REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NUMBER 131 OF 2015

NATHANIEL IRUNGU NJUGUNA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence before Hon. J. Nthuku in Chief

Magistrate Court at Nakuru vide Criminal in CMCC No 53 of 2012 delivered on 30th March 2015)

JUDGMENT

1. The Appellant Nathaniel Irungu Njuguna was charged and convicted for the offence of defilement of a seven (7) years old girl child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. He was sentenced to life imprisonment on the 3rd March 2015.

2. He appeals against both the conviction and sentence by his Amended Petition of appeal dated and filed on the 4th July 2019, upon grounds that the conviction was against the weight of evidence that there was lack of positive identification. He thus prayed for the quashing of both the conviction and the sentence.

The appellant relied fully on his written submissions filed on the 4th July 2019. The prosecution tendered oral submissions in opposition to the appeal.

3. As the first appellate court, it is my duty to re-examine and re-evaluate the evidence adduced before the trial court and come up with my own findings – **Okeno –vs- Republic (1972) EA 32**.

The minor child, hereinbelow referred to as the "victim" was seven years. She testified as PW7.

A *voire dire* examination was conducted by the trial magistrate who made a finding that the child who was in primary school class one was intelligent and understood the importance of telling the truth, thus tendered sworn evidence.

4. Four (4) prosecution witnesses testified upon whose evidence a conviction was founded. The offence is alleged to have been committed on the 17th February 2012 Njoro District within Nakuru County wherein the appellant is alleged to have unlawfully and intentionally inserted his penis into the victim's vagina, AWM.

5. The appellant in his defence raised an *alibi* defence which the trial magistrate found to have had no merit.

6. The victim's testimony (PW1) was that on the material day as she went home from school, about 1.00pm., she met the appellant whom she knew as he lived near the school, armed with a knife in his coat, and with threats that he would cut her up if she screamed, carried her on his back to his house, put her in a sack, tied her month, locked up the house and left. She further testified that the appellant came back to the house in evening, removed her from the sack and also removed her pants, that he also removed his trouser and did "*tabia mbaya*" to her.

7. The child further testified that the appellant strangled her with a rope and put her back into the sack tied her mounth and took her to the maize *shamba* and placed maize stalks on top of her and then left. She testified that she escaped through a hole in the sack to the road where one Ann Nduta (PW2) found her and took her to Njoro hospital, was examined and later went to report at the police station with the said Ann Nduta. While in court, she pointed to the appellant saying he is the one who did the "*tabia mbaya*" to her.

On cross examination the child reiterated that she knew Irungu (the appellant) and that he was the one who defiled her.

8. PW2 Ann Nduta told the court that she and another woman Margaret Wambui found the victim sleeping at the road at about 3.00p.m. on the material day with blood flowing from her vagina to the legs. It was her testimony that she knew the child and called her grandmother and the village elder (PW3) and together took the child to the hospital and later to reported at the police station.

9. PW2 testified that the victim told them what had happened and took them to the appellant's house and the shamba where she was defiled where found a blood stained sack.

PW3 repeated the evidence as stated by PW2.

10. One Jacob Chelimo, **PW6** a clinical officer at Njoro Health centre examined the victim on the 18th February 2012, two days after the incident. His observations were that the victims neck had bruises, her genitalia had tears on the perineum was bleeding from her vagina, that stitching had to be done to correct the injuries. He produced the P3 Form as an exhibit. I have seen it. The doctor saw the child's immunization card and was satisfied that the age was six years. The clinician's conclusion was that there was penetration by penis into the child's vagina.

11. From the evidence as recorded, the issues for determination which are also the grounds of appeal are:

(1) Age of the victim

(2) Whether there was penetration

(3) Whether there was sufficient evidence upon which a conviction can stand

(4) Whether there was positive identification of the appellant by the victim as the offender.

(5) Whether the sentence imposed was lawful and/or excessive.

12(1)**The Age** of the victim is not disputed, but being a very vital ingredient of the offence of defilement, it is important to reaffirm that there is evidence by the child's immunization card that she was about six years old – **Hilary Nyongesa –vs- Republic**

12(2) **. Identification**

I have re-examined all the prosecution witnesses evidence. The victim knew the assailant, PW2, PW3 and PW4 all identified him as their neighbour. The house where the victim took PW2 and PW3 belonged to the appellant. PW4 knew the appellant. He went to his *shamba* when people went there looking for Irungu. He knew him well. While in court, the victim pointed at the appellant and stated

"*you did tabia mbaya to me here (touches her genitals) and put your thing which is between your legs here, touches her genitals."*

13. There was therefore undeniably positive identification by recognition of the assailant as the appellant. In the case **Republic –vs- Turnbull (1976) 3 All E.R. 549,** the Judge rendered that

"*Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the Jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

See also **Hussein Abdi Noor –vs- Republic (2019) e KLR.**

14. The offence took place in broad daylight in the appellant's house. The victim was able to identify the assailant and gave very clear record of events from the time the appellant grabbed her, carried her to his back like a baby, took her to his house, tied her mouth and put her in a sack, and later took her in the sack to a maize farm and left her there helplessly.

I have no doubt in my mind that the victim and identify the assailant by recognition.

15. The appellant raised a defence of *alibi* and denied defiling the victim. He could however not explain why he went missing from the village soon after the commission of the offence and from PW4's *shamba* when the village elder and PW2 and PW3 went looking for him.

This conduct, in my view, is not consistent with innocence.

16. Other than the victim, no other person witnessed the commission of the offence. But the circumstances pertaining thereto speak volumes that point to no other than the appellant as the assailant. Coming from the minor child, it cannot be said that the child was out to frame the appellant as no prior conduct or enemity existed between her or her parents and the appellant.

17. Proviso to **Section 124 of the Evidence Act** empowers the court to convict upon uncorroborated evidence in sexual offences if it finds it credible and truthful and upon warning itself of dangers of such evidence.

18. When a case rests entirely on circumstantial evidence as is the case herein, the prosecution has to satisfy three tests, as stated by the Court

of Appeal in Abanga *alias* **Onyango –vs- Republic, Civil Appeal No.32/1990 (UR**).

(a) That circumstances from which any inference of guilt is to be drawn must be cogently and firmly established

(b) Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused

(c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no oneelse.

19. I am persuaded to believe the victim's narration in detail of all what happened before and after the commission of the offence. Her evidence was cogent and clear, and was corroborated by PW1, PW2 and PW4 including the clinician's medical evidence.

20. The Court of Appeal discussing the phrase "*tabia mbaya"* by minor Children, in the case **Muganya Chilegi Saha –vs- R (2019) e KLR** held that such phrase means sexual conduct or intercourse that a minor of tender years has no other language to explain the act.

Further in **JE –vs- Republic (2019) e KLR**, the phrase *"tabila mbaya"* (bad manners) was construed to have similar meaning.

21. Having discounted the appellant's *alibi* defence, I come to the unenviable conclusion that the appellant was the assailant upon the minor victim who without a doubt was traumatized by heinous events.

22. It is trite that where several witnesses testify there is bound to be some inconsistencies and contradictions in their evidence. In such circumstances, the court is obligated to sieve through such evidence and come up with its own findings whether such inconsistencies are grave enough to invalidate an otherwise lawful judgment – **Ahmed Abulfathi Mohammed & Another –vs- Republic (2018) e KLR**.

23. In its totality, I find that the appellant was properly and lawfully convicted on the evidence on record.

I uphold the conviction.

24. **Section (2) of the Sexual Offence Act provides for** a mandatory and minimum sentence of life imprisonment.

The trial magistrate was therefore within the law when she imposed the life imprisonment sentence upon the appellant.

25. The Supreme Court decision in the celebrated **Muruatetu Petition No 15 & 16 of 2015 (2017) e KLR Fraincis Karioko Muruatetu & Another –vs- Republic** opened and untied Judicial officers hands in sentencing where death, and by implication, life imprisonment is concerned. Thus the Supreme Court re-affirmed the court's exercise of its discretion in sentencing that ought be in live with the particular and individual character of each case, with a view to uphold the purpose and objectives of sentencing being proportionality, deterrence and rehabilitation.

26. Following the re-awakening numerous courts have in exercise of their discretion and independence, set aside sentences of death and life imprisonment and substituted them with term imprisonments.

Among them **Nakuru HCCCRA NO.136 of 2015 – NOO –vs- Republic (2019) e KLR,** See **Eliud Waweru Wambui –vs- Republic (2016) e KLR, RKS –vs- Republic (2018) e KLR, Benson Njoroge Ngugi -vs- Republic (2019) e KLR, Raphael Mutungi Mutunda – vs- Republic (2019) e KLR.**

27. The offence committed by the appellant was heinous and very serious, and caused trauma to the young girl child, and deserving of a deterrence sentence as imposed by the trial court.

However, and considering the above decisions of the superior courts, and upon consideration of the appellant's mitigating factors before the trial court, I shall set aside the life imprisonment and substitute it with a 30 years imprisonment to run from the date of the trial court's sentence, the 3rd March 2015.

Delivered, Signed and Dated at Nakuru this 14th Day of November 2019.

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J.N. MULWA

JUDGE