IN THE COURT OF APPEAL AT KISUMU

(CORAM: OMONDI, KIMARU & JOEL NGUGI,

JJ.A) CRIMINAL APPEAL NO. 129 OF 2019

DAVID OKOTH ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (Karanjah, J.) dated 4th April, 2019*

in

Criminal Appeal No. 13 of 2018)

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JUDGMENT OF THE COURT

1. **David Okoth Onyango** (the appellant) was charged before the Principal Magistrate's Court at Mbita 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 8th June 2017, at Godjope Location in Lambwe Sub- location in Mbita Sub-county within Homabay County, the appellant intentionally and unlawfully did an act which caused his penis to penetrate the anus of **I.A.O.,** a child aged 9 years.

2. The appellant faced an alternative charge of **committing an**

indecent act with a child contrary to **Section 11(A)** of the

Sexual Offences Act. The particulars of the charge were that on the same date and location, the appellant intentionally and unlawfully touched the vagina and anus of **I. A. O.,** a child aged 9 years.

3. The appellant denied the charges. A brief background of the case according to the prosecution was that on 8th June, 2017, the complainant was at Berian Christian School, when the appellant approached her and led her to a bath shelter. He removed her clothes, then removed his trousers and had sex with her. Later that evening, while bathing the complainant, her mother noticed a discharge from her genitalia and, upon inquiry, the complainant disclosed what had transpired. It was further the prosecution's case that on 15th June, 2017, while at school, the complainant experienced pain in her genital area and reported to her teacher, **Joseph Okech** (PW3). PW3 recalled that they confronted the appellant about the alleged defilement. He did not deny the same. They decided to escort the appellant to the police station.

4. The complainant's mother, **Jenifer Adhiambo** (PW2), worked as

a cook at the same school the complainant attended. She

testified that the appellant was employed as a groundsman at

the said school. It was her testimony that on the evening of 8th June, 2017, as she was giving the complainant a bath, she noticed traces of semen on her underwear. Upon inquiry, the complainant informed her that the appellant took her to the school's bathroom and penetrated her anus. PW2 stated that she took the complainant to Mbita Hospital for medical examination, and thereafter reported the matter at Mbita Police Station. PW2 stated that the complainant was born on 13th December, 2007. She produced her birth certificate in evidence.

5. PW4, **Victor Adika,** a clinical officer, testified that the complainant was brought to Mbita Hospital on 16th June, 2017. She was alleged to have been defiled on 8th June, 2017. It was his evidence that the complainant's labia minora and majora were inflamed and reddish. She had a foul brown discharge emanating from her vagina and her anus. A urinalysis test showed that she had a urinary tract infection. Her hymen was intact. It was his testimony that there was no penetration to her vagina, but her anus had been penetrated. He further testified that the complainant was mentally challenged.

6. The investigating officer, PC **Priscilla Wambui** (PW5), testified

that on 16th June, 2017, the appellant was brought to Mbita

Police Station by police officers from Ogongo. The appellant was alleged to have taken the complainant to a school bathroom and penetrated her anus, on 8th June, 2017. PW5 stated that she interviewed the complainant and referred her to Mbita Hospital for medical examination. After concluding her investigations, she recommended that the appellant be charged with the offence for which the complainant was convicted.

7. The trial court found that the appellant had a case to answer.

He was placed on his defence. He elected to give sworn evidence. He denied defiling the complainant. It was his testimony that he was assaulted by the school teachers and threatened into admitting that he defiled the complainant. He was taken to Ogongo Police Station, then to hospital, and later to Mbita Police Station. Upon cross-examination, the appellant admitted that he was employed as a groundsman at Berian Christian School, and that the complainant was known to him as she attended the said school.

8. At the conclusion of the trial, the learned magistrate determined that the prosecution had established its case

against the appellant in the main charge of defilement to the required

standard of proof beyond any reasonable doubt. The appellant was convicted, and sentenced to life imprisonment.

9. The appellant was dissatisfied with the decision of the trial court. He lodged an appeal before the High Court challenging the impugned decision, on grounds that the learned trial magistrate erred: in failing to appreciate that the charge sheet as drafted was defective, as the complainant's evidence on penetration was not in tandem with the particulars of the charge; in failing to note that the evidence of the complainant and PW2 on penetration was contradictory; for convicting him yet the medical evidence failed to corroborate the complainant's evidence on penetration; in failing to acknowledge that his right to a fair trial was violated, as he was not accorded an interpreter when PW4 and PW5 testified, and was not given adequate time to mount his defence; and lastly, that the learned magistrate erred in passing a harsh sentence.

10. His appeal before the first appellate court was dismissed, both on conviction and sentence.

11. The appellant, aggrieved by the decision of the learned

Judge,

filed a second appeal before this Court. He faulted the learned first appellate Judge for: failing to note that he was not accorded

a fair trial in line with the provisions of **Article 50(2)(g), (h**) and

(j) of the **Constitution;** failing to appreciate that the prosecution's case was marred by contradictions; failing to address the issue of illegal or defective trial in regard to final submissions, as it had powers to introduce it *suo moto*; and, for affirming an inhuman and degrading sentence, that was repugnant to the principle of equality before the law under **Article 27** of the **Constitution.**

12. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that his constitutional right to a fair trial was violated as he was not accorded ample time to prepare his defence. He averred that he was compelled to defend himself immediately after the trial court ruled that he had a case to answer, which denied him the chance to call a defence witness. It was his submission that since the complainant was mentally challenged, her evidence against him was incredible. He contended that the medical evidence was unreliable, arguing that the clinical officer's conclusion that the complainant's anus had been penetrated was not supported by the

findings, in the absence of any noted

injuries to the anus. He urged that the PW2’s testimony on

which organ was penetrated contradicted the medical evidence. Further, the complainant's testimony on how she was defiled differed from that of her mother (PW2). It was his submission that the complainant stated that she was defiled while lying down, yet PW2 testified that she was instructed to bend over. In the premises, the appellant urged us to allow his appeal as prayed.

13. In rebuttal, Assistant Director of Public Prosecutions, **Mr. Okango,** urged that all the ingredients forming the offence of defilement were established to the required standard by the prosecution. It was his submission that the complainant's evidence on penetration was corroborated by the medical evidence adduced by PW4. **Mr. Okango** submitted that the appellant did not seek additional time to prepare his defence before the trial court. Instead, upon being appraised of the provisions of **Section 211** of the **Criminal Procedure Code**, he indicated that he was ready to proceed with his defence and that he did not intend to call any witnesses. He pointed out that the contention by the appellant that the complainant was mentally challenged and therefore likely to have fabricated her testimony

was not supported by evidence. He explained that the trial court

conducted a *voire dire* examination and was satisfied that the complainant was fit to adduce evidence before Court. He further submitted that the appellant was given an opportunity to cross- examine the complainant, and at no time did he challenge her competence to adduce evidence. On medical evidence, **Mr. Okango** submitted that the complainant was examined eight days after the alleged incident, and that the clinical officer observed that the discharge from the complainant's anus was indicative of penetration. He therefore urged us to dismiss the appeal for lack of merit.

14. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of ***Dzombo Mataza v Republic [2014] eKLR***, where this Court expressed itself in the following terms;

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court…. By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact***

unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have

considered or that looking at the evidence they were plainly wrong."

15. We have considered the record of appeal, the submissions made and the law. From his grounds of appeal and submissions filed before this Court, the appellant's appeal turns on:

    i. ***Whether he was accorded a fair trial;***

    ii. ***Whether the prosecution sufficiently established the case against him; and,***

    iii. ***Whether the appellant's sentence is legal.***

16. The appellant contended that his right to fair trial was violated allegedly because he was denied adequate time to prepare his defence. We have perused the record of the trial Court. It shows that upon being placed on his defence, the requirements of **Section 211** of the **Criminal Procedure Code** was duly explained to him. He elected to give sworn evidence and expressly indicated that he was ready to proceed. He told the Court that he did not intend to call any witnesses. There is no indication on record that he sought adjournment or additional time to prepare his defence and was denied the same. In the circumstances, this ground of

appeal is an afterthought and must fail.

17. On the second issue, the offence of defilement is established upon proof of three essential ingredients: the age of the complainant, proof of penetration, and the identity of the perpetrator. (See ***Gikunju v Republic (Criminal Appeal 117 of 2018) [2025] KECA 401 (KLR)***). The complainant's birth

certificate was produced in evidence by PW2, indicating that she was born on 13th December, 2007. At the time of the alleged offence on 8th June, 2017, she was aged 9 years. This element was therefore proved to the required standard of proof beyond any reasonable doubt.

18. The appellant challenged the finding of penetration, arguing that the medical evidence did not support the complainant's testimony, particularly in the absence of injuries to the anus. According to the evidence on record, PW4, the clinical officer, testified that although there was no vaginal penetration, the complainant's anus had been penetrated. He based this conclusion on the presence of a foul brown discharge from the anus, coupled with clinical findings made upon examination. It is noteworthy that the examination was conducted eight days after the alleged incident, a factor that

may account for the

absence of visible injuries.

19. Further, the complainant gave direct evidence that the appellant penetrated her anus. Her account was consistent with the disclosure she made to her mother, PW2, shortly after the incident. Notably, PW2 testified that on the material evening, while bathing the complainant, she observed what appeared to be semen on the complainant's undergarments. This observation lends further credence to the occurrence of sexual assault. The complainant gave the same account to her teacher, PW3.

20. It is trite that penetration need not be proved by medical evidence alone. The credible testimony of a complainant may suffice in certain circumstances. This Court in ***Kassim Ali v. Republic [2006] KECA 156 (KLR)*** held that the absence of

medical evidence to support the fact of rape is not decisive, as the fact of rape can be proved by oral evidence of a victim of rape, or by circumstantial evidence. In this case, the complainant's evidence was corroborated by both the medical findings and the evidence by PW2 and PW3. We are therefore satisfied that penetration was proved to the required standard of proof.

21. The appellant questioned the complainant's credibility on the basis that she was mentally challenged, and therefore likely to have fabricated her testimony. The record, however, shows that the trial court conducted *voire dire* examination and was satisfied that the complainant possessed sufficient intelligence to testify and understood the duty to tell the truth. Her evidence was coherent, consistent, and detailed as to what transpired. Further, her account was not stand alone or made in isolation. She narrated the incident to her mother (PW2) on the same day, and subsequently thereafter reiterated the same to her teacher (PW3) when she experienced pain while at school. The consistency in her narration to different persons at different times lends credence to her testimony, and negates the suggestion by the appellant that she had fabricated the sexual assault. We are satisfied that her testimony was credible, truthful, cogent and consistent.

22. On identification, the appellant was well known to the complainant. He was employed at her school. This was therefore a case of recognition, which is more reliable than identification of a stranger. The complainant consistently

identified the

appellant as the perpetrator. She identified him by name.

Additionally, PW3 testified that when confronted, the appellant did not deny the allegations. The appellant's defence that he was coerced into admitting the offence was properly considered and rejected by the two courts below.

23. The last issue relates to the appellant's sentence. The appellant was sentenced to life imprisonment, which is the penalty prescribed under **Section 8(2)** of the **Sexual Offences Act**. In his grounds of appeal, the appellant's faulted the learned first appellate judge for affirming a sentence that was unjustifiable, unfair, discriminatory and repugnant to the principle of equality before the law, under **Article 27** of the **Constitution**. We note that the appellant did not make any submission in relation to this ground of appeal.

24. That being said, the Supreme Court in ***R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment)*** held that statutory minimum

sentences do not, of themselves, violate the **Constitution**. The Court drew a clear distinction between mandatory

sentences, which wholly deprive courts of sentencing discretion, and

minimum sentences, which merely prescribe a sentencing floor,

while permitting the imposition of a higher sentence depending on the circumstances of the offence.

25. From the foregoing, it is clear that the sentence of life imprisonment prescribed under **Section 8(2)** of the **Sexual Offences Act** remains lawful, constitutional, and binding upon trial courts. Consequently, courts are not at liberty to impose sentences below the statutory minimums set out in the **Sexual Offences Act**.

26. In the end, the appellant's appeal on both conviction and sentence is devoid of merit. It is hereby dismissed.

Dated and delivered at Kisumu this 24th day of April,2026.

H.A. OMONDI

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... JUDGE OF APPEAL

L. KIMARU

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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 original.

DEPUTY REGISTRAR