REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NUMBER 54 OF 2015

JOHN ODONGO SUTHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal against the judgment in criminal Case No. 186 of 2013 in Cms Court Nakuru before Hon. Rita Mwayi (RM) delivered on 5th March 2015).

JUDGMENT

1.The appellant was charged with the offence of defilement of a minor girl child aged 14 years on diverse dates between 1st August 2013 and 2nd September 2013 at Nakuru Blankets, Nakuru County.

He denied the offence. On the 5th March 2015, the trial court but upon trial, the trial court convicted and sentenced him to 30 years imprisonment pursuant to the provisions of **Section 8(1) of the Sexual Offences Act No. 3 of 2006 as read with Section 8 (3) of the Act.**

2. This appeal is against both the conviction and sentence, upon grounds stated in the appellant's Amended petition of appeal filed on the 2nd July 2019, that

(a) The trial magistrate erred in law and fact in failing to subject the complainant to a voire dire examination

(b) Contradictory and inconsistent untruthful prosecution evidence

(c) Penetration not proved.

The appellant relied wholly on his written and filed submissions. The prosecution tendered oral objections to the appeal.

3. An appellate court of the first instance has a duty imposed by law to carefully examine and analyse a fresh, the evidence on record and come up with its own findings. It is however not its duty to merely scrutinize the evidence, but also make its own findings, upon which it would decide whether or not the trial magistrate's findings should stand – **Okeno –vs- Republic (1972) EA 32.**

4. **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.

If convicted the penalty is stated in **Section 8(3)** as

> "A person who commits an offence of a defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

5. **Analysis of evidence and findings.**

The prosecution called six (6) witnesses.

The age of the victim (PW2) is not in dispute. The victim testified to have been born in 1999 and produced a child health clinic, a valid

document to prove age. She was in primary school class six, a fact corroborated by PW3, her father.

6. **Voire Dire Examination**

The victim testified on oath as PW2. The record confirms that she was not put through a *voire dire* examination. She was in primary school class six. The appellant faults the trial magistrate for failure to ask the complainant whether she understood the meaning and importance of telling the truth so as to form an opinion on the same.

I have considered the evidence. It is well stated. There is no doubt that the complainant knew and understood the evidence she was testifying to, in view of her age and the court's opinion.

7. **Section 19 of the Oaths and Statutory Declarations Act** provides that where in the opinion of the court a child does not understand the nature of an oath, his evidence may nevertheless be received though not given on oath. But if the court is of the opinion that the child is possessed of sufficient intelligence to justify reception of the evidence it need not take the child through a *voire dire* examination, so long as the child understands the duty of speaking the truth.

8. In the **Court of Appeal Case, Maripett Loonkomok –vs- Republic (2016) e KLR,** the Honourable Judges rendered that it is mandatory for *voire dire* examination to be conducted for a child of tender years. **Section 2 of the Childrens' Act** defines a child of tender years to mean a child under 10 years, but citing the old **Court of Appeal for East Africa Case Kibageny Arap Kohil –vs- Republic (1959) EA** held that the honoured 14 years remains the correct threshold for *dire voire* examination, and that each case ought to be considered in its peculiar character.

9. In my considered view, the complainant having been 14 years old, and the trial court having been satisfied of her understanding, there was no need or necessity to subject her to a *voire dire* examination – See also **C.A in Cr. Appeal No. 44 of 2016 Sahali Omar –vs- Republic (2017) e KLR and James Mwendia Mwangi** –vs- **Republic e KLR**. I find no merit in that ground of appeal.

10. **Penetration**

The **Sexual Offences Act No. 3 of 2006** defines **penetration** as

The partial or complete insertion of the genital organs of a person into the genital organs of another person.

Penetration is one of the core ingredients of the offences under the Sexual Offences Act, and must be proved beyond reasonable doubt – **Hilary Nyongesa –vs- Republic.**

Medical evidence is one of the methods by penetration may be proved.

11. PW2 the victim testified to have had penetrating sexual intercourse twice with the appellant in his house prior to the incident, subject of this appeal.

PW1 the doctor who examined the complainant and filled the P3 form observed abrasions on the labia and old broken hymen with whitish discharge from the genital organs of the complainant, and made a conclusion of penetration. A pregnancy test turned positive, but the doctor did not give an estimate age of the pregnancy.

12. I agree with the appellant's submission that abrasions on the labia is not the only proof of penetration, as abrasions may be caused through other methods, but is a pointer in the absence of other explanation.

A D.N.A test was not conducted to ascertain the paternity of the pregnancy but with pregnancy, it is crystal clear that penetration occurred.

13. The next question is who was responsible for the penetration, and not necessarily the pregnancy?

The complainant had old broken hymen meaning she had engaged in sexual intercourse for a while, prior to the appellant's arrest and arraignment in September 2013. The particulars of the offence were stated to have been committed on diverse dates between 1st August 2013 and 2nd September 2013, a period of one month. The complainant testified to have met the appellant in the month of August when she went to his house and had non-forced sexual intercourse and thereafter, two other times.

14. At all material times, the complainant went to the appellant's house intentionally and willingly, and engaged in sexual acts, without any complaints. A matter of consensual sex? It appears to have been so.

However, it is trite that children below the age of 18 years cannot consent to sexual activity as such children have no legal capacity to give consent. This has been held in numerous judicial decisions, among them

- **Criminal Appeal No. 16 of 2016(2016) e KLR**
- **Constitutional Petition NO. 40 of 2011 (2015) e KLR**
- **Cr. Appeal No 32 of 2015 (2016) e KLR.**

Though it may appear that the complainant was a willing participant in sexual activities with the accused person, the law states otherwise, that she had no capacity to consent to sexual intercourse.

15. **Contradictory and inconsistent prosecution evidence**

Though no witness testified to have seen or witnessed the commission of the offence, all prosecution evidence points to the commission.

PW2's evidence was clear and cogent, and pointed to the appellant as the offender, not once but at least three times.

The appellant was thus positively identified by his partner in crime, the complainant **Aganga** *alias* **Onyango –vs- Republic Cr. Appeal No. 32/1990(UR).**

16. I find no material contradictions or inconsistencies in the prosecution evidence that would be grave enough as to invalidate lawful findings and the conviction

In its totality, I am persuaded that the appellant was lawfully convicted on the evidence on record for the offence of defilement of the 14 years old girl. I uphold the conviction.

17. **Excessive Sentence**

I have stated earlier (Par. 4) that the sentence provided under **Section 8(3) of the Act** is imprisonment for not less than twenty years. The trial court in its discretion meted to the appellant 30 years imprisonment. This is legal and lawful sentence.

However, in the current justice dispensation under the 2010 Constitution, Minimum and mandatory sentences are not wholly welcome to judicial officers as they do not serve the purpose and objectives of sentencing as stated in the Judiciary Sentencing Policy and further erode and curtail judicial discretion and independence, which is the corner stone in the administration of justice.

18. A sentence should be consumerate and proportionate to the crime committed and the manner it is committed. It should also meet the ends of justice, principles of proportionality, deterrence and rehabilitation.

19. The Supreme Court of Kenya in the **Muruatetu Petition, No.15 and 16 (consolidated) of 2015 (2017) e KLR Francis Karioko Muruateru & Another -vs- Republic,** set the pace and there seems to be no end to the application of the principles stated therein. See a few - **Carolyn Arina Majabu –vs- Republic (2014) e KLR, Kabibi Kaluma Katsui –vs- Republic, Antony Mbithi Kasyula –vs- Republic Cr. App No. 134 of 2012, N.O.O –vs- Republic (2019) e KLR, J.E. -vs- Republic (2017) e KLR**.

20. The Court of Appeal in **Jared Koita Injiri –vs- Republic (2019) e KLR** reduced life imprisonment to 30 years imprisonment and rendered, in respect of **Section 8(1) Sexual Offences Act** that

> ----if the reasoning in the **Supreme Court** case was applied to this provision it too should be considered unconstitutional on the same basis, and set aside the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court.

21. I have taken into account the above, as well the character and circumstances to the offence, as well as the time the appellant spent in custody - six years in custody and prison. I have taken that into account, including the mitigation tendered before the trial court.

22. In exercise of my discretion I set aside the thirty (30) years imprisonment imposed by the trial court, and substitute it with the time served in prison todate.

Consequently, the appellant is set at liberty unless otherwise lawfully held.

Delivered, Signed and Dated at Nakuru this 7th Day of November 2019.

……

J.N. MULWA

JUDGE