REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 326 OF 2013

BENARD GATHENJI NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. Amwayi R. delivered on the 3rd of December 2013 in NAKURU CM Criminal Case No. 190 of 2011in Republic v Benard Gathenji Ndungu.)*

JUDGMENT

1. The Appellant was charged with the offence of **defilement** contrary to **Section 8 (2)** of the **Sexual Offences Act No. 3** of **2006**. The particulars of the offence are that, on the 7th of September 2013 in Njoro District in Nakuru County the appellant intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ of **TA** a child aged 8 years which caused penetration.

2. The appellant was also charged the offence of **indecent Act** with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the Charge sheet were that on the 7th of September 2013 in Njoro District in Nakuru County intentionally and unlawfully committed an indecent act by touching the private parts namely vagina of **TA** a child aged 8 years.

3. The matter came up for hearing on 27th November 2013. After the complainant was examined in chief, the appellant did not ask any question and instead asked to retake plea. The charge was read to him and in response he said in Kiswahili: "*ni kweli*" meaning it is true. Plea of guilty was entered and facts read to the appellant in detail. He responded that the facts were correct. Upon the response, he was convicted on his own plea of guilty. The prosecutor said the appellant was a first offender. He was given opportunity to mitigate. He stated that his family relied on him, that he was not married and asked for leniency.

4. After mitigation, the trial magistrate noted that the offence carries a life sentence and deferred to 3rd December 2013 for sentencing to give time to the appellant to think whether to change plea or not.

5. On 3rd December 2013, the appellant was reminded that he had pleaded guilty to the charge and asked if he wishes to retake plea or not. He responded to the negative and said he still admitted the charge. The trial magistrate recorded that she had considered appellant's mitigation and sentenced him to life imprisonment.

6. The Appellant being dissatisfied with the conviction and sentence filed this appealed on the following grounds:-

i. The Learned Trial Magistrate erred in law and in fact by relying on the wrong principles in law thus giving an excessive and harsh sentence, which was against the spirit of sentencing and purpose of correction. It was an error to pass a sentence without considering the Appellant's mitigation as clearly stipulated under article 329 of the CPC.

ii. The Learned Trial Magistrate erred in law and fact by convicting the Appellant on evidence of PW 1 but failed to note that her age was not conclusively proved in evidence

iii. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant but failed to note that, penetration was not conclusively proved as against the Appellant, it was a misdirection to find that the evidence of the Doctor (PW 3, Daniel) was not corroborating the documentary evidence (P 3 forms) produced and yet held that PW 1's evidence was corroborating by PW 3's evidence. This was an error in law

iv. The Learned Trial Magistrate erred in law and fact by disregarding the Appellant's plea made on the 9th of September 2013 that "I only understand kikuyu" which overturned the whole prosecution evidence case at the end of the prosecution case.

7. The Appellant submitted that the charge was unsafe and a nullity since it did not contain the necessary information as to the nature of the charge as required in **Section 134** of the **Criminal Procedure Code** instead it contained the punishment for the charge. He further states that is the law required that in a charge of defilement is under Section 8 (1) as read together with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

8. Further, in the Alternative count the omission of the word "without consent" in the particulars of the charge sheet also facilitated defectiveness of the charge sheet. He cited the case of **Sigilai V Republic [2004] eKLR 480** where the court held as follows:-

> **"The Accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the Accused may be able to prepare his defence**"

9. The Appellant further stated that the defect occurred during the commencement of the trial. The charge sheet ought to have been amended, this was not done.

10. In respect to the second ground, the Appellant submitted that **Article 50 (1) (2) (m)** gives the accused person a right to benefit from at least severe of the prescribed punishment for an offence, if convicted to appeal to or apply for review by a higher court as prescribed by law. He states that the sentence of life imprisonment was harsh. By awarding the life imprisonment, the Hon. Court used its discretion unfairly; that the Trial Magistrate did not consider the Appellant's mitigation at all.

11. Further that plea taking was infringed as per the law as the Appellant stated that he only understood Kikuyu.

12. Thirdly, Appellant submitted that no age assessment was done to ascertain the age of the minor. He cited authorities where the courts held that age of the complainant is crucial.

13. Appellant further submitted that the prosecution failed to avail expert witnesses to testify and therefore failed to prove this case beyond reasonable doubt. He concludes that the appeal should be allowed, conviction quashed, sentence set aside and the Appellant set free. The Appellant further states that the sentence of life imprisonment be reduced and the Appellant be given a favourable sentence under the Sexual Offences Act No. 3 of 2006 Section 11 (1).

14. Respondent opposed the appeal on both conviction and sentence. On being coached to plead guilty; the respondent submitted that the lower court file shows that the Appellant was warned of the plea of guilty because it came with a life imprisonment.

15. .In the lower court, general out patient record card from the Rare Health Centre dated 8th of September 2013, PRC form dated 9th of September 2013, this showed there was redness on the vagina, broken hymen and bruises. No spermatozoa or yeast cell. The P3 form showed soiled white pant and dirty navy blue dress**;** broken hymen, hyperemic introitus and bruises.

ANALYSIS AND DETERMINATION

16. IK have perused the lower court record I find the following as issues for determination

i. Whether the charge was defective

ii. Whether plea was unequivocal

17. On defective charge sheet, the appellant submitted that the words without consent were omitted. This is an offence of defence meant of a girl aged 8 years. Even if the consent of a child aged below 18 years was sought, it still would have been an offence. Use of words without consent is applicable in respect to offence of rape not defilement. On that ground, the charge is not therefore defective.

18. **Was the plea unequivocal?**

From the lower court record, the following are evident. On the 12th of September 2013 it was noted that the accused understood Kiswahili. He respondent to the charge in Kiswahili by saying '*si kweli*.'

19. On allegation that name of interpreter was not given, however from the proceedings in the lower court the name of the interpreter was always indicated.

20. On the issue that the Trial Magistrate failed to explain the nature and consequence of the charge, respondent submitted that the record is clear. That facts were read on the 27th of November 2013 and he was given time till 3rd of December 2013 to make up his mind on whether to plead guilty. On the 3rd of December 2013, the court explained that he had pleaded guilty if he wanted to retake the plea. The Appellants stated that he had nothing to respond.

21. On the 27th day of November 2013 the Accused stated that he would proceed in Kiswahili and court recorded that the Accused understood Kiswahili. During the testimony of the Complainant, the Accused chose not to cross examine the Complainant and opted to retake the plea where the charge was read in Kiswahili and he replied that (*ni kweli*) it was true and a plea of guilty was entered.

22. On being asked whether the facts read to him were correct, the appellant confirmed that they were correct. In mitigation, he stated that his mother was old and depended on him.

23. The Court noted that the offence carried a life sentence and directed to have the case mentioned on 3rd December 2013 for the Accused to think about whether to change the plea. On the 3rd of December 2013, the Accused upon being asked if he wished to retake the plea stated that he still admitted the charge as read on the 27th of November 2013.

24. From the above it is quite clear that the appellant understood the charge and its full particulars and that he knew what he was pleading. He had time to think over the charge and particulars read told him. He was informed of the sentence that was likely to be imposed against him if he maintained the plea of guilty. The plea was therefore unequivocal.

25. From the foregoing, I see no merit in the appeal on conviction. I now wish to consider the issue of sentence. Whether this court should interfere with sentence imposed. In the case of Francis **Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015** the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by **section 204** of the **Penal Code** was unconstitutional. The Court stated as follows:-

> **"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 that 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, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."**

26. In the case of **Christopher Ochieng v Republic [2018] eKLR** while the Court of Appeal was agreeing with the supreme court in **Muruatetu** cited above case stated as follows:-

> **"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."**

27. The appellant herein was sentenced to life imprisonment for defiling a child aged aged 8 years. Section 8 (2) provide that a person found guilty of defiling a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life. Record show that the appellant was a first offender. In his mitigation, he asked for leniency and stated that his family depends on him and that he is not married.

28. I am guided by the decision of the above Supreme Court decision and Court of Appeal decision in respect to sentencing and I do agree that the court should have the discretion to consider the circumstance of the offence and mitigating factors by the convicted person in arriving at an appropriate sentence to impose. Having considered appellants mitigation on record. I am inclined to reduce the sentence to 20 years imprisonment

29. **FINAL ORDERS**

1. Appeal on conviction is hereby dismissed.

2. Sentence reduced to 20 years imprisonment

Judgment dated, signed and delivered at Nakuru this 9th day of October, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Appellant in person

Chigiti for State