REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL CASE NO. 10 OF 2013

PAUL MULUSI KITILI..........APPELLANT

VERSUS

REPUBLIC............................RESPONDENT

(Being an Appeal from judgment of the Senior Resident Magistrate Hon. J. Nthuku delivered on 20th of January 2013 in Nakuru Adult Criminal No. 167 of 2011)

JUDGMENT

1. The Appellant herein is Paul Muluvi Kitili. He was arraigned before the Chief Magistrate's Court in Nakuru charged with defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. According to the charge sheet, the child who was allegedly defiled was FW who was six (6) years old at the time. The date of the alleged attack was 11/09/2011; the place of the attack was within Mirangine District of the former Central Province. The other particulars alleged in the charge sheet was that the Appellant intentionally and unlawfully committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) of FW which caused penetration.

2. The Appellant also faced an alternative count of committing an indecent act with FW contrary to section 11(1) of the Sexual Offences Act. The facts are the same as for the main count except for the penetration; the allegation being that the Appellant intentionally touched the vagina of FW.

3. The Appellant pleaded not guilty and the Prosecution called six witnesses to prove its case. At the conclusion of the Prosecution case, the Learned Trial Magistrate was persuaded that a prima facie case was made and put the Appellant on his defence. The Appellant gave a sworn statement and did not call any witnesses. The Learned Trial Magistrate returned a verdict of guilty and imposed the mandatory life imprisonment as per the statute.

4. The Appellant is dissatisfied with both the conviction and sentence and has appealed to this Court. He filed Amended Grounds of Appeal in which he outlined three major complaints against the conviction as follows:

a. That the Trial Magistrate erred in law and fact by convicting the Appellant on evidence of identification which was not conclusively proved;

b. That the Learned Magistrate erred in law and facts by convicting the Appellant in the case without proving the age of the Complainant.

c. That the Learned Magistrate erred in law and facts by convicting the Appellant without conclusive evidence of penetration.

5. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

6. During the trial, the Complainant testified first. She testified that on the material day, she was coming from church when she met the Appellant. She knew the Appellant as "Paul" and he was a herdsman at the neighbour's farm near their home. She told the Court that the Appellant gave her some sweets then took her to a maize field where he made her remove her clothes and lie down. He then "did bad manners" to her: he inserted "his thing" for passing urine into her. He then reportedly told her not to tell anyone.

7. The Complainant's mother, MW testified as PW2. He told the Court that she noticed that something was wrong when her daughter went to her place of business (where she sells clothes) after church. The Complainant was crying repeatedly; and when W offered her tea she started vomiting. She vomited severally even on the way home but would not say what was wrong except to complain that her tummy was aching. The pattern continued overnight.

8. The following day the Complainant would not let her mother wash her. She continued crying and vomiting. It is only on the third day that W decided to take the Complainant to Tumaini Centre where a doctor examined her and concluded that she had been defiled. She was treated and W was advised to go report to the Police. She also reported to the area Chief. It was at that point that the Complainant said that it was the Appellant who had defiled her.

9. W testified that she, the Chief and a few other neighbours went to Paul's house where they found him. Even before he was asked any questions, he blurted out that he never defiled the Complainant – which persuaded the group that he was, indeed, guilty. Paul was arrested and taken to the Police Station.

10. The Area Chief who participated in the arrest of the Appellant is Mikhai Dichu. He recalled how W called her with the news of the defilement and how they surrounded the Appellant's house to arrest him – in part to save him from a mob that had threatened to lynch him.

11. At the Administration Police Post, when she first reported, W found Corporal Joseph Irungu Wanjiku. Later on, W came accompanied by members of the public who had arrested the Appellant. Corporal Wanjiku re-arrested him. PC Philemon Kibet from Milangine Police Station, the Investigating Officer, also testified. He received the Appellant at the Police Station when he was brought from the AP Camp and conducted the investigations. He formed the opinion that the Appellant had defiled the Complainant and made a recommendation to charge him. Coporal Wanjiku testified as PW 5 while PC Kibet testified as PW6.

12. At Tumaini Centre, the Complainant was attended to by Peter Ngiyo who filled out her P3 Form. He produced the P3 Form. He found mild tenderness on the external genitalia and her hymen was perforated with raw edges. Mr. Ngiyo also produced the treatment notes as exhibits.

13. Put on his defence, the Appellant rendered a flat denial. He knew nothing about defiling the case and, indeed, denied knowing the Complainant or her mother. He complained that he was only at his place of work when some people came and took him to the Police Station.

14. The Learned Trial Magistrate identified the three elements that needed to be proved in order for the charge of defilement to stand:

> a. That the complainant was less than twelve years old: In this regard, the Learned Trial Magistrate referred to Prosecution Exhibit 3 – an age assessment report dated 24/10/2011 which concluded that the Complainant was aged between six and seven years old. She also referred to the oral testimony of W, the Complainant's mother, who said that the Complainant was born on 26/06/2005.
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> b. That there was penetration: the Learned Trial Magistrate referred to the oral testimony of the Complainant who testified that the Appellant inserted his penis into her vagina. She found that the medical evidence by Mr. Ngiyo corroborated the evidence of penetration and concluded that penetration had, indeed, been proved beyond reasonable doubt.
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> c. That it was the Appellant who caused the penetration: the Learned Trial Magistrate relied on the evidence of the Complainant who identified the Appellant as her assailant. She believed her testimony. It was during the day, and there was no possibility of error. Besides, the Learned Trial Magistrate concluded that the evidence tendered was one of recognition since the child knew the Appellant before.

15. Owing to this analysis, the Learned Trial Magistrate found the evidence overwhelming that the Appellant had, indeed, defiled the Complainant and convicted him.

16. I have now subjected the evidence to independent evaluation. I am unable to disagree with the Learned Trial Magistrate that the conviction was not safe. I am equally satisfied that all the three elements to establish the offence of defilement were proved.

17. In his submissions, the Appellant has complained at length that the conviction was not error-free because the Complainant at some point in her testimony said that she did not know his name. However, evidence of identification does not depend on whether the victim knew the name of the assailant or not. It only depends on whether they recognized him in circumstances which were free from possibility of error or misidentification. In the present case, the victim knew the Appellant as a person who worked looking after the animals of a neighbour. The incident happened in the early afternoon in plain light. The victim described the assailant as soon as she overcame her fear and revulsion. On the witness dock, the victim gave clear evidence which was straightforward and credible. The Learned Trial Magistrate certainly found it so; and I have no reason whatsoever to disagree with her findings.

18. I also find the complaint that age was not conclusively proved hilariously pedantic. The Prosecution produced a scientific age assessment report showing that the victim was between six and seven years old. Then, the mother of the victim gave oral testimony about the exact date of her birth. Age was conclusively proved.

19. On sentence, in a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

> In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for

> depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.
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> Being so persuaded, we 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.
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> The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

20. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

21. In the present case, the Appellant offered mitigation in the Trial Court. He told the Court to treat him with leniency because he has no relatives and he is an orphan.

22. Looking at the circumstances of this case, there is little reason to depart from the suggested minimum sentence. The victim here was a girl of very tender years. She was barely seven years old. The Appellant was a friend of the father. So he took advantage of that friendship to lure the young girl. The sexual assault was quite traumatic on the young girl as proved by the fact that she continued vomiting for two days after the attack.

23. Looking at all these factors, one can only conclude that the imposed sentence of life imprisonment is eminently warranted in the present circumstances.

24. The upshot is that the appeal herein is without any merit. It is hereby dismissed in its entirety.

25. Orders accordingly.

Dated at Nakuru this 8th day of November, 2019

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JOEL NGUGI

<u>JUDGE</u>

Delivered at Nakuru this 11th day of November, 2019

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J. N. MULWA

<u>JUDGE</u>