REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 114 OF 2018

BETWEEN

PHILIP AMWAYO ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Winam

SO Criminal Case Number 20 of 2017 by Hon. C.Njalale (SRM)

on 07th December, 2018)

JUDGMENT

Background

1. The Appellant herein **PHILIP AWAYO ODHIAMBO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as ***the Act***) which was allegedly committed on 25th August, 2012 against **RAO** a girl aged 13 (Thirteen) years.

2. The prosecution called 6 witnesses in support of the charges. **PW1**, the complainant stated that she was born in 2004 and was 15 years old. She recalled that on 22.08.17, she met the Appellant whom she used to see frequently and he invited her to his house where she went and stayed for three days within which time they had sexual intercourse. It was her evidence that Appellant did not force her into sex and that she consented willingly.

3. **PW2 Dr. Mathews Oluoch** produced a P3 form on behalf of his colleague Dr. Nyakwambo with whom he had worked for two years and who had gone for further studies. The P3 form (**PEXH. 1**) shows that complainant was examined on 29.8.17 and she told the doctor that she had consensual sex with her boyfriend. Upon examination, the doctor found that the vaginal wall was inflamed and the hymen was broken an indication that she had sexual intercourse.

4. **PW3 Omondi Collins Odongo,** a clinical officer produced the complainant's PRC form on behalf of his colleague Arnold Owiti with whom he had worked for 6 months and who was no longer working with Jaramogi Ogngа Oginga Teaching and Referral Hospital. The PRC form (**PEXH. 2**) shows that complainant was examined on 29.8.17 and she told the doctor that she had consensual sex with her boyfriend. Upon examination, the complainant's vaginal wall was inflamed and the hymen was broken an indication that she had sexual intercourse.

5. **PW5 Alex Onyango Ongore** the complainant's father told court that complainant was 15 years old. He stated that complainant left home on 22.08.17 and was found with Appellant in the latter's house on 24.08.17. **PW4 Stephen Odhiambo Onyango** stated that he was with PW5 when the complainant and Appellant were arrested from Appellant's house on 24.08.17.

6. **PW6 PC Thaddeus Okumu** the investigating officer received complainant and Appellant and upon recording the investigations and receiving the complainant's medical report caused the Appellant to be charged. He produced complainant's age assessment report (**PEXH. 3**) which shows that she was 15 years old.

7. In his sworn defence, the Appellant stated that he had been friends with the complainant for about 2 years. It was his testimony that the complainant went to visit him on 22.08.17 and she stayed in his house for 2 days within which time they engaged in sex. He stated that the complainant was not going to school and that he did not know that she was underage.

8. In a judgment dated 07th December, 2018, the Appellant was convicted and sentenced to serve 20 years' imprisonment.

Appeal

9. Aggrieved by this decision, the Appellant lodged the instant appeal on 20.12.18 in which he raised six (6) grounds which I have summarized into three (3) grounds as follows: -

1. That there was contradiction regarding the age of the complainant

2. The defence was not considered

3. The P3 form was not produced by its maker

10. When the appeal came up for hearing on 24.07.19, I directed that the appeal be argued by way of written submission which both parties dutifully filed.

SUBMISSIONS BY THE PARTIES

Appellant's submissions

11. The Appellant holds the view that the P3 form and PRC form which were not produced by the makers and which tended to prove the age of the complainant are inadmissible since they were not produced by the makers. On that ground, the Appellant asserts that his right to a fair trial under Article 50(2) (k) was breached for he was denied a chance to challenge the evidence in those documents by way of cross-examining their makers. In support thereof, Appellant placed reliance on **Alfayo Gombe Okello v Republic [2010] eKLR** where the Court of Appeal stated that:

> **In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).**

12. Reliance was also placed on **Crawford v. Washington, 541 U.S. 36** where the Supreme Court of Washington stated as follows:

> **In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.**

13. Concerning the Appellant's defence, it was submitted that he had been a boyfriend to the complainant for a long time and that his defence that he believed that she was not a minor raised a reasonable doubt. In support of this assertion, the Appellant relied on Section 8 (5) (b)of ***the Act***. He also relied on **Francis Murangiri Mbaya v Republic [2017] eKLR** and **Muthoka Mwalya v Republic [2015]** eKLR where the courts held that **Section 8(6)** provides that the belief referred to in **sub-section (5) (b)** is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

14. Appellant similarly relied on **R K W v Republic [2017] eKLR** where the court held that:

> **It was for the prosecution to prove beyond reasonable doubt that the appellant knew that the complainant was below the age of 18 years. Once there is doubt that the accused did not know this, he is entitled to the benefit of doubt. The trial court did not consider the defence of the appellant that he did not know that the girl was below the age of 18 years.**

Submissions by the State

15. It was submitted for the state that the complainant's testimony that she was 15 years old was corroborated by her father. It was also submitted that the Appellant conceded that he had sexual contact with the complainant and that he was appropriately convicted.

Analysis and Determination

16. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

> **''On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit.''**

17. Appellant complained that there was a contradiction concerning the complainant's age. The penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant.

18. The trial court after considering the evidence by the complainant and her father that complainant was 15 years ruled that the same was corroborated by the age assessment report. The age assessment report was however not produced by its maker. To my mind, in the context of this case, Section 33 and 77 of the Evidence Act contemplate a situation where the officer giving evidence knows the doctor who prepared the report. In effect the witness should be conversant with the maker's handwriting and signature. It does not contemplate a situation where the officer giving evidence is a total stranger to the doctor as it was in this case. PW4 did not state that he knew the maker of the age assessment report, his handwriting and/or signature. He was a total stranger to the maker of that document. For that reason, I find and hold that the admission in evidence of age assessment report without calling its maker was procedural.

19. The foregoing notwithstanding, the age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report. In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

> **"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".**

20. The trial court found as a fact that the complainant's evidence that she was 15 years old had been corroborated by her father. From the foregoing, I find that the trial court arrived at a correct conclusion when it found that the complainant's age had been proved to be 15 years.

21. Penetration is a main ingredient in a charge of sexual offence. Section 2 of ***the Act*** defines **"**penetration" to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. Penetration was not denied since Appellant conceded that he indeed had sex with the complainant. As stated hereinabove, the complainant was a minor and the act of the Appellant engaging her in sex amounts to defilement.

22. It has been submitted at length that the complainant and the Appellant were lovers and that Appellant believed that complainant was not a minor. I have considered the provisions of Section 8 (5) of ***the Act*** which provides that:

> **It is a defence to a charge under this section if—**
>
> > **a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
> >
> > **b. the accused reasonably believed that the child was over the age of eighteen years.**

23. Section 6 on the other hand provides that:

> **The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant**.

24. There is neither evidence that the Appellant was deceived into believing that complainant was over the age of eighteen years at the time of the commission of the offence nor that the he took any steps to ascertain the age of the complainant. Consequently, I find that Appellant's defence was rightly rejected.

25. Concerning sentence, the Appellant was sentenced to the mandatory minimum sentence of 20 years prescribed under the provisions of Section 8 (3) of ***the Act***.

26. 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 holding of the Supreme Court 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**.**

27. From the foregoing, 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.

28. The Sentencing Policy Guidelines require the court, in sentencing an offender to a 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.

29. The Appellant who is a is a first offender. He was in a relationship with the complainant. The Appellant is a relatively young man and considering the totality of the circumstances, a long custodial sentence would not serve the interests of justice. I recognize the seriousness of the act of defilement. I therefore uphold the conviction. The Appellant has served about 11 months of his 20-year sentence. The sentence 20 years' sentence is substituted with the 2 years' sentence from 07th December, 2018 when he was convicted.

DELIVERED AND SIGNED IN KISUMU THIS *07th* DAY OF November 2019.

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu