REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 151 OF 2015

DAVID RIMURI ALIAS KADEV....APPELLANT

VERSUS

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

(Being an Appeal from against both the conviction and the sentence of Senior Resident Magistrate Hon. Nthuku J. delivered on 4th OF JUNE 2015 in NAKURU Court Criminal Case No. 126 of 2012.)

JUDGMENT

1. The Appellant was charged before the Nakuru Chief Magistrate's Court with one count of defilement of a child aged less than twelve years contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence as per the Charge sheet were that on 7th day of June 2012 at [particulars withheld] Village in Njoro in Njoro District within the Rift Valley Province, the Appellant unlawfully and intentionally committed the offence of defilement by inserting a male genital organ (penis) into a female genital organ (vagina) of ENM, a girl aged 9 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. of 3 of 2006**. The particulars of the offence is that on 7th day of June 2012 at [particulars withheld] Village in Njoro in Njoro District within the Rift Valley Province, unlawfully and intentionally committed an indecent to child namely ENM aged 9 years by touching her genital organ namely (vagina) with your genital organ (penis).

3. After a fully-fledged trail, the Trial Court convicted the Appellant and sentenced him to serve life imprisonment as mandatorily stipulated in the law.

4. The Appellant is dissatisfied with the conviction and sentence and has appealed to this Court. The grounds of appeal, reproduced verbatim, are that:-

> **a. The Appellant pleaded not guilty**
>
> **b. The learned trial magistrate erred in both law and in fact by failing to note that the medical evidence tendered at the trial was questionable and insufficient to rely on as the basis for a conviction,**
>
> **c. The learned trial magistrate erred in law and fact by failing to note that the important element of penetration was not conclusively proved.**
>
> **d. The learned magistrate erred in law and in fact by no considering that the age of the complainant was not conclusively proved**
>
> **e. The prosecution case was not established against the Appellant beyond reasonable doubt in order to sustain a safe conviction**
>
> **f. The Appellant was prejudiced by not being given a fair hearing as he was denied the opportunity to defend himself.**

5. The Appellant submitted that the trial Court erred in law and fact to have convicted and sentenced him while medical evidence tendered at the trial was questionable and insufficient to rely on as the basis for a conviction. He submits that the he pleaded not guilty to the offence. He also submits that there was no medical examination carried on him to prove that he committed the crime. He further states that PW 4

stated that the required procedure was not followed. He further states that his opinion was not sought before PW 4's testimony was accepted. He further complains that Section 33 of the Evidence Act was not invoked. He further states that the learned trial magistrate did not satisfy herself whether the expert witness who gave medical evidence was certified professional. He further states that PW 4 did not state the skill that made him an expert witness and he did not give the criteria of how the test were carried out.; and further that he was not a lab technician to have given lab results.

6. The Appellant drew the Courts attention to the following cases: ***Michael Odhiambo v Republic HCCR Case no. 280 of 2014; Elizabeth Gathoni Kibiku v Republic [2007] eKLR; Mutonyi v Republic (1982) KLR; Gabriel Muchira Mwenja v Republic App. No. 1224 (2000) NRB.***

7. In ground three and four, the Appellant submits that no penetration was proved, PW 4 testified to have found lacerations on the labia majora and minora and perforated hymn. He draws Courts attention to **Karisa Lilongo v Republic (2000) eKLR**, the gist of the case is that a perforation of the hymen is not conclusive evidence of penetration. He further submits that the age assessment report stated she was either 11-12 years of age. He draws Court's attention to **Muiruri v Republic (1983) KLR**, the gist being that proof of age must be provided and failure to adduce such evidence means one vital element of the charge remains unproven.

8. On ground five and six, the Appellant submits that the trial magistrate convicted him on testimony not tendered during the trial contrary to section 200 (4) of the Criminal Procedure Code. He further states that PW 4 stated that the injuries were more than a day old (3 days) this puts the time to 5th of June 2012 yet PW 1 claimed to have been defiled on 7th of June 2012. The Appellant further states that he was within his legal rights to demand for the witness who had expressed doubt in his sanity and states that his rights were violated because that person was not brought to Court.

9. I will address the complaints raised by the Appellant as I review and re-evaluate the evidence afresh as I am obliged to do, this being a first appeal. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic*** **[1972] EA 32**).

10. In the Court below, the following evidence emerged. The Prosecution called 5 witnesses in support of its case. It was Complainant's testimony that she met the Appellant as she was on her way home from school. By her testimony, that was on 07/06/2012. She told the Court that she went to school and realized that she was late. She therefore decided to go back home. As she was heading home, she met the Appellant, whom she knew as "Kadev". He pulled her by the hand and took her to his house, where he lay her on the bed, covered her mouth with a piece of cloth and defiled her. She was graphic in her description of the "tabia mbaya" that the Appellant did to her. After the ordeal, she went home and told no one about it.

11. The following day, the Complainant went to school but apparently, she had difficulties walking or sitting. She was sent home to bring her parents. She went to Mama L house. Mama L called L to her house. L testified as PW2. She said when she got a call from her mother, she went to her house only to find the Complainant walking with difficulties and looking all scared. L interrogated the Complainant on what had happened. The Complainant narrated how Kadev had defiled her. Kadev was also known to L. L testified that she physically examined the Complainant's private parts and noted that her vagina was swollen and her panties were oily. The Complainant told her that the Appellant had applied oil to her private parts before defiling her. L called the Complainant's mother.

12. The Complainant's mother is PW. She testified as PW3. She told the Court that she was called to L home on 08/06/2012. On arriving there, she found her daughter, the Complainant, had difficulties walking. Upon inquiry, the Complainant told her that "Kadev" had defiled her the previous day. She examined the Complainant and saw some discharge on her panties. She accompanied the Complainant to Njoro Police Station where they were given a P3 Form. She also took her to PGH for treatment.

13. The fourth Prosecution witness was Jacob Chelimo, a Clinical Officer at Njoro Health Centre. He testified that the P3 Form was filled by his colleague, Robinson Kipjut. He testified that he had worked with Robinson for more than three years and he was familiar with his handwriting and signature. It was Robinson who examined the Complainant on 08/06/2012 and filled the P3 Form. The P3 Form showed that the Complainant had tenderness on her right upper hand and the age of her injuries were 3 days. There were lacerations on the Labia Majora and Minora and a perforated hymen. No sperm cells were seen but there were moderate pus cells and few epithelial cells. He concluded that the Complainant had been defiled.

14. The final Prosecution witness was the Investigating Officer who confirmed that the incident was reported to Njoro Police Station on 08/06/2012. She was also one of the arresting officers who arrested the Appellant that same evening. They were led to the Appellant's house by the Complainant. The Complainant referred to her assailant as "Kadeve". The Investigating Officer also produced an Age Assessment Report. It showed that at that time (around February, 2015), the Complainant was aged between 11.5 and 12.5 years. This would mean that she was about nine years old at the time of the defilement.

15. When he was put on his defence, the Appellant chose to remain silent as by law permitted.

16. Based on this evidence, the Learned Trial Magistrate was persuaded that the Prosecution had proved that the Appellant defiled the Complainant beyond reasonable doubt. She proceeded to convict him and sentenced him to life imprisonment as prescribed in the Sexual Offences Act.

17. During the hearing of the Appeal, Ms. Kibiru appeared for the State. She submitted that all the three ingredients of the offence of defilement had been proved beyond reasonable doubt:

> a. On the age of the minor, Ms. Kibiru submitted that the Complainant was eleven at the time of giving the testimony. Further, she submitted that the Complainant's mother had confirmed that the Complainant was born in 2003. The age assessment report dated 29th of May 2014 was presented and it showed that the child's age was certainly below twelve at the time of the incident.

b. On the identity of the perpetrator, Ms. Kibiru submitted that the Complainant had stated that she had known the Appellant since she was in class 1. Further, she submitted that the act occurred during the day and so the Complainant was able to identify the Appellant.

c. On the issue of penetration, Ms. Kibiru argued that the Complainant tesified to it and further that the P3 Form produced by PW 4 was conclusive evidence that there was penetration.

18. Ms. Kibiru argued that the grounds of appeal must fail since there was sufficient evidence for a safe conviction.

19. The Learned Trial Magistrate correctly identified the three elements the Prosecution was required to prove beyond reasonable doubt in order to prevail in obtaining a guilty verdict:

i. That there was penetration of the Complainant's genitalia;

ii. That it was the Appellant who caused the penetration (i.e. identification of the Appellant as the assailant); and

iii. That the Complainant was less than twelve years old.

20. The age of the Complainant is hardly in question. An age assessment Report produced by PW5 placed the age of the Complainant in May, 2014 at between 11.5 and 12.5 years. That indicates that the Complainant was well below twelve years at the time of the incident. Additionally, the mother of the Complainant (PW3) testified that she was born in 2003; and the Complainant herself testified that she was eleven at the time she appeared in Court. Finally, the Trial Court ruled that she was young enough to not understand the meaning of oath. There is no reasonable doubt that the Complainant was below twelve years old.

21. It was on the issue of proof of penetration that the Appellant raised most complains. First, he complained that the evidence of the Clinical Officer does not qualify as expert evidence and should not have been accepted. Second, he obliquely complains that he was not examined and that therefore there was a gap in investigations. Third, he says that there was no sufficient evidence of penetration. In particular, he says that there was material discrepancy between the evidence of the Complainant who said she was defiled on 07/06/2012 and that in the P3 Form which, on 08/06/2012, indicated that the injuries were about three days old.

22. I should begin by noting that the Complainant gave straightforward evidence of penetration and how it happened. The Trial Court believed here. Her testimony was eminently credible. I find no reason to doubt it. Both PW2 and the mother of the Complainant said they observed the physical injury to the genitalia immediately after it happened and that the Complainant had difficulties walking. Finally, the Clinical Officer was categorical that there was penetration.

23. There is no requirement in our law that defilement can only be proved beyond reasonable doubt when medical evidence shows positively that semen or seminal fluids of an Accused Person was found in the genitalia of the victim. Indeed, the position in our law is that the Prosecution does not have to prove by medical evidence that any fluids found in the Complainant's genitalia was the Appellant's spermatozoa as the Appellant appears to argue on appeal. As our decisional law has established many times, rape or defilement is proved by evidence, not by way of DNA test. See ***AML v Republic [2012] eKLR***. In the present case, medical evidence established there was defilement; and oral testimony of the Prosecution witnesses connected the Appellant to the rape.

24. The complaints that the P3 Form was filled by an unqualified person was long answered by our jurisprudence. In ***Fappyton Mutuku Ngui v Republic [2014] eKLR*** held:

> "We do not think much turns on the Appellant's complaint that PW5 was not competent to fill in a P3 form under section 48 of the Evidence Act. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence. (See ***Raphael Kavoi Kiilu v Republic Cr. App. No. 198/2008***; Section 2 of the Clinical Officers Act (Training, Registration and Licencing) Act, Cap 260 (LOK)."

25. Similarly, in ***Francis Ndichu Kuria v Republic [2015] eKLR*** the Court stated that:

> "My understanding of the person referred to therein is that person who is trained in medicine such as a clinical officer or a practicing doctor and any of them is competent to fill a P3 form. Regard must be given to the fact that not all medical facilities in our Republic are equipped with practicing medical doctors and where the medical doctors can be found may be far out of reach for most people. In those instances, P3 forms are competently filled by clinical officers."

26. What should we make of the discrepancy on the evidence of the approximate age of injuries? I have come to the conclusion that it is immaterial discrepancy. As noted by the Uganda Court of Appeal in ***Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001 [2003] UGCA, 6*** it is not every contradiction that warrants rejection of evidence by a Court of law. The Kenyan Court of Appeal has taken the same position – see, for example, ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** ***Criminal Appeal NO. 5 OF 2013***. As the Court put it:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

27. Having looked at the trial Court record in its entirety and in context, I have come to the conclusion that the so-called inconsistency in question in this case is not material at all; it can be ignored as it has no bearing on the veracity of the material evidence tending to demonstrate the guilt of the Appellant. It does not relate to factors verging on the incredulity of the witnesses. Given that the defilement was only detected when the Complainant developed difficulties walking, it may be that she had been defiled a day or two earlier than she recalled in her testimony.

28. As for identification, the Complainant was categorical who it was that defiled her. She gave lucid testimony of how the Appellant led her by the hand to his house. The Appellant was well known to her. She identified him as "Kadev" to PW2, her mother and the Investigating Officer. She so identified him at the earliest instance. She led the Police to the Appellant's house. There is little doubt that the Appellant was the assailant.

29. Consequently, it is my finding that all the elements for the offence of defilement were proved beyond reasonable doubt. The conviction was safe and free from errors. The conviction is hereby affirmed.

30. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

> 8(2) 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.

31. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, 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.

32. 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.

33. In the present case, the Appellant refused to give any mitigation. However, there some material in the Court file which suggests that the Appellant is relatively youthful and that he, at times, suffered from mental illness. Comprehensive psychiatric examinations showed that the Appellant was fit to stand trial; and there was no evidence that the defence of insanity was applicable. However, this could still be a factor in sentencing. It is also a factor that while, the victim was a child of tender years and she will likely be scarred for life by this traumatic sexual assault, the defilement did not involve use of sadistic or gratuitous violence on the victim. Therefore in the circumstances of this case, life imprisonment would be disproportionate. Considering the mitigating and aggravating factors, I am of the view that a sentence of thirty years imprisonment would properly serve the sentencing objectives in this case.

> 28. **The upshot of all this is that the Appellant's appeal against conviction fails. However, the appeal against the sentence is hereby allowed. Accordingly I set aside the sentence of life imprisonment and substitute therefor a sentence of thirty (30) years imprisonment with effect from the date of sentence by the Trial Court.**

34. Orders accordingly.

Dated and signed at Nakuru this 5th day of December, 2019.

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JOEL NGUGI

JUDGE