REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 18 OF 2017

MBII NTHULA KIUA...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(From the original conviction and sentence of Hon. Mwaniki J. (SPM) in Makueni on 19th December, 2018

Senior Principal Magistrate's CourtCriminal (S.O) Case No. 218 of 2016)

JUDGMENT

1. **Mbii Nthula Kiua** 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 No. 3 of 2006. The particulars being that the Appellant on the 7th day of March 2016, at [Particulars Withheld] in Makueni district within Makueni county, intentionally and unlawfully caused his penis to penetrate the vagina of **RMM** a child aged below 11 years.

He faced an alternative count of committing Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 7th day of March 2016 at [Particulars Withheld] in Makueni district within Makueni county intentionally committed an indecent act by causing his penis to touch the vagina of **RMM.**

2. He denied the charges and the matter proceeded to full hearing. Thereafter, he was found guilty, convicted and sentenced to life imprisonment.

3. Being aggrieved he filed this appeal raising the following grounds:

> *1)* ***That,*** *the case for the prosecution was not proved to the required standard requisite standard needed in law.*
>
> *2)* ***That,*** *the provisions of Section 169(1) of the Criminal Procedure Code was not adequately complied with in relation to his defence statement.*
>
> *3)* ***That,*** *the mandatory life sentence imposed is in law unconstitutional.*
>
> *4) Reasons wherefore, he prays that the appeal be allowed, conviction quashed and sentence set aside.*

4. The case before the court was that the complainant herein **RMM** was aged six (6) years as at 7th March 2016 *(EXB2).* She did not testify having been confirmed to be deaf and dumb *(letter dated 10th October, 2017 and received by the court on the same date.)* RMM lives with her grandmother **RMG** (Pw1).

5. **Pw2 EN** was at home on 07/03/2016 and left for the river with her jerican at about 3:00pm. At the river she found the Appellant *(Mbii)* washing the minor RMM. He was washing her private parts, which was bleeding. Pw2 asked him why he was washing her and he answered that he did not know. She again asked him what RMM had done and he said he did not know. Pw2 decided to call her husband but the Appellant took off in the direction of their home. She alerted her husband who arrested him and returned him to the river.

6. Meanwhile, word spread and women came to the river, and saw RMM who they confirmed had been defiled. Her biker was found on a stone where the Appellant was washing her.

7. **Pw1** arrived home after 2:30 pm from her work place and on not finding RMM, ran to check for her at the kiosk. Before reaching the kiosk, she was called by Pw2 who informed her the child had been injured. She ran towards the river. She found RMM who was not wearing her pant and biker yet she had dressed her in them in the morning. They took RMM to hospital after reporting the matter at the police station.

8. **Pw3 Mathewa Katiku** the assistant chief of Ngiluni sub location received a report of the incident and went to the scene. He took the Appellant to the police station at Mukuyuni. **Pw4 No. 51278 PC Osman Mbula** received the Appellant from Pw3 and members of public on 7th March, 2016. RMM was also brought to the station.

9. **Pw5 Dr. Manuel Leposha** produced the P3 form *(EXB1A)*, PRC form (EXB1B), Appellant's P3 form (EXB3) on behalf of Doctor Kago who was out of the country for further studies. In respect of RMM, the findings were as follows:

- Bruises and lacerations on the outer vaginal wall
- Dry blood on the vaginal wall
- Broken hymen
- No spermatozoa
- Had pains while urinating
- Lab test revealed the presence of gonorrhea
- Conclusion was that the complainant had engaged in penetrative sexual intercourse.

The examination on the Appellant revealed no injuries in his genitalia.

10. The Appellant gave an unsworn defence and denied the charge. He admits having passed by the river from his place of work, at around 2:00 pm and it was very hot. He therefore decided to take a bath. He then saw a woman come and he decided to only wash his hands and feet. On his way he met a man who asked him where he had come from as a girl had allegedly been defiled. He asked him to accompany him back after he told him he had seen a girl and her mother.

11. At the river he saw the woman he had seen at the shamba. He was thereafter beaten up and injured and had his trouser removed. He was tied up and taken to Mukuyuni police station for defiling a girl. He was also taken to hospital.

12. He relied on his written submissions for his appeal where he raises issue with the doctor's finding that R.M.M. had gonorrhea. His submission is that he should have been examined for the said gonorrhea. His view was that whoever defiled RMM had gonorrhea which he did not have. He cited the case of **Woolmington –vs- the DPP (1935) AC 462** and submits that failure to have him examined for gonorrhea left a gap in the prosecution case.

13. He submits that the case was not proved beyond reasonable doubt as no one witnessed the incident. RMM being dumb and deaf cannot communicate while Pw1 and Pw2 did not witness the incident.

14. On sentence, he submits that following the case of **Francis Karioka Muruatetu –vs- Republic Petition No. 15816 of 2015** in the Supreme court the mandatory nature of the life imprisonment sentence is unconstitutional. He also cited the case of **Evans Wangala Wanyonyi –vs- Criminal Appeal No. 312 of 2018 at Eldoret.**

15. The State through learned counsel Mrs. Owenga relied on the evidence on record, in opposing the appeal.

Analysis and Determination.

16. This is a first appeal and this court has a duty to re-analyze the evidence afresh and arrive at its own conclusion. The Court of Appeal in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** stated thus of this duty:

> ***"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 appellate 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."***

17. In a much earlier decision the Court of Appeal held in **Okeno –vs- Republic (1972) E.A 32** that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh convicting evidence and draw its own conclusions (Shantilal M Ruwala v 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 findings and conclusions; 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 v Sunday Post [1958] EA 424."***

18. Having considered the evidence on record, the grounds of appeal and the written submissions by the Appellant, I find three issues falling for determination namely:

> ***i. Whether R.M.M was defiled.***
>
> ***ii. Whether the appellant was identified as the person who committed this offence.***
>
> ***iii. Whether this court should interfere with the sentence meted out against the appellant.***

19. The complainant herein RMM was as per the birth certificate produced herein as EXB2 born on 26th October, 2009. At the date of incident (7th March, 2016) she was aged 6 years and 4 months. She was therefore a minor and was below the age of 11 years as provided for under Section 8(2) Sexual Offences Act. Age was therefore proved. RMM was said to be deaf and dumb and was therefore not able to communicate.

20. The court issued an order for her to be examined at the hospital and a report filed to confirm the condition. This was done and a report dated 10th October 2017 was produced by the prosecution with the Appellant's consent. The report confirmed that RMM is deaf and dumb since childhood, and is unable to communicate. She could not therefore testify.

21. Besides, the age there must be proof of penetration of the complainant's genitalia. In this case there was no eye witness and RMM is not able to communicate. The available evidence is that of Pw1, Pw2 and Pw5. Pw2 who was the first to note that there was a problem found the Appellant washing RMM Her biker had been removed and placed on a stone. What was being washed was her private parts which was bleeding. She became suspicious.

22. Pw1 came to the scene later and on examining the child she saw blood in her private parts. The doctor who produced the P3 form (Pw5) clearly set out the medical findings as found at paragraph 9 of this judgment. The conclusion was that *the* child had been sexually penetrated. My finding therefore is that RMM. was defiled.

Issue no. (ii) Whether the Appellant was identified as the person who committed this offence.

23. The evidence of Pw2 places the Appellant at the scene where RMM was found. `The Appellant does not deny having been at the river. He even says he saw a woman there with a child. What he denies is the accusation of having defiled R.M.M. Pw2's evidence is that he found the Appellant washing R.M.M's private parts which was bleeding.

24. Furthermore, she asked him two crucial questions to which he responded" I don't know" meaning he did not know what the child had done and he did not know why he was washing her private parts yet the child was bleeding from there. The Appellant in his defence chose to say nothing about it.

25. The Appellant has submitted that failure to have him examined for gonorrhea was fatal to the prosecution case. First of all, Pw5 is not the one who examined RMM. I have read through the P3 form *(EXB1A)* and the PRC form *(EXB1B)* and find nowhere indicated that there was any presence of gonorrhea. Had it been there it ought to have been indicated at page 4 of the P3 form. Secondly the tests were done soon after

the incident; i.e. on 7th March, 2017. Even if the child had been infected with gonorrhea through that day's incident it could have been too early for it to manifest in that day's test. It is not clear where Pw5 got this notion of gonorrhea.

26. Further that could not have been the sole determinant as to whether it's the Appellant who did it or not. The Appellant should have exonerated himself by explaining to Pw2 and the court why he was washing RMM's bleeding private parts and why the child's pant and biker were on the stone.

27. I find that the prosecution evidence and the Appellant's own evidence placed him at the scene. He is the person who defiled the minor RMM.

Issue (iii) Whether this court should interfere with the sentence meted out against the Appellant.

28. Section 8(2) Sexual Offences Act provides: -

> ***"A Person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"***

However, upon applying the judgment of the Supreme court in **Francis Karioko Muruatetu & Anor –vs- Republic (supra)** and others from the Court of Appeal namely: **Christopher Ochieng –vs- Republic (2018) eKLR Kisumu Criminal Appeal No. 202 of 2011; Jared Koita Injiri –vs- Republic, Kisumu Criminal Appeal No. 93 of 2014; Evans Wanjala Wanyonyi vs- Republic (2019) Eklr,** I find that the learned trial magistrate applied the mandatory minimum sentence of life imprisonment. He did not therefore exercise any discretion

in sentencing as in the scenarios the above cited authorities dealt with.

29. The record shows that the Appellant was a 1st offender. In mitigation he told the trial court that he had a family that was dependant on

him.

30. I have taken all these circumstances into consideration including the time it took to complete the case. I therefore set aside the life imprisonment sentence and substitute it with a sentence of thirty (30) years imprisonment.

31. The upshot is that the appeal partially succeeds. I therefore make the following orders: -

- **The conviction is upheld.**

- **The sentence is reduced to thirty (30) years imprisonment.**

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 17TH DAY OF OCTOBER 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE