REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 260 OF 2013

JAMES KIMANI GATHURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment in S. O. No. 594 of 2011 at Kigumo by B. Khaemba, Ag. Senior Resident Magistrate, on 15th February 2013]

JUDGMENT

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) of the **Sexual Offences Act**. He was sentenced to *life* imprisonment.

2. The charge read that on the 29th day of May 2011 at K. Market *[particulars withheld]* in Murang'a County he "intentionally and unlawfully caused his penis to penetrate the vagina of MWN [particulars withheld] a child aged 5 ½ years."

3. The appellant has lodged a *petition of appeal*. On 26th June 2018, I granted him leave to *amend* the grounds of appeal.

4. There are five *amended grounds* of appeal. Firstly, that the appellant was not positively identified; secondly, that the *voir dire* examination was improperly conducted; thirdly, that crucial exhibits were not produced at the trial; fourthly, that the evidence of PW1 and PW3 was contradictory; and, fifthly, that the charge was *not* proved beyond reasonable doubt.

5. At the hearing of this appeal on 24th July 2019, the appellant relied wholly on his written submissions.

6. The appeal is contested by the State. Learned State Counsel, *Mr. Mutinda*, submitted that all the ingredients of the offence were proved to the required standard. He submitted that penetration was proved; that the age of the victim was established; that the complainant knew the appellant; and, that PW3 witnessed the incident.

7. He submitted further that that the defence tendered was a sham; and, that the punishment meted out was the minimum sentence. I was implored to dismiss the appeal.

8. This is a *first appeal* to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.

9. I will deal first with ground 2 of the amended grounds. The complainant (PW1) and one witness (PW3) were minors. The trial court carried out a *voire dire* examination. The record does not contain the *questions* by the court but it has elaborate answers by both minors. Ideally, both the questions and answers should be put on the record. I do not think the deviation was material or that it prejudiced the appellant. The learned trial magistrate formed the opinion that the minors were intelligent and understood the nature of an *oath*. The both testified under oath.

10. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath; and, the need to tell the truth. I am satisfied that the trial court largely complied with the procedure of taking the evidence. ***Republic v Peter Kiriga Kiune*** Criminal Appeal 77 of 1982 (unreported), ***Johnson Muiruri v Republic*** [1983] KLR 445.

11. I will now turn to the issue of identification. The appellant and complainant were *not* strangers The offence took place in broad daylight. The complainant was on her way to church when the appellant led her to some bushes and defiled her. She knew the complainant by name.

She testified as follows:

> I went to my mother and reported to her what had happened. I told her it was Kimani who did so.

12. PW2 was the victim's mother. She said she noted that her clothes were blood-stained; and that when she told her what had happened, she (PW2) fainted. PW2 did not in her evidence in chief mention Kimani's name. But under cross examination, she said that the complainant pointed out the appellant as the person who defiled her.

13. But that was not all. PW3 saw the appellant leading the victim into the bushes and removing her clothes. She knew the appellant. She said:

> I passed through a nearby bush and saw John Kimani holding M.W. [particulars withheld]. He led her to the bush and removed her clothes. I rushed and went and told my grandmother Rachel Wangui what I had seen. I went to her place. You first pass her home before going to our home. We went there and we found Mary lying on the ground. Kimani was by then leaving that place. My grandmother told me to go and call Mary's mother. I did so. Her mother went and took Mary to hospital. I knew Kimani before then. He used to carry people's load [sic] at K. [particulars withheld]

14. From the combination of the evidence of those three witnesses, I am left in no doubt that the appellant was positively identified as the person who led the victim into the bushes and defiled her.

15. Was penetration proved? *Penetration* is defined in section 2 of the **Sexual Offences Act** as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

16. The evidence of the victim was quite graphic on that point. Like I stated, she was on her way to church. She saw a shilling on the road. When she tried to pick it up a man appeared and asked her to follow him so that he could buy her something. It was a ruse; he instead led her into the bushes and defiled her. PW1 testified as follows:

> I followed him. We went up to the nappier [sic] grass. He then removed my clothes. He also removed his clothes. I was bleeding from my private parts. His private part was big. I was bleeding from the place where I urinate from. He put his private part, that which he uses to urinate and put it in my place where I use to urinate. He closed my mouth so that I could not scream. He then left me. I went to my mother and reported to her what had happened. I told her it was Kimani who did so.

17. This was corroborated by her mother (PW2) who noted that her dress had blood stains; and, by the clinical officer, Joseph Mathenge (PW5). He said her inner clothes had dust and blood stains. He stated further:

> She was under a lot of pain. She was examined and the perineum area was torn and also the hymen around the anus. There was fresh blood coming from the vagina. The tests were done at Nairobi Women Hospital.

18. From the graphic evidence of the complainant; the P3 Form; and the medical evidence of PW5, I find that there was *full* vaginal penetration.

19. When the appellant was placed on his defence he claimed that he was framed up. His brief statement went as follows:

> I am from K. [particulars withheld] I was working as a loader at K. [particulars withheld]. The charges were framed [sic] against me. There is no truth. Police came and found me at K. market [particulars withheld] lying down. They woke me and took me to the chief's camp. They were with the complainant and her mother. That is when the mother said that I had defiled her daughter. That was just a frame up. That is all

20. The appellant did not elaborate on why the complainant or her mother would frame him up. Like the learned trial magistrate, I find that the defence was hollow and a sham.

21. I agree with the appellant that there were some inconsistences between the evidence of PW1 and PW3. However, the discrepancies are minor and immaterial. In any trial, there are bound to be such discrepancies. ***Joseph Maina Mwangi v Republic***, Court of Appeal, Criminal Appeal No. 73 of 1993.

22. I will now turn to the age of the complainant. It is *material* in offences of this nature. See ***Kaingu Kasomo v Republic***, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), ***Felix Kanda v Republic*** Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

23. I am satisfied from the evidence of PW2 and the birth certificate (exhibit 1) that PW1 was born on 22nd February 2006. At the time of the incident, she was slightly below 6 years.

24. In the end I find that the prosecution proved all the elements of the charge beyond reasonable doubt. The appeal on conviction is *dismissed*.

25. I will now turn to the sentence. Section 8 (1) and (2) of the **Sexual Offences Act** provides for a *minimum* sentence of *life imprisonment*.

Following landmark decision of the supreme Court in **Francis Karioko Muruatetu & another v Republic**, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR, the courts now frown upon minimum or *mandatory* sentences.

26. Specifically, the Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act** in ***Jared Koita Injiri v Republic*** [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> 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.
>
> 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. [Emphasis added]

27. The above decision is on all fours with the facts in this appeal. I accordingly *set aside* the life sentence. The appellant shall now serve a term of *30 years imprisonment*. For the avoidance of doubt, the new sentence shall run from 15th February 2013, the date of the original conviction and sentence.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 8th day of October 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Ms. Keya for the Republic.

Ms. Elizabeth, Court Clerk.