IN THE COURT OF APPEAL
AT NAKURU

(CORAM: WARSAME, MATIVO & J. NGUGI, JJ.A)

CRIMINAL APPEAL NO. 28 OF 2016

BETWEEN

JOSEPH KONGOTO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bomet (Muya, J.) dated 19th June, 2016

in

HC.CRA No. 46 of 2015)

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JUDGMENT OF THE COURT

1. This is an appeal against the decision of the High Court in Bomet (Muya. J) dated 19th June 2016 where the appellant was charged and convicted of the offence of defilement contrary to **Sections 8(3)** as read with **Section 8(2)** of the sexual offences Act and sentenced to life imprisonment.

2. The complainant, NC (PW1), gave evidence before the trial court, that on 15th April 2014 at about 5.00 p.m., the

appellant, who

was her uncle, took her to a maize plantation near their home, removed her innerwear, put her on the ground, lay on top of her and defiled her. She felt a lot of pain and started crying. While in the shamba, a lady by the name of Sharon found the appellant on top of the complainant.

3. PW2, the complainant's mother who was at home cooking at the time, testified that she sent NC and her siblings to collect firewood. However, Sharon, who was the wife of the appellant, came and informed her that she had caught the appellant defiling the minor in the maize plantation but when she raised an alarm the appellant fled. The complainant, who was crying, then told her mother what the appellant had done to her.

4. Members of the public including, PW3 a village elder, responded to the alarm, went to the maize plantation and saw that the ground had been disturbed. PW3 instructed two women to inspect NC's private parts and they concluded that she had been defiled. Members of the public, who learnt that the appellant had escaped towards Narok pursued him, arrested him and took him

to Kapkimolwa Police Post where Sgt Wilmot Kapiego booked the report in the occurrence book and detained him.

5. PW2 proceeded to Longisa Hospital where NC was examined by PW5, a clinical officer by the name of James Kiprono Lagat on 16th April 2014. PW5 observed that the complainant had lacerations on the labia majora and labia minora and her hymen was freshly broken and reddish in colour. He estimated that the injuries were about 20 hours old and concluded that she had been defiled.

6. The appellant, who was charged before the Principal Magistrate's Court at Bomet, categorically denied defiling the child as alleged. He claimed that the allegations were fabricated by his wife (Sharon) as revenge due to marital problems and stated that he and his wife had quarreled and separated before the incident. He raised an alibi defense and claimed that on the material day he was returning from work at Kataker, Narok County. He arrived home from work when his wife began making all manner of allegations. He mentioned that a colleague who could have been his witness had been killed. He also pointed out that his wife

Sharon, who allegedly found him with the child, had fled and did not testify in court because she knew the allegations were false.

7. The learned trial Magistrate, after considering the entire evidence, found the appellant guilty of the main charge of defilement and sentenced him to life imprisonment.

8. Dissatisfied with the conviction and sentence, the appellant appealed against the same to the High Court. The learned Judge, after hearing the appeal, which was opposed by the state counsel, upheld the decision of the trial court and determined that the conviction was safe and the sentence was lawful. The learned Judge, expressed himself as follows:

> *"It's instructive to note that the wife of the accused who allegedly found him in the farm in the company of the complainant was not called to testify. The accused himself does concede that she had run away from the matrimonial home. The reason for her disappearance is not hard to fathom. The prosecution's contention is that she had been issued with threats. I find no good reason to doubt this assertion.*
>
> *The complainant did testify before the court after a voire dire examination was conducted. Her evidence appears*

lucid. The trial Magistrate found her a trustworthy

witness. I have no good reason to find otherwise. The clinical officer PW5 in his evidence testified to have examined her genitalia and found that the hymen was freshly torn and there was laceration of both the labia's majora and minora. There is no proper age assessment report placed before the court. However, the age of the complainant is not in dispute and therefore not an issue in this appeal...

I find this appeal has no merit and it's dismissed. The conviction was safe and the sentence lawful. Both are upheld."

9. Undeterred, the appellant filed the present appeal, raising four grounds of Appeal. The gist of the grounds of appeal is that the learned Judge erred in law in convicting the appellant of the offence of defilement notwithstanding that penetration by the appellant was not proved, crucial witnesses failed to testify and the complainant was not declared a vulnerable witness and lastly that the sentence was harsh and excessive.

10. Relying on his written submissions, the appellant submitted that the prosecution had requested on 21st July, 2014 to "step down" the complainant so they could present evidence from her mother first in order to get proper sequence of what happened. It is the

contention of the appellant that the procedure adopted was in violation of the law. It is further contended that the court did not use proper mechanism to protect the complainant who was a vulnerable person. Consequently, the reliance on the evidence of the minor was unsafe.

11. The appellant also challenged his conviction on grounds that penetration was never properly established as the medical evidence from PW5 showed lacerations and a freshly broken hymen, but did not conclusively establish penetration. He further submitted that crucial witnesses mentioned during trial were never called to testify, particularly Sharon (his estranged wife) who allegedly found him with the child. This failure deprived him of his right to a fair trial and cross examination. Lastly, the appellant challenged the life imprisonment sentence as harsh and excessive, arguing that the trial court failed to consider mitigating factors. He requested that the appeal be allowed or that the matter be remitted to the High Court for resentencing, arguing that the life sentence offers no opportunity for

rehabilitation and reintegration, and that courts should balance punishment with human dignity.

12. Mr. Omutelema, the learned Counsel for the prosecution similarly relied on his filed submissions. It was submitted that all ingredients of defilement were proven beyond doubt, including: penetration which was proved by medical evidence showing lacerations on the complainant's labia majora and labia minora, with freshly broken hymen; the appellant's identity was established since the accused was well known to the complainant and her family and that the complainant's age was proved through a clinic health card showing that she was 7 years old at the time of the incident.

13. Furthermore, it was argued that Sharon's absence was not fatal to the prosecution's case, as the evidence from other witnesses, including the complainant's direct testimony, the mother's corroborating account, the village elder's observations of the crime scene, and the clinical officer's medical findings provided an overwhelming proof of the appellant's guilt that rendered Sharon's testimony, while potentially valuable, not essential for

securing a conviction. In any event, under **Section 127(3)(b)** of the Evidence Act, Sharon was a competent witness but not a compellable one, meaning the prosecution could not force her to testify against her husband.

14. In conclusion, the State contended that the sentence was entirely lawful under **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act, which prescribes life imprisonment for defilement offenses. In support of this submission, **Section 361** of the Criminal Procedure Code, which limits the circumstances under which appellate courts can interfere with sentences, and **Republic v Mwangi (Petition E018 of 2023) [2024] KESC 34** were also cited.

15. We have considered the record, submissions by the appellant and the state, as well as the law. In determining the appeal before us, we bear in mind that this being a second appeal, the limit of this Court's jurisdiction is delineated under **Section 361** of the Criminal Procedure Code. We are bound to entertain only issues of law. Nonetheless, we can interfere with findings of fact by the two courts below where they are not based on any evidence at

all, or on a misapprehension or perverted construction of the evidence. (See **Karani vs. R [2010] 1 KLR 73**.)

16. It is pertinent to note from the outset that the appellant has raised for the first time, before this court the issue of failure to declare the complainant a vulnerable witness and appoint an intermediary. A perusal of the record reveals that this ground was not raised before the High Court where the appellant's grounds of appeal were limited to: erroneous conviction despite lack of evidence, failure to consider medical evidence, non-reliance on eyewitness evidence, contravention of **Section 200** of the Criminal Procedure Code, and failure by the prosecution to summon Sharon as a witness.

17. It is well established that an appellate court will not generally entertain new grounds of appeal that were not canvassed in the court below. However, given that the appellant is acting in person we find it necessary to point out that a cursory look at the record shows that the request by the prosecution was limited to stepping down the minor who was distressed by the traumatic experience meted on her by the appellant. Consequently, the

court adjourned the matter "to allow her to compose herself" on 21st October, 2014 and she was recalled on 27th October 2014, where she successfully gave coherent testimony as PW1 and the appellant was given the opportunity to cross-examine her. This ground, therefore, amounts to nothing.

18. Turning to the issue of penetration and medical evidence, we find that the medical evidence by PW5 clearly established penetration. The clinical officer found lacerations on both the labia majora and labia minora, with a freshly broken hymen that was reddish in colour. These findings, coupled with the complainant's own testimony describing the appellant's actions, constitute sufficient evidence of penetration. The appellant's contention that penetration was not established is, therefore, without merit.

19. On the issue of the missing witness, Sharon, we think that the prosecution is not obligated to call every potential witness. **Section 143** of the Evidence Act provides that no particular number of witnesses is required for proof of any fact. The case of **Keter v Republic (2007) EA 135** established that the

prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to prove the case beyond reasonable doubt. What is important is the relevance and reliability of the evidence to be tendered by a particular witness. It is not rocket science that the prosecution can call every witness mentioned in the course of investigation, but what is essential, without sounding repetitive is relevancy and if there exists a gap to be filled by the prosecution.

20. Moreover, as correctly submitted by the State, under **Section 127(3)(b)** of the Evidence Act, a spouse is not a compellable witness against their partner in criminal proceedings. The record shows that the prosecution made efforts to locate Sharon but she had absconded from her matrimonial home and was at large; a fact confirmed by PW3, a village elder. Nevertheless, her absence did not create any gaps in the prosecution's case, given the overwhelming evidence from other witnesses including the complainant herself, her mother, the village elder, and the medical officer. The totality of the availed witnesses proved the case against the appellant beyond any reasonable doubt.

21. Regarding the sentence of life imprisonment imposed, it is prescribed by law under **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. In the recent Supreme Court decision in **Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34**, the Supreme Court affirmed the constitutionality of mandatory minimum sentences for sexual offences and held that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences. It is Parliament, not the Judiciary, that sets sentencing parameters for each crime in statute, unless it is unconstitutional and/or unlawful, we see no merit in disturbing the sentence imposed by the trial court, and upheld by the High Court.

22. Having carefully considered the record, the grounds of appeal, and the submissions by both sides, we are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. The complainant's evidence was consistent cogent and corroborated by the medical evidence and testimony of other witnesses. All the essential ingredients of the offence of

defilement were established: the age of the complainant who was 7 years old, penetration as evidenced by medical findings, and positive identification of the appellant who was the complainant's uncle and well known to her. The trial court and the High Court were both correct in their findings and we see no reason to disturb their concurrent conclusions.

23. In the result, this appeal lacks merit and is accordingly dismissed.

Dated and delivered at Nakuru this 31st day of October, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR