REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 38 OF 2019

STEPHEN KAMAU GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Gatundu Senior Principal Magistrate's Court***

Criminal Case (S.O.) No. 22 of 2017** by **Hon. L. M. Wachira (SPM)** on **27/04/18)

J U D G M E N T

1. **Stephen Kamau Gitau,** the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **8(4)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between the month of **July, 2017** and **18th September, 2017** in **Gatundu South Sub-County** within **Kiambu County,** intentionally and unlawfully did an act which caused penetration with his genital organs namely penis into the genital organs namely vagina of **EWN** a child aged **17 years old.**

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between the month of **July, 2017** and **18th September, 2017** in **Gatundu South Sub-County** within **Kiambu County,** intentionally and unlawfully touched the vagina and buttocks of **EWN** a child aged **17 years old** with his hands.

3. Having been taken through full trial, he was convicted of the main count and sentenced to twenty-five (25) years imprisonment.

4. Aggrieved, he appeals on grounds that; The charge sheet was defective; penetration, a key ingredient of the offence, by the Appellant was not proved; **Section 77** of the **Evidence Act** was not adhered to; there were explicit inconsistencies and contradictions in evidence tendered which went to the root of the case; the defence put up was cogent which exonerated the Appellant from any wrong doing; and the sentence meted out was excessive as it did not appreciate the need of both the integration and rehabilitation of the Appellant.

5. Facts of the case were that on the **18th September, 2017,** PW2 **James Muthaiga Ngomo,** the Deputy Headmaster **[Particulars Withheld] Primary School** got a report that PW1, **EWN** was unwell. Following his instructions, she was taken to the library. He went and confirmed that she had fainted. This was not the first time she was barely perceptible. He notified her stepfather, the Appellant herein who went to school and took her home at about **11.00 a.m.** Upon arrival she had fully regained her consciousness. She decided to wipe her shoes, but the Appellant asked her to take some water to him. He seized the opportunity to take her to the bedroom where he violated her sexually and told her not to tell anybody. The following day the Appellant went to the school rang PW2 and requested to hand over a book to the Complainant that she had allegedly left at home. Permission was granted to PW1 to see him and he gave her **Kshs. 50/=,** four buns and a book to take to her brother.

6. On the **20th September, 2017,** PW4 **Evangeline Njoki Munyi,** the sister-in-law of the Appellant saw him passing going towards the school. All over a sudden she saw the Complainant and sought to know why she was not in school. She explained that she had been called by her mother. When she engaged her further she explained that her stepfather (Appellant) was molesting her. She informed her husband and the Complainant's mother. The Complainant was taken to hospital for examination and treatment. The family sought to resolve the matter at home. Some members disagreed, and reported the matter to the police. Investigations were carried out that culminated into the arrest of the Appellant who was subsequently charged.

7. Upon being put on his defence the Appellant denied the allegations. He urged that PW4 masterminded the allegations with an intention of taking away his land to dispose it off. That PW2 colluded with PW4 to bring him down so that he would not be successful in life.

8. The Appellant canvassed the Appeal by way of written submissions. It was urged that the Appellant should have been charged with incest as he was the Complainant's half father having married her mother and in the same vein the Court should have considered meting out the minimum sentence to afford the Appellant the opportunity to rehabilitate and reunite with his family.

9. Secondly, that penetration by the Appellant was not proved. That per the allegations of the Complainant it was not the first time the Appellant was sexually assaulting her therefore it was not possible that there were lacerations on the vulva. That the evidence of PW7 Dr. Nyairo Daran, that she was examined 72 hours later was proof that the alleged existence of injuries was evidence of fabrication.

10. It was contended further, that the medical report was adduced in evidence without adherence to statutory safeguard. In as much as the Appellant did not dispute the production of the PRC form, he contended that no compelling reasons were shown as to why the attendance of the medical officer who prepared the treatment notes was not procured. That the Prosecution took advantage of ignorance of the Appellant and adduced evidence without seeking his consent and the trial Court failed to ensure that the laid down procedure was complied with.

11. He pointed out inconsistencies in evidence adduced by PW1 and PW2 in respect of whether PW1 left school when he (Appellant) was called to school after PW1 got epileptic seizure or when he purportedly took to her **Kshs. 50/=,** buns and a book and whether PW4 was indeed told that the Appellant would go to school and tell PW1 that she was being called by her mother. That failure to reconcile the contradictions was prejudicial to the Appellant.

12. He urged that the fact of having been implicated was disregarded and the sentence meted out was excessive in the circumstances.

13. The State/Respondent through learned Counsel, **Ms. Muthoni** opposed the Appeal. She urged that the charge was not defective as the Appellant was a stepfather who had lived with the Complainant for just one (1) year. That penetration was proved by PW1 as well as medical evidence adduced by PW7. On identification of the perpetrator of the act, she argued that the victim was seventeen (17) years old therefore was not mistaken as to her assailant.

14. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

15. At the outset the Appellant was charged with incest where the Complainant was indicated as his daughter. When it turned out that the Appellant was the Complainant's stepfather the charge was amended to one of defilement. **Section 20(1)** of the **Sexual Offences Act** provides thus:

> ***"(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***
>
> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

The test of relationship is stipulated in **Section 22** of the **Sexual Offences Act** that provides as follows:

> ***"(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.***
>
> ***(2) In this Act—***
>
> ***(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;***
>
> ***(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;***
>
> ***(c) "half-brother" means a brother who shares only one parent with another;***
>
> ***(d) "half-sister" means a sister who shares only one parent with another; and***
>
> ***(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning."***

The charge having been amended and the information given having been that the Appellant was a husband of the Complainant's mother the Prosecution gave the definition of stepfather a literal meaning and found that it did not disclose what is envisaged by **Section 22** of the **Sexual Offences Act** hence charged the Appellant with the offence of defilement. The question to be posed is whether the Appellant was prejudiced in that respect?

16. In the case of **FOD vs. Republic (2014) eKLR Majanja, J.** had this to state:

> ***"15. In order to secure a conviction for the offence of defilement under section 8(1) of the Sexual Offences Act, the prosecution***

must establish that the person has committed an act which causes 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."

16. While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest. It is clear that the appellant was the step-father of PW 1 and as such fell into the categories of prohibited relationships in section 22 of the Sexual Offences Act.

18. Although there was no reason to substitute the charge, I do not find any prejudice occasioned to the appellant in this case."

17. I am persuaded by the decision aforestated and I am also of the view that in the instant case the Appellant was not prejudiced. Therefore, the charge was not defective.

18. As correctly submitted, in the case of **Fappyton Mutuku Ngui vs. Republic Criminal Appeal No. 296 of 2010** it was stated that the Prosecution needed to prove:

(i) Penetration of the Complainant's genitalia.

(ii) The age of the Complainant; and

(iii) Positive identification of the perpetrator of the act.

19. The Prosecution adduced in evidence a Birth Certificate issued to the Complainant. It is indicated she was born on **4th June, 2000.** This was proof that she was seventeen (17) years old at the time of the incident. Her age is also not in dispute.

20. On the fact of penetration, she was examined and treated at **Gatundu Hospital** on the **22nd September, 2017.** Subsequently, a medical examination report (P3) was filled by **Dr. Omol.** According to the findings the external genitalia was normal. But her hymen was broken and she had lacerations on the vulva. The area was reddened and swollen. These injuries were four (4) days old at the point of examination.

21. The medical document was adduced in evidence by PW7 **Dr. Nyairo Davan.** It is the contention of the Appellant that no proper basis was laid prior to the document being produced in evidence. And that the Court was of no help since it did not seek his consent prior to the document being adduced in evidence.

22. A medical document is admissible if produced under **Section 33** or **Section 77** of the **Evidence Act.** No Application was made to indicate under what provision of law the document was to be produced. It was not clear whether or not the Court allowed production of the document having presumed its genuineness as envisaged by **Section 77** of the **Evidence Act** that provides thus:

"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

And if the author of the document was unwell such that he could not be availed to testify as stipulated in **Section 33** of the **Evidence Act** that provides thus:

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose

attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) ……

(b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

(c) ……..''

A proper basis should have been laid.

23. However, it should not be forgotten that medical evidence in defilement cases is not mandatory. In the case of **George Kioji vs. Republic (Nyeri) Criminal Appeal No. 270 of 2012 (UR)** it was stated that:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

In **Kassim Ali vs. Republic Criminal Appeal No. 84 of 2005 (MSA)** it was stated that:

> ***"… (The) Absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

24. Circumstantial evidence tends to prove the fact in issue by proving other events or circumstances which establish a reasonable inference of the occurrence of the fact in issue.

25. The Complainant stated that she had seizure on the **18th September, 2017** when the Appellant was called. He took her home and took advantage of her by having sexual intercourse with her. This, according to her was not the first time he had sex with her. She alluded to a time in the month of **July, 2017** when he did it after he sent her brother and sister away from home. On cross examination she stated that she did not scream because he threatened to stab her with five (5) knives.

26. PW6, **PM** the brother of the Complainant learnt from her that the Appellant was defiling her. She also confided in PW4 after she asked her why she was not in school. PW5 **Esther Nduta** was reluctant to testify. She told the Court that the whole issue was tearing apart her family. She wanted the matter resolved at home for fear of her husband being jailed yet he was the sole breadwinner.

27. It was argued by the Appellant that his relatives had colluded with his wife to have him brought down. He also accused PW2 as one of the persons who wanted him out of the way. PW5 testified but no such allegation was brought up. He had no question to put to PW2. When PW4 testified, on cross examination she said that she did confront the Appellant over the allegation that the Complainant was sleeping with young men.

28. The trial Magistrate appreciated the fact that on the material date the minor was at home after the Appellant collected her from school therefore the Appellant had the opportunity of committing the act complained of. She had the opportunity of observing the minor and believed her.

29. Evidence on record does not support the allegation of the Appellant having been framed. In any case as correctly found by the Court, the Complainant's mother was keen on protecting the Appellant for reasons given.

30. Therefore, there was no misdirection on the part of the Court in reaching the decision to convict the Appellant which I hereby affirm.

31. On sentence, I have been called upon to consider the Supreme Court case of **Francis Muruatetu & Another, Petition No. 15 of 2016** which declared the mandatory nature of death sentence unconstitutional which has been interpreted to extend to the minimum mandatory sentences under the **Sexual Offences Act by the Court of Appeal.**

32. In the case cited of **Evans Wanjala Wanyonyi vs. Republic (2019) eKLR** the Court of Appeal stated thus:

> ***"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 – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal 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 Karioko Muruatetu & another – v- Republic SC Petition No. 16 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 conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
>
> ***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.***
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> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of***

imprisonment for a term of ten (10) years."

33. I have considered the authorities cited and circumstances in which the offence was committed. In the premises I do set aside the sentence meted out and substitute it with a sentence of **fifteen (15) years imprisonment.** To be effective from the date of conviction and sentence by the trial Court.

34. It is so ordered.

Dated, Signed and **Delivered** at **Kiambu** this **12th day** of **September, 2019.**

L. N. MUTENDE

JUDGE