



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.85 OF 2017**

**LEVIS MABARE ADEYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal arising out of the conviction and sentence of Hon. Juma SPM delivered***

***on 13<sup>th</sup> July 2017 in Kibera CM Cr. Case No. 63 of 2016)***

**JUDGMENT**

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 27<sup>th</sup> June 2016 at Kawangware Stage II within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of TMJ, a girl aged ten (10) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child, contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 27<sup>th</sup> June 2016 at Kawangware Stage II within Nairobi County, the Appellant intentionally and unlawfully touched the vagina of TMJ with his penis against her will. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of defilement and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He faulted the trial court for failing to find that the element of penetration was not established by the prosecution to the required standard of proof beyond any reasonable doubt. He was of the view that the trial court failed to adhere to the Provisions of Section 77 of the Evidence Act in admitting the medical evidence tendered by the prosecution. He was aggrieved by his conviction, stating that material witnesses were not availed by the prosecution to adduce evidence. He was further aggrieved that the trial court relied on the prosecution's evidence which was inconsistent and full of contradictions. He faulted the trial magistrate for making inferences not founded on the evidence on record. He asserted that the trial court failed to properly evaluate his defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Ms. Akunja for the State opposed the appeal. She averred that the Appellant sexually assaulted the complainant in a toilet. He gagged her mouth to prevent her from screaming. Learned State Counsel submitted that the complainant was eight (8) years old at the time the incident occurred. Her birth certificate was produced in evidence. She asserted that the medical evidence adduced established the ingredient of penetration. The complainant's hymen was missing and her vaginal wall was reddened. She was of the view that the prosecution availed all witnesses required to establish its case. She asserted that the Appellant's sentence ought to be upheld. She therefore urged this court to dismiss the Appellant's Appeal.

The facts of the case according to the prosecution are as follows: PW1 is the complainant's father. He stated that the complainant was born on 17<sup>th</sup> June 2007. On 27<sup>th</sup> June 2016, he left his house at around 4.00 p.m. He left his children in the house. At around 6.00 p.m., he got a call from his neighbour informing him that he needed to go back to the house urgently. When he got home, he was informed that the Appellant had been caught defiling the complainant in a toilet. The complainant informed him that the Appellant locked her inside a toilet and inserted his penis into her vagina. PW1 informed the court that the plot had several houses but they all used a common toilet. The Appellant was his neighbour. When he confronted the Appellant, the Appellant admitted to defiling his daughter. PW1 together with other members of the public took the Appellant to the police station where they reported the incident. He afterwards took the complainant to Nairobi Women's Hospital for medical treatment.

PW2, Eliaka Mawole, was on her way home when she met a crowd of people at the plot where PW1 lived. She was informed that the Appellant had defiled the complainant. Together with other members of the public they took the Appellant to Muthangari Police Station where they reported the incident. The complainant was thereafter taken to Nairobi Women's Hospital.

PW3, TMJ is the complainant. She stated that she was nine (9) years old. She told the court that on 27<sup>th</sup> June 2016, she was at home with her siblings. Her father had left the house. She went outside to use the toilet. There were two toilets in the plot. She went inside one of toilets. The Appellant used the next one. When she got out of the toilet, the Appellant took her hand and forced her inside the toilet. He forced her to undress. She refused. He forcefully undressed her. He also removed his trouser and underwear. He inserted his penis into her vagina. The Appellant gagged her mouth to prevent her from screaming. One of the neighbours, Baba Tony, found her and the Appellant in the toilet. He called another lady by the name Mama Iso. The two of them forced the toilet door opened and rescued the complainant. They went to report the matter to the police station. She was thereafter taken to the hospital. The complainant stated that the Appellant was known to her. She referred to him by name. She said that the Appellant was her neighbour.

PW4, Simon Nzanku, was a clinical officer at Nairobi Women's Hospital. He stated that the complainant was examined at the said hospital on 27<sup>th</sup> June 2016. She was alleged to have been defiled. Upon examination, it was discovered that her genitalia was reddened and her hymen was broken. He produced a Post Rape Care form in evidence. PW5, Dr. Shako, examined the complainant on 28<sup>th</sup> June 2016. She told the court that the complainant's hymen was missing. She was however not able to examine the complainant's genitals further as the complainant was anxious. She also examined the Appellant's genitals on the same day. She stated that his genitals were normal with no signs of bruises. PW6, CPL Pamela Karimi attached at Muthangari Police Station investigated the case. She was assigned the case on 28<sup>th</sup> June 2016. She interviewed the witnesses and recorded their statements. The Appellant was already in custody. She also visited the scene of crime. She found out that the Appellant and the complainant were neighbours. The Appellant sexually assaulted the complainant inside a toilet.

The Appellant was put on his defence. In his unsworn statement, he denied sexually assaulted the complainant. He told the court that on the material day of 27<sup>th</sup> June 2016, he went to work as usual at 6.00 a.m. He came back home in the evening. PW1 went to his house and took him to the police station.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32).

**In the present appeal, the issue for determination is whether the prosecution established the charges of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case as well rival submission by the parties. Section 8(1) of the Sexual Offences Act provides that:-**

***“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”***

The prosecution is required to prove three elements to establish the offence of defilement; the age of the complainant, proof of penetration and positive identification of the perpetrator. On the age of the complainant, PW1, who was the complainant's father, testified that the complainant was born on 17<sup>th</sup> June 2007. The complainant told the court that she was nine (9) years of age. The complainant's birth notification produced in evidence confirmed that the complainant was nine (9) years of age at the time of the sexual assault. **The Appellant did not challenge the evidence adduced with regards to the complainant's age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

**With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:**

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

The complainant narrated to the court how the Appellant grabbed her hand and pushed her into a toilet. He forcefully undressed her. He also removed his trouser and underwear. He then inserted his penis in her vagina. The complainant stated that the Appellant gagged her mouth to prevent her from screaming. The Appellant sexually assaulted her. The complainant was rescued by neighbours who found her and the Appellant in the toilet. **The complainant was candid that the Appellant inserted his penis in her vagina.**

The medical evidence adduced by the prosecution established that indeed the complainant's vagina was penetrated. The complainant was examined at Nairobi Women's Hospital on the same day the incident occurred. The Post Rape Care form adduced in evidence indicated that the complainant's vaginal walls were reddened. Her hymen was also broken which was indicative of penetration. The complainant was also examined by PW6 the following day on 28<sup>th</sup> June 2016. She stated that the complainant's hymen was broken. She produced a P3 form in evidence which indicated that the complainant's hymen had a tear at 4 O'clock. **Taking into consideration the P3 form and Post Rape Care Form produced in court as well as the complainant's testimony, this court is of the opinion that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.**

**The Appellant submitted that the medical report from Nairobi Women's Hospital was improperly allowed in evidence since it was not produced by the author. This court had perused the trial court's record. PW4 did explain that Dr. Mutisya, who examined the complainant, was not available to give evidence. Section 33 of the Evidence Act allows the court to admit documentary evidence from a witness other than the author. Documents from a medical practitioner are among the qualified documents under Section 77 of the Evidence Act that may be admitted into evidence in the absence of the maker. PW4 was also a medical practitioner. This court is of the opinion that the medical report was properly allowed in evidence. That said, even if the medical report from Nairobi Women's Hospital was not admitted in evidence, the P3 form as well as the evidence adduced by PW5 established that the complainant was indeed penetrated. This ground of appeal must therefore fail.**

**The third issue is whether penetration was perpetrated by the Appellant. The Appellant was a neighbour to the complainant. She**

referred to him by name. He was therefore not a stranger. The Appellant's identification was by recognition. The complainant informed several prosecution witnesses that the Appellant sexually assaulted her. From this evidence, the Appellant was properly identified as the perpetrator of the sexual assault. The Appellant in his defence denied sexually assaulting the complainant. He stated that he was at his house when PW1 came and escorted him to the police station. His defence is however displaced by that of the complainant as well as PW1 and PW2 who rescued the Appellant from the irate mob. His defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no probative value.

**The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt.** This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.**

As regards the sentence, Section 8(2) of the Sexual Offences Act provides a mandatory sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. However, the recent decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic [2017] eKLR* held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and that the mandatory nature of the sentence deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the *Muruatetu* case was also extended to mandatory sentences imposed by the Sexual Offences Act in recent decisions by the Court of Appeal in *Christopher Ochieng vs R [2018] eKLR* and *Jared Koita Injiri vs R [2019] eKLR*. The Court of Appeal in *Jared Koita Injiri (supra)* held thus:

*"...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."*

Guided by the aforesaid decisions of the Supreme Court and the Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the life imprisonment sentence that was meted on him was deserved or another sentence ought to be imposed. In the present appeal, the Appellant is a young man. He is a first offender. He submitted that he was remorseful and has undergone various rehabilitation programs within the prison facility.

In the premises, this court sets aside the life imprisonment sentence meted by the trial court. The same is substituted with a sentence of this court sentencing the Appellant to serve thirty (30) years imprisonment with effect from the date he was convicted by the trial court *i.e.* 13<sup>th</sup> July 2017. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF OCTOBER 2019.**

**L. KIMARU**

**JUDGE**