REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 162 B OF 2018

JKO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(being an appeal from the judgment delivered by Hon. J.N Maragia, Resident Magistrate on 18th October,2018 in Kakamega Criminal Case No. 110 of 2016)

JUDGMENT

1. **JKO** the appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars were that the appellant on the 16th day of September, 2016 in Kakanega central district within Kakamega county, intentionally and unlawfully caused his penis to penetrate the vagina of BS a child aged 15 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(a) of the Sexual offences Act No. 3 of 2006. The particulars being that the appellant on the 16th day of September,2016 in Kakamega central district within Kakamega county intentionally and unlawfully caused his penis to come into contract with the vagina of BS a child aged 15 years.

2. He pleaded not guilty to both counts and the case proceeded to a full trial, after which he was found guilty and convicted on the principal count. He was sentenced to serve twenty years imprisonment.

3. Being dissatisfied with the judgment he filed this appeal raising(the following grounds.

> ***a.*** *THAT he was not accorded a fair trial as the trial court failed to observe that his right under article 50(2)(h) of the Constitution was infringed*
>
> ***b.*** *THAT the trial court erred in law and facts by basing his conviction on flimsy and doubtful evidence which ought not to have been relied upon to achieve conviction*
>
> ***c.*** *THAT the trial court erred in law and facts by shifting the burden of proof to his side in light of the inconsistencies and contradictions of the prosecution witnesses*
>
> ***d.*** *THAT the trial court erred in law an facts by not considering the present case was not fully investigated and if any investigations were done then it was shoddy*
>
> ***e.*** *THAT the trial magistrate erred in law and facts by basing his conviction and sentence on circumstantial evidence*
>
> ***f.*** *THAT the trial magistrate erred in law and facts by convicting and sentencing him without considering that the medical evidence adduced in court did not link him to the said offence.*

4. A summary of the prosecution case is that the complainant BA who testified as (PW1) is a daughter of the appellant. She testified on 28/3/18 while on oath and stated that she was born on 21st November, 2001. She recalled that on 16th September, 2016 she arrived home from school at 10 am and found the appellant at home. He was the only one present then. He asked her to give him drinking water which she did and proceeded to her bedroom to change her clothes.

5. The appellant followed her to the room and sat there. He told her he wanted to know if she had slept with a man. At that time she was in

her petticoat and panty. He inserted his fingers into her vagina. He proceeded to pull down her half petticoat and pant. He over powered her and continued to insert his fingers.

6. Thereafter he unzipped his black trousers, removed his penis which he inserted into her vagina. When her step mother came she reported the matter to her and promised to ask him.She returned to school on 19th September, 2016. She later fell ill and on 25th September, 2016 and she was taken to Kakamega County Referral Hospital. She identified the hospital documents(EXB 1a, b, and c, 2 and 3).

7. PW2 **IS** is a maternal uncle to PW1. He is the one who was called by the school ([particulars withheld]) and asked to take PW1 to hospital. It was then that he learnt that the girl had been defiled by the father. He reported the matter at Kakamega police station where a P3 form (EXB3) was issued.

8. PW3 **Patrick Mambili** a Clinical Officer examined PW1 and also used the treatment documents to assess PW1. She confided in him that she had been defiled three times by the father. His finding was that the child had beensexually penetrated .She even had an infection. He produced the lab form (EXB 1), Prescription Form(EXB 1a). PRC – (EXB2), P3 Form (EXB3). He examined her on 29th September, 2016.

9. PW4 **No. 9640005 P.C Sarah Andega**of Kakamega Police Station is the Investigating officer. She confirmed that the confirmed that the, station received PW1's report on 27th September, 2016 vide OB 34. The girl had been sent home for school fees. She produced PW1's birth certificate (EXB 3).

10. The appellant when placed on his defence elected to give a sworn statement. He testified that PW1 was his first born child and her mother died in 2001. She was 12 years of age at the time of incident. PW1 was in school and he was paying her fees. He said he had given his contact to be called by the school incase of anything. He denied the charge. He stated that he has had dispute with his inlaws since PW1'S mother was buried there. His current wife is EA.

11. The appellant argued this appeal vide the written submissions. He submitted that defilement as not proved since PW1 was examined two (2) weeks after the alleged incident. That the doctor's report did not support PW1's claims, since there were no bruises on her vagina, hence no penetration.

12. He further submitted that Article 50(2)(h) of the constitution was violated since he was not given court proceedings to enable him prepare for his defence. He also contents that the case was not properly investigated since PW4 did not take any photos to clarify his investigations. He never called an independent witness and no DNA was undertaken.

13. He further submitted that there were contradictions and inconsistencies in the evidence.He cited the issue of date of incident and the date on treatment form showing 29th September, 2016, plus date of examination shown as 16th September, 2016.

Finally he submitted that there wasn't sufficient evidence to support a conviction.

14. In his response learned counsel Mr. Mwaura opposed the appeal on the ground that the prosecution presented sufficient evidence to support its case. He did not however understand why he had been charged with defilement instead of incest. To him this was an error on face of the record and did not cause any injustice.

15. He submitted that the appellant is PW1's father and the girl was clear on what the appellant did to her, at 10 am. This he said was supported by the medical evidence.

16. In a rejoinder the appellant wonderedwhy it had taken so long for him to be arrested.

17. This is the first appellate court and as such it is guided by the principles set out in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

> *"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

18. In a much earlier decision, the Court of Appeal similarly held in **Okeno vs. Republic [1972] EA 32** that:

> *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(Pandya vs. Republic (1957) EA. (336)*** *and the appellate court's own decision on the evidence.*
>
> *The first appellate court must itself weigh conflicting evidence and draw its own conclusion****.(Shantilal M. Ruwala Vs. R. (1957) EA. 570)****. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see* ***Peters vs. Sunday Post [1958] E.A 424****."*

19. I have considered the evidence on record, grounds of appeal and submissions and find the following to be the issues for determination:

a) Whether the appellant's rights under Article 50(2)(h) of the Constitution were violated

b) Whether BAS's age was proved.

c) Whether there was unlawful penetration of the vagina of BAS

d) Whether the appellant was positively and properly identified.

Issue no(a)Whether the appellant's rights under Article 50(2)(h) of the Constitution were violated.

20. The appellant submitted that he was not served with court proceedings to allow him have ample time for preparing his submissions for the defence hence a miscarriage of justice and in contravention of Article 50(2)(h)

21.The said provision of the Constitution provides that:

"50.Fair hearing

(1)…….

(2) Every accused person has the right to a fair trial, which includes the right—

……

(h)to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly"

22.I do believe that the appellant must have been referring to Article 50(2) (j) which provides that:

"….to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

Even if that was the case, it is clear that the aforementioned constitutional provision refers to evidence the respondent intended to rely on and not the court proceedings of the trial court. I do not see how the appellant's rights under Article 50(2)(j) were violated in any way, and I find this ground lacking in merit and the same is dismissed.

Issue no. (b)Whether B.A.S's age was proved

23.One of the ingredients necessary to satisfy the charge of defilement is determination of the victim's age. This is all set out under the provisions of section 8 of the Sexual Offences Act.

24.In the case of **Martin OkelloAlogo v Republic [2018] eKLR** this Court stated that

"On the issue of whether the age of the Complainant was proved, the importance of proving the age of a victim of defilement under Sexual Offences Act by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See ***AlfayoGombeOkelloVs. R. Cr. Appl. No. 203 of 2009 (KSM)*** *where the Court of Appeal stated:*

"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt.That must be so because dire consequences flow from proof of the office under Section 8 (1) …"

25.PC Sarah Andega testified as PW4 and produced **BAS's** birth certificate as *PExhibit3* which indicated that BAS was born on 3rd July 2001. The birth certificate provided the best evidence as to the age of **BAS** which was around 15 years at the material date and thus unlawful sexual activity with her fell within the ambit of 'Defilement' under Section 8(1) and the punishment within Section 8(3) of the *Sexual Offences Act, 2006* . I therefore find that age was proved, and that PW1 was a child.

Issue no (c) Whether there was unlawful penetration of the vagina of B.A.S.

26. Another ingredient necessary to prove the charge of the defilement is the fact of penetration.

The Sexual Offences Act, No 3 of 2006 defines**"penetration"** as

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

The Court of Appeal, in the case of **Sahali Omar v Republic [2017] eKLR**, held that:

> *"…penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act*

27.PW1(BAS) explained in detail what happened to her on 16th September,2016 when she arrived home from school and found the appellant there. He was the only one at home. It is on record that the mother to PW1 died long before this incident and the appellant had remarried. It was her testimony that when her step mother came home she reported to her what the appellant had done, and the lady promised to ask him. It is obvious that she did not. PW1 returned to school on 19tth September,2016.

28. She fell sick while in school and her uncle (PW2) was called by the school. It's while at the hospital that she confided in the medical personnel what had befallen her. PW3 the Clinical officer testified that the treatment and examination of PW1 revealed that she had the following: whitish discharge, pain while passing urine, hymen not intact, pus cells (indication of infection)(EXB1,2,3). PW3 confirmed that the child had been sexually penetrated.

29.PW4 the investigating officer confirmed that the report at the station was that PW1 had been defiled by her father who is the appellant. It is also common knowledge that P3 forms are filled after a report has been made and after treatment. It follows that the date of treatment and filling of a P3 form cannot be the same. In this case the incident occurred on 16/9/16, treatment was on 26/9/16 and examination and filling of P3 form was on 29/9/16. The appellant has submitted that a DNA ought to have been conducted on him. Section 36(1) Sexual Offences Act provides:-

> "(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 conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence".***

30. The wording here is coached in discretionary terms. See court of Appeal case of **Robert MutingiMumbi V R. Cr. Appeal No. 52 of 2014(Malindi)**. There were no fluids or spermatozoa found on PW1 since she was examined two weeks after the incident. There was therefore nothing to for the basis of a DNA test.

> **Issue no (d) whether the appellant was positively and properly identified.**

31.BAS stated that the appellant is her father, a fact the appellant also admitted in his defence testimony. BAS's testimony was also corroborated by that of PW2 who stated that he is a brother-in-law to the appellant i.e a brother to PW1's deceased mother. This incident occurred in broad daylight and at the home of the appellant in his own house and in PW1's bedroom. Did PW1's evidence require corroboration by an eye witness?

Section 124 of the Evidence Act Cap 80 Law of Kenya provides:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

32. The learned trial magistrate who saw and heard PW1 believed her. In her Judgment at page 24 lines 6-9 of the record of appeal she states:-

> ***"From PW1's testimony, it is clear that there was penetration of her genitalia. At first, her father used his fingers then later inserted his penis into her vagina. She was very sincere in her testimony. She testified with the innocence of a child."***

As an appeal court I have no reason whatsoever to interfere with this finding, by the trial court, as I did not hear or see PW1 testify.

33. The appellant in his defence said his in-laws PW2 included were harassing him for dowry hence the fabrication of these charges. This cannot be far from the truth. Had that been the case the inlaws would not have allowed him to stay with PW1. His lawyer never put the questions of fabricationto PW1. At the time of incident PW1 was aged 15 years and so was not a tiny child who could be persuaded to lie against her father who was taking care of her.

I am therefore satisfied that the prosecution proved beyond reasonable doubt that PW1 was defiled and the defiler was none other than the appellant who is her father.

34.As I conclude I would wish to point out that a relationship of father and daughter having been established between the appellant and Pw1, a charge of incest ought to have been preferred against the appellant instead of defilement. The sentence for incest with a minor is upto life imprisonment under section 20(1) of the Sexual offences Act. Since the State did not raise the issue I will leave it at that. In both defilement and incest the common denominator is penetration of the female genitalia which has already been proved.

35.From the foregoing I find no reason to make me interfere with the trial courts findings or conviction which I uphold.

36.On sentencing I note that section 8(3) of the Sexual Offences Act provides:

> **"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".**
>
> Upon conviction by the trial court, the appellant was given an opportunity to mitigate. This was his response:
>
> " **I have nothing to say in mitigation**"

The learned prosecuting counsel M/s Kibet confirmed to the trial court that the appellant was a first offender.

37.I have considered all this in line with the Supreme Court decision in **Francis KaviokoMurualetu& Another Vs Republic SO Petition No. 16 of 2015(2017) eKLR** on discretion in sentencing and mandatory sentences.

38.Recently the Courtof Appeal in the case of **Evans WanjalaWanyonyi V R(2019) KLR** 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 V R (2018) eKLR Kisumu Cr. Appeal NO. 202 of 2011*** *and in* ***Jared KoitaInjiri V R Kisumu Cr. 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 KavuokoMurualetu and Another V R SO petition No. 160 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 confirm to the tenets of fair trial that accrue to the accused person under Article 25 of the constitution."*

39. Duly guided by the above holdings by the Supreme Court of Kenya and the Court of Appeal I have to decide whether the minimum mandatory sentence meted out on the appellant should stand. I have considered the fact that the appellant is the father to PW1 who lost her mother while still very young. She will live to remember the father's shameful act against her innocence as a child. He betrayed her trust. All said and done he remains PW1's father.

40. I will exercise discretion over the matter and set aside the 20 years term of imprisonment and substitute it with a 15 years term of imprisonment from the date of sentence by the trial court on 18th October, 2018.

41. The upshot is that the appeal partially succeeds.

i. The conviction is upheld.

ii. Sentence reduced to 15 years imprisonment from 18th October, 2018 the date of sentence by the trial court.

Orders accordingly

Delivered signed and dated this 12th day of September, 2019 in open court at Kakamega.

H.I. ONG'UDI

JUDGE