IN THE COURT OF

APPEAL AT KISUMU

[CORAM: ASIKE- MAKHANDIA, OMONDI & ACHODE, JJ.A]

CRIMINAL APPEAL NO. 370 OF 2019

BETWEEN

LINUS AYIENDA ONSATE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kisii (Majanja J.) dated 17th December, 2018

in

HCCR APPEAL N0. 54 OF 2018)

****

**** JUDGEMENT OF THE**

COURT

1. This is the second appeal of Linus Ayienda Onsate against the judgment dated **17th December 2018**, by Majanja J. The appellant had been charged, tried, convicted and sentenced to life imprisonment in the Magistrate's court at Ogembo for defilement, contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act (SOA).** The particulars of the offence were that on 17th February, 2018 at Gesabakwa location, Nyangusu Sub-location, Nyamanche Sub-county within Kisii County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of E.B., a child aged 5 years.

2. The appellant pleaded not guilty to the charge. The case was subjected to a full trial and to bring the appeal into

perspective, we have summarized the evidence that was presented before the trial court.

3. PW1 C.O, the mother of the minor told the court that she left her two minor children, one aged 7 years and the complainant minor aged 5 years at home on 17th February 2018, and went to the market to ply her wares. When she returned home at about 9pm, she found the minor crying and she reported to her that the appellant had defiled her during the day. PW1 took the minor to Nyamache hospital for medical attention and to the police station where she made a report and obtained a P3 form. The minor's birth certificate produced in evidence indicated that she was born on 12th August 2018.

4. The minor testified as PW2 after being subjected to *voire dire* examination. She stated that the appellant called her into his house when her mother was away at the market. He placed her on his bed and *"did bad things"* to her which included inserting his tongue in her mouth and his penis in her vagina. At the end of it all, he gave her Kshs. 20 to go and buy sweets.

5. PW3 Corporal Olivia Ledonyo, of Nyangusu Police station was the investigating officer who received the report of the defilement from PW1 and the minor. Her investigation revealed that the suspect was a caretaker in the neighbourhood who lived a few houses away from the home of the minor .

6. PW4 Ann Nyabunga, a Clinician at Nyamache hospital,

produced the medical report in respect of the minor. She testified that the minor presented with a history of defilement

on the night of the attack and upon examination, she was found to have a white vaginal discharge, lacerations on the vagina and the hymen was absent. The minor revealed that this was the third time the perpetrator had defiled her. PW4 produced the medical report, PRC form and the P3 form in evidence.

7. At the close of the prosecution case, the appellant was placed on his defence. Testifying without oath, he stated that on 18th February 2018, he spent the day working as usual. In the evening as he was preparing his evening meal, four people entered his employer's compound where he lived and arrested him without telling him what offence he had committed. Two of the people entered his house and took his Machete and hammer and escorted him to Nyangusu police station. He was surprised when the charges were read to him. He denied them. He did not call any witnesses to support his case.

8. At the close of the case, Hon. J. K. Mutai, the learned Resident Magistrate considered the evidence and convicted the appellant. Taking in to account the appellant's mitigation that he had children who depended on him for their education, the Magistrate sentenced him to life imprisonment.

9. Aggrieved by the judgment, the appellant first challenged the conviction and sentence in the High Court of Kenya at Kisii, alleging that the case against him was not proved beyond reasonable doubt. That he was HIV positive and an

object of discrimination in the community, a fact that the trial court overlooked. The respondent's contention, on the other hand

was that the prosecution proved all the elements of the offence of defilement.

10. Majanja J. re-evaluated the evidence on record and in a judgement delivered on 17th December 2018, came to the conclusion that the prosecution had proved all the elements of the offence of defilement. He dismissed the appeal in its entirety, upheld the conviction and affirmed the sentence.

11. Undeterred, the appellant filed a second appeal in this Court based on three grounds that: the ingredients of the offence were not conclusively proved; the trial was unfair contrary to **Articles 25, 27** and **50(1) (2)**; of the Constitution of Kenya and, the sentence of life imprisonment was unconstitutional.

12. The appellant filed undated written submissions in person. On the first ground, he alleges that the elements of the offence of defilement were not proved. That penetration, an important ingredient of defilement, was not proved as stated in **E.E. v Republic [2015] eKLR**. He also relies on the Supreme Court case of **Basita v Uganda Cr 35 of 1995** where it was held that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence.

13. The appellant contends that the two courts below erred in relying on what PW1, who was not a medical expert observed when she examined the minor, as corroboration of the minor's testimony. Also that PW4 did not conclude that the white discharge, vaginal lacerations and missing hymen observed on the minor upon examination, were as a result of

penetration.

14. The appellant asserts that there is scientific evidence that some girls are not born with a hymen, or that the hymen may be broken by factors other than sexual intercourse, such as insertion of objects including tampons in the vagina, masturbation injury and medical examination. That the hymen may also be raptured by natural tearing or, vigorous activity such as horseback riding, cycling or gymnastics. **(Canadian case of Queen v Manuel Vincent Quintanila [1999] AB QB 769)**. Further, that penetration was not proved since he is HIV positive yet the minor was examined and found to be HIV negative.

15. The second ground is that the trial violated **Articles 25, 27** and **50(1)** and **(2)** of the **Constitution of Kenya** as the appellate court failed to find that the appellant was not supplied with witness statements before the trial commenced to enable him know the charges he was facing with sufficient details to prepare his defence.

16. The third ground is that the sentence of life imprisonment meted upon the appellant is unconstitutional. He argues that the mandatory nature of the life sentence provided under **section 8(2)** of the **SOA** was declared unconstitutional by the High court in **Maingi & 5 Others v Director of Public Prosecution & Anor, Petition No. E017 of 2021, KLR** and by the Court of Appeal in **Cr Appeal No. 12 of 2021: Julius Kitsao Manyeso v Republic.** The appellant submits that he is fit to be sentenced to ten years imprisonment, as the least severe sentence in this case.

17. He contends that the mandatory and indeterminate nature of the sentence offends **Articles 27** and **28,** for being discriminatory, not upholding the dignity of the prisoner and denying him a chance to get out of prison once he is rehabilitated. Further, that it denies the the trial court discretion in sentencing. That it is contrary to standards of decency and Human Rights to which Kenya has agreed to adhere by virtue of **Articles 2(5)** and **2(6**) of the Constitution of Kenya and is cruel and degrading. To buttress this argument, he relied on the cases of **State v Bull and Anor [2002] (1) SA 535, (SCA) at (para 23), Makoni v Prisons Commissioner, CCZ 8/16, Constitutional application No. CCZ48/15 [2016] ZWCC,** and **Guyo Jarso Guyo v Republic [2018] Petition No. 2018.**

18. The appellant urges that should the appeal on conviction fail, the Court should consider that he is a first offender, his children need him to fend for them and that he is rehabilitated while weighing what sentence to impose.

19. Joseph Kimanthi, learned Assistant Director Public Prosecutions filed written submissions dated 8th November 2024, on behalf of the respondent, urging the Court to confine its duty on second appeal to matters of law as provided by **section 361** of the **Criminal Procedure Code** and articulated in **John Kariuki Gikonyo v Republic [2019] eKLR.** Counsel highlighted the ingredients of defilement set out in **Charles Wamukoya Karani v Republic, Cr Appeal No. 72 of 2017** and **John Muynua**

Munywoki v Republic [2017] eKLR, as

proof of the age of the victim, penetration and the identity of the accused. That the prosecution proved all the three ingredients.

20. Regarding the age of the minor, counsel submits that PW1 the mother of the minor and PW4 the Clinician, testified that she was aged five years old. That her birth certificate produced in evidence showed that she was born on 12th August, 2012 making her five years old at the time of the offence.

21. On the element of penetration, counsel submits that it was proved by the evidence of the minor who narrated what the appellant did to her. This was supported by the evidence of the mother as to what she observed of the minor when she returned home in the evening and what the minor herself told her. That this was further corroborated by the evidence of PW4 the Clinician who examined her at Nyamache hospital and confirmed that she had been defiled.

22. Concerning the identity of the assailant, counsel submits that the offence occurred during daytime and the appellant was well known to the minor. In her first report made to PW1, she narrated what was done to her and the identity of the person who did it. The mother knew whom the minor was talking about. According to counsel, the appellant was recognized by the minor and there was no chance of mistaken identity.

23. Lastly, counsel submits that the sentence of life imprisonment is lawful and it was correct for the trial court to

mete it against the appellant, having convicted him under **section 8(2)** of the

SOA. He relies on the holding of the Supreme Court in **Republic v Joshua Gichuki Mwangi: Criminal Appeal No. E018 of 2023,** to buttress this point. He urges the Court to find that the appeal is lacking in merit and dismiss it.

24. The appeal came before Court on 22nd May 2025 for plenary hearing via the virtual platform. The appellant appeared in person and Mr. Joseph Kimanthi, the learned Assistant Director of Public Prosecutions was present for the respondent. They each relied on their written submissions entirely and elected not to make any oral highlights.

25. This is a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code,** we are mandated to only render ourselves on matters of law. The section also provides that severity of sentence is a matter of fact and not of law, save for where the legality of the sentence has been challenged. With regard to matters of fact, we are required to pay homage to the findings of the two courts below, except where such findings were not supported by the evidence on record, or were made as a result of wrong application of the law.

26. The role of the Court on second appeal was succinctly captured in the case of **Karani vs R [2010] 1 KLR 73** as follows:

> ***"This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider***

only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the

trial court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

27. The appellant's first ground is that the ingredients of the offence for which he was convicted were not conclusively proved. He was tried and convicted for the offence of defilement contrary to **Section 8(1)** of the **SOA** which provides as follows:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

To sustain a conviction pursuant to this section the prosecution was required to prove that the victim was a minor, that she was penetrated and that the accused person was the perpetrator. (See- **John Mutua Musyoki vs Republic [2017] eKLR**.)

28. The age of the minor was not contested. Nonetheless, we observe that PW1 produced her birth certificate in evidence and it indicated that she was born on 12th August, 2012. The evidence of PW1 was corroborated by PW4, the Clinician who examined the minor and indicated in the P3 form that she was five years old.

29. The different ways of proving age were adverted by this Court in the case of **Mwalango Chichoro Mwanjembe vs Republic [2016] eKLR,** as follows:

> ***"The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."***

30. We are satisfied that the two courts below reached the correct conclusion based on the evidence on record, that the minor was aged five years old at the time of the Sexual attack.

31. Penetration on the other hand is defined under **Section 2(1) (d)**

of the **SOA** as:

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

32. The minor in the appeal before us gave a graphic description of what transpired in the following words:

> *"The accused did bad things to me in his bed. I was at home with my sister Purity Tom when he called me...*
>
> *Mother had gone to the market, he took me to his bed. I felt pain. He inserted his penis in my*

vagina

…. I felt pain in my body where I use to urinate. He kissed me. He inserted his tongue in my mouth."

33. This account of the minor confirms that she was penetrated during the assault. Her evidence was corroborated by the testimony of PW1 who stated that when she came home in the evening, she found the minor crying. The minor informed her that she had been defiled and upon checking her genitals, PW1 saw what she termed as *"spermatozoa and other dirt."* She took the minor to hospital. Further corroboration was provided by PW4, the Clinician, who upon examination, found that the minor's external genitalia had a whitish discharge, lacerations on the vagina and a missing hymen. She produced the P3 form and PRC form in evidence. In her opinion, the injuries found on the minor were consistent with defilement.

34. We therefore, find no basis to depart from the conclusion of the two courts below, that the element of penetration was conclusively established.

35. Regarding the identity of the perpetrator, the minor was the only identifying witness. The proviso to **section 124** of the **Evidence Act** is clear that the court can found a conviction on the evidence of a single witness without corroboration in a sexual offence. The said Section provides as follows:

"Notwithstanding the provision 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 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."

36. In the instant case, the minor identified the appellant as the man who assaulted her. The assault occurred during the day and the appellant was well known to her. She described him as the man who lived in the house of her uncle Onyonga. She explained in detail how he called her from her home where she had been left in the company of her sister Purity Tom and promised to give her sweets. He placed her on his bed and defiled her. He gave her Kshs. 20 after the nefarious act and she bought the sweets and shared with her sister. PW1 corroborated the minor's evidence to the extent that the appellant was indeed her brother's herdsman.

37. Upon examining the circumstances prevailing at the time of commission of the offence, we are satisfied that both courts below properly found that they were favourable for positive identification.

38. The second ground is that the trial violated the appellant's rights in **Article 25** on fundamental rights and freedoms that may not be limited; **Article 27** on the right to equality and freedom from discrimination; and, **Article 50 (1)** and **(2)** on the right to fair hearing. The appellant urged that the rights in these articles were violated by the Court's failure to supply him with witness statements before the trial, to enable him know the charges he was facing with, sufficient details to prepare his defence.

39. The record of appeal indicates that the trial followed the proper procedure. The appellant had a chance to hear the evidence brought against him and to cross-examine the witnesses. He was given a chance to mount his defence. Nowhere on the record did he raise any of these issues in the trial court, nor did he ask for additional time to prepare his defence and was denied. Upon conviction he was given a chance to offer mitigation. We note that these new grounds only sprung up on second appeal. They were not raised in the trial court nor in the first appeal for consideration. We cannot therefore, fault the first appellate court for failing to render itself on these grounds which they were not placed before it for determination. In a nutshell, we find that the appellant has failed to demonstrate that his rights under the Constitution were violated.

40. The appellant's third ground is that the sentence of life imprisonment meted upon him is unconstitutional. He contends that the mandatory and indeterminate nature of

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sentence offends **Articles 27** and **28,** of the Constitution of Kenya for being discriminatory, not upholding the dignity of the prisoner and denying him a chance to get out of prison once he is rehabilitated. Further, that it denies the trial court discretion in sentencing. The respondent rebutted this assertion stating that the sentence of life imprisonment is lawful and it was correct for the trial court to mete it against the appellant, having convicted him under **section 8(2)** of the **SOA.**

41. The appellant's argument is that the mandatory nature of the life sentence provided under **section 8(2)** of the **SOA** was declared unconstitutional by the High court in **Maingi** *(supra).* Perhaps he is ignorant of the fact that that ship has long since sailed, in view of the Supreme Court holding on sentencing under **section 8** in **Joshua Gichuki Mwangi,** *(supra)* that:

> ***"66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However,***

where a sentence is set in Statute, the Legislature has

already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed….

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the Sexual Offences Act remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

42. On the appellant's argument that the mandatory minimum sentence imposed is unconstitutional, we hold first, that this Court lacks jurisdiction to interfere with it and second, that the record shows that the appellant did not challenge the constitutionality of the sentence meted out by the trial court and the High Court. Hence, he cannot raise it at this stage. Our holding draws its efficacy from the case of **Republic vs. Mwangi** *[supra],* where the Supreme Court stated that;

"The record also shows that the issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by

counsel representing the respondent. Having combed through the Record of Appeal and proceedings,

we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.

43. Consequently, we find that the appellant has not established any grounds to warrant our interference with the conviction or sentence. The appeal is therefore, found to lack merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

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.... JUDGE OF APPEAL

H. A. OMONDI

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... JUDGE OF APPEAL

L. ACHODE

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... JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR