REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 65 OF 2019

RICHARD ONGERA MISORE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence of Hon. S. Makila (SRM) delivered on 12th July 2019)

JUDGMENT

1. Richard Ongera Misore, the Appellant herein,was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2*) of the Sexual Offences Act.*** The particulars of the offence were that on 23rd day of August 2018 within Kisii County, the Appellant intentionally caused his penis to penetrate the vagina of JM, a child aged eight (6) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to ***Section 11(1) of the Sexual Offences Ac***t. The particulars of the offence were that 23rd day of August 2018 within Kisii County, the Appellant intentionally touched the vagina of JM, a child aged eight (6) years, with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted on the main charge of defilement and sentenced to life imprisonment.

2. In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court admitted the evidence of Pw2. He faulted the trial court for arriving at the finding of guilt whilst the evidence by the doctor did not indicate that he committed the offence. He was of the view that the sentence by the trial court was excessive. He was of the opinion that the prosecution's evidence was insufficient to sustain a conviction.

3. During the hearing of the appeal, this court heard oral submissions from Mr. O.M. Otieno for the Appellant and Mr. Otieno for the State.

4. Counsel for the Appellant submitted that the evidence on record did not prove that there was penetration. He submitted that Pw3 examined the victim and found that there was an attempt of penetration. He argued that an attempt to penetration and penetration were different ingredients. He further submitted that he is alive to the provisions of **section 124of the Sexual Offences Act;** however the evidence ofPw1 alone could not lead to a conviction. He urged court that the trial court further noted that Pw1 was unable to answer simple questions put to her and her evidence ought to have been treated with caution and circumspection.He also urged that the words used by Pw1 "*bad manners*" cannot be equated to penetration. He advanced that the trial's court finding on sentence was not safe.He referred to the cases of ***Peter Saikipor Naiyoma vs Republic (2019); Samuel Machara Kimani vs Republic (2019) eKLR and John Kagunda Kariuki vs Republic (2019) Eklr*** in which mandatory minimum sentences have been declared unconstitutional as it fails to conform to the tenents of fair trial. Finally he contends that the accused rights under **Article 50 of the Constitution of Kenya** were violated as he was not informed of his right to representation.

5. The state counsel opposed the appeal. He submitted that Pw1 testified she knew the appellant and identified him as the one who defiled her. The evidence of Pw3 was to the effect that there was a sign of attempted penetration of the minor but on re-examination he states there was penetration. He contends that as per the P3 and the PCR form, the observations made point to penetration. He submitted that taking into account that penetration can be complete or partial, the prosecution proved penetration beyond reasonable doubt.He further submitted that on the issue of representation, the appellant was warned of the consequences and that the charges were read in Ekegusii as language the understood. He also pointed out that on 21st September 2018 the accused had Mr. Wasonga as his Advocate. The state counsel further advanced that Pw1 was not the only eye witness as the court also received evidence from Pw5. He submitted that he did not that he did not oppose the reduction of sentence but asked the court to consider the fact the complainant was 6 years old at the time of defilement.

6. As this is a first appeal, this court is required to appraise all evidence and come to its independent conclusion whether to sustain the conclusion while all the time bearing in mind that it never heard nor saw the witnesses testify (***see Okeno v Republic [1972] EA 32***). In order to proceed with this, I will now set out the facts as they emerged before the trial court.

7. The court after examining Pw1 found that she could not answer simple questions and directed that she gives evidence through Pw2. She testified that the accused was known to her as *Osama*. She told court that she was in the company of Pw5 and Monica when the appellant asked them to go to his house so that he can cook for them. The appellant sent Monica to get vegetable and directed Pw5 to sweep and she was left alone with the appellantin the sitting room. Pw1 then described what transpired thereafter. She testified that;

> **"The accused remained alone with me and removed my clothes and did bad manners. He removed my skirt which I was wearing. He also removed my underwear. He put his "thing" inside my private part (points at her vagina). I felt pain and screamed but he covered my mouth. The accused made me sit on his laps. No one came to my rescue. Douglas (Pw5) was in one of the rooms. He saw what happened but left without doing anything to help me."**

8. After *voire dire* examination the trial court directed that Pw5 to give unsworn testimony. Pw5 testified that the appellant instructed him to sweep his bedroom and also sweep outside towards the toilet. He recalled seeing the appellant do bad manners to Pw1. He explained the appellant used his penis on the private parts of Pw1. Pw2 told court that Pw1 is her daughter. Pw2 testified that Pw1 told her that the accused defiled her after placing her on his lap. She told court that she told her husband and with the help of the community police the appellantwas arrested. She testified that both the appellantand Pw1 were referred too hospital.

9. Pw3 a clinical officer testifiedthat Pw1 was brought to hospital with a history of defilement by uncle. Upon examination of her private part, he noted reddish marks and the area was painful to touch. There was no discharge and Pw1 tested negative for HIV and syphilis. He concluded that there was a sign of attempted penetration. Pw4 testified that on 24th August he received a complaint from Pw2 in regard to the minor being defiled by the accused. He testified that the minor was referred to hospital for treatment and issued with a P3 form. The accused was arrested by the community police.

10. At the close of the prosecution case the trial court found that the prosecution had established a prima facie case and the appellant was put on his defence. The appellantagave sworn testimony. He told court that Pw1 and two other children came to his house and he sent one of them for sukuma wiki while Pw1 remained with another child. When the Sukuma wiki was brought he cooked and they ate. He escorted the children to their home. He was arrested on the following day. He told court that the grandmother of the complainant had told him that she would teach him a lesson for failing to work for her at Kshs 3,000/-.

DETERMINATION

11. It was the appellant's contention that the evidence of Pw1 could not be relied on as the trial magistrate after examining Pw1 found that the minor was unable to answer simple questions put to her. Pw1 gave her evidence through an intermediary. ***Section 2 of the Sexual offences Act***, defines an intermediary to mean:

> **"….**a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."

12. Section 31(1) (a) of the Sexual offences Act provides that a court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is *to give evidence in those proceedings a vulnerable witness if such witness is the alleged victim in the proceedings pending before the court*. The trial court after examination of Pw1 appointed Pw2 as an intermediary. The trial court considered the evidence of Pw2 after testifying through an intermediary found her to be truthful. I am aware that **Section 31 (10**) of the **Sexual Offences Act** provides that *a court shall not convict an accused person charged with an offence under that Act solely on the uncorroborated evidence of an intermediary*. The evidence of Pw1 was clear that she was defiled. She even described how the appellant defiled her by testifying that the accused *"put his "thing" inside my private part (points at her vagina). I felt pain…"* Pw5 also testified that he saw the appellantuse his penis on the private parts of M. The evidence is further corroborated by the medical evidence presented by Pw3. Pw3 testified that on examining Pw1 he observed that she had marks which were reddish on her private part and that the area was painful to touch. The appellant has challenged the offence of penetration claiming that Pw3 concluded that there was merely attempted penetration.

13. Section 2 of the Sexual Offences Act defines penetration in the following language, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* The Court of Appeal in ***Mark Oiruri Mose vs R (2013) eKLR*** stated thus:

> **"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…."**.' **(emphasis mine).**

14. I am therefore constrained to agree with the findings of the trial court that medical evidence supported penetration. The appellant'sargument that there was attempted penetration does not hold. The appellant also argued that he was notaffordeda fair trial as it was not informed of his right to legal representation. The right to legal representation is guaranteed under **Article 50(2)(g) of the Constitution**.In this case the appellant was represented by counsel during bond hearing but for unknown reason he proceeded to trial in person. In this case the appellant was not entitled to representation at the expense of the state as he was not facing a capital offence. In ***Karisa Chengo and Others v R [2015]eKLR*** the Court of Appeal held as follows;

> **Substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**

15. I now turn to the issue of identification. Pw1, Pw5 both testified that the appellant was a person known to them and referred to him as *"osama"*. Pw2 testified that Pw1 told her that it was the appellant who had defiled her.The trial court considered the Birth Notification Form

and the indicated date of birth was 21st May 2012 and, therefore, 6 years old on 23rd August 2018, the date of the defilement. The Appellant's guilt was established to the required standard of proof, beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, finds no reason to disagree with the finding reached by the trial court.I affirm the conviction of the trial court.

16. The trial court sentenced the appellant to life imprisonment pursuant to **section 8 (2)** of the **Sexual Offences Act** which provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. I have considered the appellant's appeal on sentence and the Court of Appeal's decision in ***Jared Koita Injiri v Republic [2019] eKLR*** where the Court of Appeal after considering the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015*** observed as follows;

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.**
>
> **….**
>
> **Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

17. The appeal is hereby allowed only to the extent that the sentence of life imprisonment is quashed and substituted with that of 30 years' imprisonment from date of sentence. The appellant has a right of appeal within 14 days.

Dated, signed and delivered at Kisii this 8th day of November 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant Present

Miss Angasa h/b Mr.O.M Otieno For the Appellant

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court clerk