REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 53 OF 2018

JOSEPH MULAMA MATEMWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Judgment delivered by Hon. B. Ochieng, Chief Magistrate on 13th April,2018 in Kakamega Criminal Case No. 108 of 2016)

JUDGMENT

The Background

1. This appeal stems from the judgment of the learned trial magistrate aforementioned. The appeal filed on 24th April 2018 seeks *inter alia* that his sentence be set aside and his conviction quashed on the following grounds*:*

a) *THAT I did not plead guilty for the charge*

b) *THAT the learned trial magistrate grossly erred in law and facts in failing to observe that I was not subjected to medical investigations as it is undefined under section 36 of the Sexual Offences Act. No. 3 of 2006*

c) *THAT the learned trial magistrate grossly erred in law and fact in finding penetration proved even in the wake of flimsy and inadequate evidence*

d) *THAT the learned trial magistrate grossly erred in law and fact in rejecting my defense of alibi without proper evaluation*

2. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act, 2006* and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act, 2006.* The particulars of the main charge were that the appellant on unknown dates in the month of April 2016 at [Particulars Withheld] area, within Kakamega County, unlawfully and intentionally caused his penis to penetrate the vagina of a girl named VA who was aged 17 years. The particulars of the alternative charge were that the appellant on unknown dates in the month of April 2016 at [Particulars Withheld] area, within Kakamega County, unlawfully and intentionally caused his penis to be in contact with the vagina of a girl named VA who was aged 17 years.

3. At the conclusion of the trial, the learned trial magistrate found the appellant guilty on the main charge of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act, 2006* and sentenced him to fifteen years imprisonment.

4. It is the said conviction and sentence that forms the basis of the instant appeal.

5. This is the first appellate court and as such it is guided by the principles set out in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."**

6. In a much earlier decision, the Court of Appeal similarly held in **Okeno vs. Republic [1972] EA 32** that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

Issues for Determination

a) Whether VA's age was assessed and determined correctly by the trial court

b) Whether there was improper, intentional and unlawful penetration of the vagina of VA

c) Whether the appellant was positively and properly identified.

d) Whether it was mandatory to medically examine the appellant to prove that he defiled V.A

e) Whether the trial court erred in disregarding the appellant's alibi evidence

Whether VA's age was assessed and determined correctly by the trial court

7. One of the ingredients necessary to satisfy the charge of defilement is determination of the victim's age.

8. Section 8(1) and (4) of the *Sexual Offences Act, 2006* provides as follows:

"8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

……..

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

9. The *Sexual Offences Act, 2006* defines *"Child"* within the meaning of the *Childrens Act No. 8 of 2001* which defines a *'child'* as ***"….any human being under the age of eighteen years."***

10. The Court of Appeal, in the case of **Hadson Ali Mwachongo v Republic [2016] eKLR** held as follows:

"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;

"In its wisdom Parliament chose to categorize 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).?"

(Also see The Court of Appeal in **Eliud Waweru Wambui v Republic [2019] eKLR**)

11. In the case of ***JOSEPH* KIETI SEET -VS- REPUBLIC [2014] eKLR, Mutende J**. held as follows*:*

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."

12. **JO,** testified as PW2 stating that she was VA's mother and identified VA's birth certificate which was produced by **PC Christine Kemunto** (PW4) as *PExhibit4* and indicated that VA was born on 21st December 1998. **Absalom Odhiambo,** a clinical officer testified as PW3 and stated that VA was 17 years old at the time of the medical examination on 21st September 2016.

13. The birth certificate provided the best evidence as to the age of VA which was around 17 years as at April 2016. Therefore, unlawful sexual activity with her fell within the ambit of 'Defilement' under Section 8(1) and the punishment within Section 8(4) of the *Sexual Offences Act, 2006*. The respondent was able to sufficiently discharge this burden of proof.

Whether there was improper, intentional and unlawful penetration of the vagina of VA

14. Another ingredient necessary to prove the charge of defilement is the fact of penetration.

15. *The Sexual Offences Act, 2006* defines **"penetration"** as

> **"the partial or complete insertion of the genital organs of a person into the genital organs of another person"**

16. The Court of Appeal, in the case of **Sahali Omar v Republic [2017] eKLR**, held that:

> **"…penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act."**

17. VA testified as PW1 and stated that in April 2016, she was playing in the field when the appellant called her and she accompanied him to his house where the appellant did "bad things" to her. PW1 added that the appellant told her to undress and she removed her skirt and panties and lay on the bed and then the appellant "inserted his thing" into her private parts. PW1 further stated that when the appellant was through, he told her to go home and when she reached home, she told her mother that she was at the appellant's house. PW1 further stated that the appellant called her again and did "tabia mbaya" to her and that she subsequently found out that she was pregnant and that she gave birth in January 2017. PW1 stated that the appellant was the biological father. During cross-examination, PW1 stated that the appellant was the first person to have sex with her and reiterated that the appellant was the father of her child.

18. PW2 testified that she had sent PW1 to take some money to a customer but that PW1 took too long to get back. On inquiring, PW2 stated that she was informed that PW1 had been seen playing in a field and later entered the appellant's home. PW2 stated that she noticed PW1 started to miss her periods and on taking her to hospital, it was confirmed that PW1 was pregnant. PW2 added that PW1 disclosed to her that the appellant used to have sex with her in his house. During cross-examination, PW2 stated that she saw PW1 and the appellant leave the appellant's house.

19. PW3 testified that by the time PW1 was being examined, she was 24 weeks pregnant and her hymen torn and produced her Post Rape Care(PRC) form, medical P3 form and Lab test report as *Pexhibit 1,2 and 3* respectively.

20. PW4 testified that PW1 who was accompanied by PW2 reported that she had been defiled by the appellant. PW4 stated that PW2 discovered this after PW1 conceived. PW4 added that PW1 was an imbecile and she was examined by a doctor who confirmed the same and she produced the medical assessment for persons with disability as *Pexhibit 5*. During cross-examination, PW4 stated that PW1 did not report the incident earlier as she was an imbecile and unable to appreciate the seriousness of the issue. PW4 further added that PW1 stated that it was the appellant who was responsible for the pregnancy.

21. Section 124 of the Evidence Act provides that:

> **"124.Corroboration required in criminal cases**
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> **Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

22. From the above provision, it is clear that the evidence of VA did not require corroboration for it to be proven. I am satisfied that she was telling the truth and that she was able to consistently tell her story to PW2, PW3 and PW4. The respondent proved the ingredient of penetration which consequently resulted to PW1 being pregnant, a fact which was corroborated by PW3.

Whether the appellant was positively and properly identified.

23. PW1's testimony appeared firm and consistent that it was the appellant who defiled her, and that it was him who was the father of her baby. PW1 further stated that the appellant did it more than once and that he was their neighbor. PW2's testimony indicated that she knew the appellant's parents and house. The medical p3 (*Pexhibit 1*) form indicates that PW1 alleged to have been defiled by someone known to her. PW4 testified that PW1 informed her that she had been defiled by the appellant and that PW1 positively identified the appellant as the one responsible for the pregnancy.

24. In his defence as DW1, the appellant stated that PW2 had a grudge with him in that she owed him money and that she had refused to pay him back. During cross-examination, the appellant stated that he knew PW1's family and that PW1's father set him up for arrest.

25. In **Karanja & another V Republic [2004] 2 KLR 140, 147 (Githinji JA, Onyango Otieno & Deverell Ag JJA),** the Court of Appeal observed that:

> "The law as regards identification under difficult conditions is now well settled. In the case of **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989** at Kisumu, this Court states as follows: -
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> **"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said: -**
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> **'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'"**

26. From the evidence herein, this court finds that the appellant was positively and properly identified by way of recognition by PW1. The appellant was well known to PW1 and I find nothing to doubt that it was him to who defiled PW1.

Whether it was mandatory to medically examine the appellant to prove that he defiled V.A

27. The appellant had submitted and stated in his petition of appeal that he ought to have been medically examined for it to be proven that he was the one who defiled PW1 as Section 36 of the *Sexual Offences Act, 2006* says so.

28. Section 36(1) of the *Sexual Offences Act,2006* provides that:

> **"36. Evidence of medical, forensic and scientific nature**
>
> **Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

29. The wordings of Section 36(1) above are clearly couched in discretionary, rather than mandatory terms. The above provision was deliberated on by the Court of Appeal in the case of **Robert Mutingi Mumbi V R. Criminal Appeal No. 52 of 2014** where the appellate court stated:

> **"Section 36(1) of the Act empowers Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not concluded in mandatory terms."**
>
> **Decision of this Court abound which affirm the principle that Michael or DNA evidence is not the only evidence of which commission of a Sexual offence may be proved."**
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> (Also see The Court of Appeal in ***Williamson* Sowa Mbwanga V R)**

30. From the above, it is clear that medical examination on the appellant was not mandatory but discretionary and there are other ways other than *Michael* or DNA evidence to prove the commission of a sexual offence. This ground by the appellant therefore cannot stand.

Whether the trial court erred in disregarding the appellant's alibi evidence

31. The appellant stated in one of his grounds of appeal that the learned trial magistrate erred when he failed to consider his alibi evidence without proper evaluation.

32. In his defence as DW1, the appellant had stated that he had travelled to Kitale from April to June but that he had no document to show he was in Kitale as he used his employer's private motor vehicle to travel.

33. It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the respondent. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. (See The Court of Appeal in **Athuman Salim Athuman v Republic [2016] eKL;** The former Court of Appeal of Eastern Africa in **R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939)**

6 EACA 145 and The Supreme Court of Uganda, in **FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998**).

34. In weighing the appellant's alibi defence and the evidence of the respondent, I find that the weight of the respondent's evidence is against that of the appellant's alibi defence. The respondent was able to cross-examine the appellant and impeach his alibi defence which to me appeared like a desperate attempt by the appellant to be granted the benefit of doubt. The appellant was positively and properly identified by PW1 as the person who defiled her and thus the appellant's alibi defence was displaced and became worthless.

35. From the foregoing, I find that the trial court's conviction of the appellant was safe and the same is hereby upheld

36. On sentencing, I note that Section 8(4) of the *Sexual Offences Act, 2006* provides that:

> **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

37. The Supreme Court of Kenya, in the case of **Francis Karioko Muruatetu & Another vs. Republic, held** that:

> **"Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.**
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> **……**
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> **. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.**
>
> **…….**
>
> **As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***

38. Recently, the Court of Appeal, in the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR,** held that:

> **"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:**
>
> > **"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's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."

39. In the instant case, the learned trial magistrate meted out the mandatory minimum sentence provided for by section 8(4) of the *Sexual Offences Act, 2006* which was fifteen years imprisonment. As stated above, the Court of Appeal has since held that the minimum mandatory sentences stipulated by the *Sexual Offences Act,2006* are unconstitutional. This means that courts will now have to consider factors such as but not limited to mitigation from accused persons while following the guidelines set by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs. Republic(supra)** together with having regard to pre-sentencing reports/statements from victims, if any, in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

40. In this case, the record indicated that the appellant was a first time offender. The appellant's mitigation was considered by the trial court but then the trial court noted that the appellant's actions robbed off a young girl of her innocence. I also note that VA was mentally unstable and thus vulnerable but then the appellant exploited the appellant's vulnerability for his personal gratification. It is not in doubt that VA's life has been changed forever in addition to her giving birth and dropping out of school. In the process however, the appellant also became a father and has acquired added responsibilities as a father whether he is in or out of jail. This is a factor this court has considered in interfering with the sentencing meted by the trial court. Accordingly, I hereby set aside the fifteen (15) years sentence imposed by the trial court, and instead jail the appellant for eight (8) years from the date of arrest.

41. The appeal is dismissed on conviction but partly succeeds on sentencing. The appellant is sentenced to serve eight (8) years in jail.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE