed that the labias were intact, there were no lacerations or presence of any discharge or secretions and the hymen was missing. It was not possible to conduct a laboratory high vaginal swab examination for lack of test kits. In his testimony PW4 stated that defilement could have occurred sometimes.

20. The decisions in **Mark Oiruri Mose** (supra) and **Erick Onyango Ondeng** (supra) settle the fact that even penetration only to the surface is sufficient in sexual offences. I must however note that medical evidence is a form of corroboration and pursuant to **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya sexual offences can be found even without any form of corroboration as long the conditions therein are duly met. The trial court dealt with the aspect of corroboration in detail.

21. The medical evidence on record as per PW4 indeed confirmed that the complainant had been penetrated and the complainant's evidence was hence duly corroborated. But even if that medical evidence is disregarded still the trial court dealt with the law and arrived at a finding that there was indeed penetration having been satisfied that the complainant was truthful and recorded the reasons for believing her. However, that finding is vehemently challenged by the Appellant who posits that the evidence of the complainant is riddled with glaring contradictions and as such the complainant is not truthful and cannot be believed.

22. I have careful gone through the complainant's evidence and also noted the Appellant's contention which is two-fold. The first aspect is on how the complainant narrated the ordeal and I find that there was consistency in the testimony throughout the examination-in-chief and cross-examination and that any contradictions therein, if any, are of a minute nature and do not occasion any failure of justice. Infact, not every form of contradiction goes to the root of the matter and for a party to benefit from any contradiction there must be evidence of failure of justice arising from such contradiction. Save the foregone, all other forms of contradiction are curable under **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya. The other aspect relates to the evidence of PW5 who testified that the report lodged at the Police Post was that the complainant was sent by PW2 to the market on 21/01/2018 at 2000 hours and not at 08:00am as stated by the complainant and PW2. According to PW5 he received the report at the station at around 1200 hours. It is therefore obvious and logical that PW5 could not have received the report at mid-day for events which had already occurred, but later that night. I attribute the error on the use of the 24-hour time-mode on the part of PW5 who was to instead note that the incident occurred at 08:00 am and not 08:00pm. To me it is an honest and unintended error. I say so because PW5 only received the report from the complainant and PW2 at midday and both confirmed that the incident occurred at 08:00am and not 08:00pm. Infact at the time PW5 received the report, 08:00pm was about 8 hours ahead. The error is likewise curable under **Section 382** of the **Criminal Procedure Code.**

23. Having settled the issue of contradictions in favour of the prosecution, I now return a finding that the trial court did not err in finding that the complainant is a truthful and credible witness and for believing her evidence. The court also complied with **Section 124** of the **Evidence Act**. Whereas the testimony of PW4 did not connect the Appellant with the commission of the offence as submitted by the Appellant, the same coupled with the testimony of the complainant went a long way into proving penetration. I therefore find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) On whether the Appellant was the perpetrator:

24. The issue of identification was also hotly contested. The Appellant contends that there was need for an identification parade to be conducted. There is no doubt that the Appellant is a neighbour to the complainant and PW2, he is a cobbler and owned a shop at Kogeyo market and as such well known to the complainant. In fact, PW2 stated that he stayed in a plot at the market where the Appellant also lived and carried on business. In that case there was no need of an identification parade. (See the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported).** The incident took place during the day and the complainant narrated what happened as well as who the culprit was. Since the complainant knew the Appellant well she even gave his name to PW2 and the police and also identified him in court. It has been severally held that giving the name of an assailant eradicates or largely minimizes chances of mistaken identity. (See the Court of Appeal in **Simiyu & Another vs. R. (2005) 1 KLR 192**, **R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR, Lesarau vs. R. (1988) KLR 783**, **Morris Gikundi Kamunde vs. Republic (2015) eKLR** among others). Further, the evidence did not have any indications that visibility was hindered as to impede recognition.

25. On the *alibi* defense, it was hotly contested that the trial court did not consider the same in its decision under appeal. I have carefully gone through the impugned judgement and noted that indeed the defence was considered. The Appellant stated that he was not at the scene of crime as he was in Church with DW2 and DW3 and that he left his home at 08:00am and returned at 04:00pm. Whereas DW3 stated that she was in Church at 09:30 am and saw the Appellant walk in, the Appellant stated that he passed PW2's homestead at 10:00am on his way to the church. On cross-examination DW3 stated that she did not know when the Appellant entered the church. According to PW2 and the complainant the ordeal took place between 08:00am and 10:00 am when PW2 saw the Appellant pass near PW2's homestead. It is therefore

not true that the Appellant was in church between 08:00am and 04:00pm since in his own words he was near PW2's homestead at 10:00am. It is however true that the Appellant may have gone to church thereafter. The Appellant was hence placed at the scene of crime.

26. On the foregone re-consideration of the *alibi* defence in light of the prosecution's case and I am equally satisfied that the Appellant's defence does not hold and the Appellant was properly placed at the scene of crime. I say so because the prosecution evidence is credible, believable and the record withstands the test of **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya.

27. As I come to end of this discussion I must also consider the fact that there is ample evidence that the Appellant escaped immediately the offence was committed. PW2 and PW5 so confirmed and I see no impediment which would have hindered the arrest of the Appellant had he been available. PW3 testified that an order of arrest was issued against the Appellant and in effecting it he had to liaise with informers who notified him the moment the Appellant resurfaced at a different location six months later. In fact even when PW3 and his colleague went to arrest the Appellant he again ran away and had to be chased and arrested in a sugar plantation. The said conduct does not augur well with an innocent citizen and is a clear manifestation of guilt.

28. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as such the identification of the Appellant as the aggressor was not in error. I now find and hold that the prosecution proved that it was the Appellant who sexually assaulted the complainant. The third ingredient of the offence of defilement is also answered in the affirmative.

29. The Appellant further raised the issue of the defectivity of the charge. He argued that the Appellant was charged under a non-existent **Section 8(1)(2)** of the **Sexual Offences Act**. It is true the said section of the law *stricto sensu* does not exist. A proper charge should have been drafted as *'Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act'***. However, the issue is now settled courtesy of the Court of Appeal in **Nyamai Musyoki vs. Republic (2014) eKLR** where the Court expressed itself thus: -

> ***In this case as was rightly pointed out by the Learned Judge, the Appellant was charged under Section 8(1)(3) of the Sexual Offences Act. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended to charge the appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply Section 382 CPC to cure the defect. In this case, we agree with the Learned Judge that the defect did not prejudice the appellant in any manner and the invocation of Section 382 CPC was proper in the circumstances.***

30. I must however state that the said decision was rendered way back in 2014 and it seems the prosecution is yet to curb the defectivity. Whereas the police prefer charges it is the Office of the Director of Public Prosecutions which approves and presents the charges before Courts. It is therefore upon the Office of the Director of Public Prosecutions to ensure that proper charges are preferred and presented. It is my hope that this form of defectivity in charge sheets, which is indeed prevalent, shall be arrested sooner than later.

31. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

32. On **sentence**, the Appellant was sentenced to the mandatory life sentence under **Section 8(2)** of the **Sexual Offences Act**. The record is clear on that. I have previously dealt with the mandatory nature of sentences in **Migori High Court Criminal Appeal No. 58 of 2018 Morris Odero Nyangoko versus Republic** (unreported) and since I am still of that considered position I herein below reiterate what I stated therein: -

> ***25. ……..The Sexual Offences Act No. 3 of 2006 is a pre-2010 statute and introduced a raft of mandatory, sole and/or minimum sentences in sexual offences. It is therefore one of those statutes which must be applied in light of the Constitution which was promulgated in 2010. The issue of mandatory and sole nature of sentences was well settled by the Supreme Court in the much celebrated case of Francis Muruatetu & Another -vs- Republic 2017 eKLR where the Court stated in part thus: -***
>
> > *…….On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.*
> >
> > *……..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 appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right." (emphasis added).*
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> ***26. Applying the foregone reasoning, the Court of Appeal in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR while considering an appeal against life sentence imposed under Section 8(2) of the Sexual Offences Act had the following to say: -***

> *….In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*
>
> *Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic(supra), 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.*

27. Section 8(1) and (2) of the Sexual Offences Act states as follows:

> ***8(1). ……..***
>
> ***(2) ……..***
>
> ***28. It therefore goes without say that the mandatory life sentence imposed by Section 8(2) of the Sexual Offences Act cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the Constitution contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by Section 8(2) of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing. The appeal on sentence is hereby allowed for the reason that the trial court stated that it had no discretion in sentencing in view of the mandatory nature of Section 8(2) of the Sexual Offences Act. The life sentence is hence set-aside.***
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> ***29. To enable this Court arrive at a fair and a balanced sentence I am of the very considered view that this is a case where a Pre-Sentence Report ought to be considered. Given the power of this Court to take additional evidence on appeal I hereby direct that a Pre-Sentence Report be filed for consideration.***

33. I have however been urged to distinguish the case of **Francis Muruatetu & Another -vs- Republic 2017 eKLR** as it dealt with capital offences unlike in this case. Whereas I understand the prosecution's position and the concern that offenders may escape with lighter sentences, the legal principles considered in the case of **Francis Muruatetu & Another** (supra) viewed in light of the doctrine of precedents are binding to all Courts and that is why the Court of Appeal in **Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR** impugned the mandatory life sentence imposed under **Section 8(2)** of the **Sexual Offences Act**. The twin decisions are binding on this Court. I must however say that Court's discretion in sentencing must be exercised judiciously and a Court must be alive to the gravity of various offences and how such offences affect various aspects of our country. In that balancing act, Courts must not shun from handing down appropriate sentences including death sentences and/or unconditional releases in appropriate cases even if that may attract public uproar.

34. Likewise, I allow the appeal on sentence. The sentence of life imprisonment is hereby set-aside and the Appellant shall be re-sentenced. To that end, a Pre-Sentence Report shall be availed for consideration and sentencing on 02/10/2019. The Appellant shall also tender his mitigations then.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 19th day of September 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Oduk, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant