REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 102 OF 2018

BETWEEN

JOHN OCHIENG OSUNGO....................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal against judgment, conviction and sentence dated in Tamu SO 18 of 2018

by Hon. P.K.Rugut (SRM) on 31st October, 2018)

JUDGMENT

Background

1. The Appellant herein **JOHN OCHIENG OSUNGO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as ***the Act***) which was allegedly committed on 19th June, 2018 against **BAO** a girl aged 8(Eight) years.

2. In a judgment dated *31st October, 2018, the A*ppellant was convicted and sentenced to life imprisonment.

3. Aggrieved by this decision, the appellant lodged the instant appeal on 25th July, 2018. From the 5 grounds in the petition of appeal and written submissions both filed on 1st April, 2019, the appellant's raises the four main issues for determination.

1. **Prosecution case was tainted with discrepancies**
2. **The case was not promptly reported**
3. **Crucial witnesses did not testify**
4. **Alibi defence not considered**

4. At the hearing, the Appellant submitted that he was wholly relying on the grounds of appeal and written submissions.

5. Ms. Gathu, Learned Counsel for the State opposed the appeal and submitted that all the ingredients of defilement had been proved. The state emphasized that the appellant was identified by recognition and long acquaintance with the complainant and relied on **LESARAU – v-R, 1988 KLR 783** where the Court of Appeal emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name.

Prosecution case

6. **PW1, BAO** the complainant, stated that she was aged 8 (eight) years and in class 2. She recalled that on 19.06.18 in the evening, she was walking to her mother's shop when one Ochieng Tumbo pulled her, covered her mouth and took her to a place called nursing where there were a few people, undressed her and defiled her. She stated that she did not report the matter to anyone since the Appellant had threatened to beat her.

7. **PW2 Christine Adhiambo Ouko**, the complainant's mother stated that complainant was born on 30.04.10. She recalled that on 22.06.18, she heard rumours that Appellant had defiled the complainant and that when she asked complainant and she confirmed it, she reported the matter to the police and complainant was examined and found to have been defiled.

8. **PW3 PC Lilian Igunza** received complainant's report on 22.06.18 and escorted her to hospital. She produced complainant's certificate of birth **PEXH. 1** which shows that she was born on 30.04.10.

9. **PW4 Jared Okoth Olala,** examined complainant on 25.06.18. she had no bruises on both labias but had whitish discharge, inflammation on vaginal orifice and hymen was not intact. He produced complainant's P3 form as ***PEXH. 3*** and treatment notes as ***PEXH. 4*** in which he concluded that the child had been defiled.

Defence case

10. At the close of the prosecution case, the Appellant was ruled to have a case to answer and was placed on his defence. The Appellant denied the offence but conceded that complainant and other children normally went to his place of work.

Analysis and Determination

11. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows on the duty of an appellate court:

> **"It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision."**

12. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant and for the State.

13. Complainant's certificate of birth **PEXH. 1** shows that she was born on 30.04.10 and was therefore 8 years when the offence was allegedly committed.

14. Complainant's evidence that she had been defiled was corroborated by the P3 form as ***PEXH. 3*** and treatment notes as ***PEXH. 4*** in which PW4, the clinical officer concluded that there was evidence of penetration.

15. The Appellant denied the offence. He stated that complainant did not report the matter to her mother until 3 days later. The record demonstrates that the delay was explained by complainant who stated that Appellant had threatened her not to tell anyone.

16. Appellant faulted the prosecution for not availing one Edward who allegedly witnessed the incident

and who informed his mother who in turn informed one Mama Wangui who reported the matter to the complainant's mother. Indeed, complainant told court that the incident was witnessed by one Edward who was not called as a witness. The trial court addressed its mind to this issue and on the basis of the holding in **Mohamed v Republic [2006] 2 KLR 138** stated that although the complainant's evidence was not corroborated by an eye witness, it had no reason to doubt her evidence since her evidence, the history she gave to her mother and to the clinical officer were consistent.

17. From the foregoing, I am persuaded that the trial court rightfully considered the provisions of **Section 124** of the Evidence Act when it ruled that the complainant's evidence was sufficient in the circumstances.

18. The Appellant was not a stranger to the complainant. The complainant referred to him as Ochieng Tumbo which name Appellant did not deny referred to him. Further to the foregoing, the Appellant conceded that complainant and other children normally went to his place of work. The finding by the trial court that the Appellant had been identified as the assailant was therefore well founded.

19. Appellant did not raise any defence of alibi and there was therefore none to be considered. I have considered the prosecution case and I did not find any discrepancy that goes to the credibility of the case. The defence case did not cast a reasonable doubt on the prosecution case and was rightfully rejected.

20. Appellant was sentenced to the mandatory life sentence for an offence of defilement contrary to section 8(1) as read with section 8(2) of ***the Act***. The Court of Appeal has in several cases including **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences**.** The court has adopted the Supreme Court holding in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence**.**

21. Since mandatory sentences have been declared unconstitutional, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the ***Act***. It observed as follows:

> **[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**

22. Even though Appellant is a first offender and he had in mitigation pleaded for leniency and stated that he was elderly, the psychological effect of the offence on the 8-year-old complainant cannot be underestimated.

23. From the foregoing, the Appeal fails except on the issue of sentence. The life sentence imposed on the Appellant is substituted with a sentence of **15 years** from ***31st October, 2018*** when Appellant was sentenced.

DELIVERED AND SIGNED AT KISUMU THIS *14th* DAY OF *November* 2019.

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi & Okodoi

Appellant - Present

For the State - Ms. Gathu