IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO (P). GATEMBU & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 7 OF 2019

BETWEEN

ZNM.......................APPELLANT

AND

REPUBLIC.........RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi: (Chitembwe, J.) dated 13th February, 2017 in Malindi H.C.Cr. Appeal No. 62 of 2014)

JUDGMENT OF THE COURT

1. ZNM, the appellant, was convicted by the Magistrate's Court, Malindi on two counts of the offence of defilement and on a third count of sexual assault in a judgment delivered on 24th November 2014. The victims of the offences were three sisters, MKK (PW1), LSK (PW3) and LAK (PW4) aged 17, 15 and 12 years respectively who, at the material time, were under the care of the appellant, their grandfather. He was sentenced to serve consecutive imprisonment terms of 25 years, 30 years and 30 years on each of the three counts respectively. His appeal to the High Court against conviction was dismissed in a judgment delivered on 13th February 2017 but that court reduced the sentences to 15 years, 20 years and 10 years respectively and ordered the sentences to run concurrently.

2. The facts are that the appellant's home was in close proximity to the school attended by the three children. For purposes of convenience, and to avoid the children travelling a long distance from their mother's home to the school, in January 2011, their mother AKN (PW2) arranged with the appellant for the children to move in and live with him at his home. And so, the children began living with their grandfather, the appellant, a fisherman.

3. In her testimony MKK (PW1) narrated that the appellant's house was one roomed; that they (the children) slept on a mattress while the appellant slept on the floor; that one night in October 2011, the appellant had gone fishing and upon his return found them sleeping. She narrated that:

> ***"…he then came and removed my clothes. He removed my skirt and panty. He turned me and had sex with me. He held my mouth. He told me I am a mature girl now and I will see. He climbed on top of me and had sex with me. He then left and went back fishing, that same night."***

4. She stated that she woke her sister up and informed her what had happened; that she was bleeding from her private parts and did not go to school that day; that two days later, upon the appellant returning home at night from fishing, the ordeal was repeated; she again informed her sister, and the following day went to their mothers' home but were constrained to return to the appellant's house because of school; and that she successfully resisted the appellant's attempt to defile her on a subsequent occasion.

5. The testimony of the 15-year-old LSK (PW3) was equally disturbing. She stated that during their stay at the appellant's house, "*my grandfather…would do bad manners with me*" and that when he did so, "*I bled from my private parts*."

6. The youngest of the sisters, 12-year-old LAK (PW4), testified that while living with the appellant, she would see her grandfather, the appellant "*doing bad manners*" to her and her sister and that her sister "*got pregnant and gave birth as a result of what my grandfather did to her*". She reiterated that the appellant

"*did bad things to me and my sister*".

7. The children's mother, PW2, stated that in the course of her children's stay with the appellant, they started calling her complaining that they were being defiled; that she left her home and went to the appellant's home and arrived at 9.00 p.m. and informed him that she wanted to take her children; that the appellant demanded money (Kshs. 85.00) in order to release the children which she paid; that on reaching home she questioned the children; that PW1 told her that the appellant had repeatedly defiled her whilst LSK informed her that the appellant had inserted his fingers into her vagina.

8. Thereafter, after school closed, PW2 reported the matter to the sub-chief at Mambrui and was advised to take the children to hospital. At the hospital, the children were examined, and it was confirmed that PW1 was pregnant. PW2 reported the matter to the police.

9. Police constable Samuel Muturi (PW6) was the investigating officer who upon receiving the complaint at the police station referred the complainants to hospital for examination. He issued them with P3 forms that were filled at the hospital. He got their clinic cards and birth notifications based on which he established their respective dates of birth.

10. At Malindi Hospital, Ibrahim Abdullah (PW5), a clinical officer examined the children. He established that PW1's hymen was broken. Pregnancy test was positive. In relation to PW3 and PW4, he confirmed on examination that their respective hymens were broken. He formed the opinion that there was penetration.

11. In the course of the trial and having noted that scan results carried out at Malindi District Hospital in respect of PW1 showed that she was pregnant, the court, on 31st August 2012 ordered DNA tests to be carried out on the child upon birth to ascertain the paternity. On 3rd October 2012, the prosecutor reported to the trial court that PW1 had delivered a child on 18th September 2014 (must be 2012) and requested that the appellant to be ordered to report to Malindi Police Station to facilitate the taking of samples. In response to that request, the appellant stated, "*Ni sawa*", whereupon the court ordered him and PW1 to report to the OCS Office, Malindi Police Station on the same date to facilitate DNA sampling.

12. In compliance with the court order, Police Constable John Keter (PW8) escorted the appellant and PW1 together with the child to the laboratory at Malindi District Hospital where their blood samples were taken and placed in test tubes which PW8 took back to the station, prepared exhibit memo forms, and took the samples to the Government chemist in Mombasa.

13. Ann Wangeci Nderitu, a holder of a master's degree in Chemistry and an analyst at the Government Chemist received the samples and upon analysis of the DNA profiles of the same prepared a report dated 28th May 2013 concluding that, "*there are 99.99+% more chances*" that the appellant is the biological father of the child delivered by PW1.

14. In his defence, the appellant elected to give unsworn testimony in which he confirmed that the complainants were at the material time living with him for ease and convenience of attending school as their home is far. In his words, *"I lived with them in my home for about two months."* He stated that he discovered that one of the children had a behaviour problem and that with the permission of the mother, he would *"beat her"* when he noted bad behaviour. That when he beat her, she ran away from home and went to her mother, but that matter was resolved, and he was surprised to learn later that police were looking for him. That he was then arrested and taken to the police station where he explained how he lived with his grandchildren. He denied that he defiled or sexually assaulted them.

15. After reviewing the evidence, the trial court stated that, "*the evidence that was adduced clearly confirms that PW1 and PW3 were defiled and PW4 was sexually assaulted by the accused person on various occasions when he would return home from fishing at night*", and that the evidence pointed to the appellant having committed the heinous acts against his grandchildren entrusted to him by their mother as a caregiver, and convicted him on all three counts.

16. As already indicated, on appeal, the High Court reviewed the evidence before concluding that:

> ***"the totality of the prosecution evidence does prove that PW1 and PW3 were indeed defiled. The results of the defilement of PW1 is the pregnancy and the ultimate delivery of the child. PW3's hymen was broken. The same applied to PW4. There is no reason why all the three children would implicate the appellant. The appellant had all the time as he was living with the children."***

As already stated, the High Court did however reduce the sentences and ordered the prison terms to run concurrently.

17. Against that background the appellant, in this second appeal, which by dint of Section 361 of the Criminal Procedure Code must be confined to matters of law (See ***Karingo vs. Republic [1982] KLR 213***), complains that the prosecution did not discharge its burden to the required standard because the ages of the victims were not proved as no birth certificates or certified copies of age assessment reports were produced; that the DNA samples were extracted in breach of Section 122(c) of the Penal Code; that the medical evidence did not connect the age of the injuries to the dates when the offences were committed; that his alibi defence was not considered; and that the Judge erred in fettering his judicial discretion in sentencing.

18. We begin with the complaint that the age of the complainants was not proved to the required standard. The appellant quite rightly relied on the case of ***Hadson Ali Mwachongo vs. Republic [2016] eKLR*** to stress the point that age is a critical element that should be established by the prosecution in an offence of the nature he faced. In that case the Court stated that:

> ***"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."***

19. In the same spirit, the Court in ***Eliud Waweru Wambui vs. Republic [2019] eKLR*** stated that:

> ***"There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."***

20. On his part, learned counsel for the respondent ***Mr. Jami*** whilst agreeing that age of the victim in sexual offences is a critical ingredient of the offence submitted that the ages of the victims were indeed proved to the required standard.

21. Apart from the statements by the victims themselves regarding their respective dates of birth, the mother of the victims, PW2, testified regarding the ages of her children. The investigating officer (PW6) produced as exhibits, clinic cards and birth notifications showing the respective ages of the complainants as follows: MKK, (the complainant in respect of count 1) was born on 13th January 1995; LSK, (the complainant in respect of count11) was born on 9th February 1997; and LAK, (the complainant in respect of count 111) was born on 23rd March 2000. As per the charge sheet, the offences were committed between October 2011 and April 2012 when the children were aged 17, 15 and 12 years respectively.

22. A birth certificate or age assessment are not the only means for establishing the age of a victim in sexual offences. As the Court of Appeal of Uganda stated in ***Francis Omuroni –Vs- Uganda, Court of Appeal No.2 of 2000,*** *"apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense………"*

23. In the present case, beyond the testimony of the victims' mother regarding the respective ages of her children, there was the birth notifications and clinic cards that were produced. Therefore, there is in our view no merit in the complaint that the ages of the victims were not proved.

24. The next complaint is that the DNA samples were extracted in breach of Section 122(C) of the Penal Code. Sections 122A to 122D of the Penal Code deal generally with sampling for DNA identification and provides that a police officer of or above the rank of inspector my require a person suspected of having committed a serious offence to undergo DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence. The provisions detail the procedure for doing so. Section122(C), which the appellant complains was not complied with provides that a suspect may undergo the DNA sampling procedure *"by consent"* provided such consent shall be recorded in writing signed by the person giving the consent.

25. In the present case the appellant was facing charges under the Sexual Offences Act. Section 36 provides that 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 the offence. The essence of that provision was expressed by this Court in ***Robert Mutungi Mumbi vs. Republic [2015] eKLR***, thus:

> ***"Section 36(1) of the Act empowers the 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."***

26. See also the decision in ***Boniface Kyalo Mwololo vs. Republic [2016] eKLR*** where this Court expressed that "*where a person is charged with an offence of sexual nature, a court may direct an appropriate sample for purpose of forensic and other scientific testing, including a DNA test*". Section 36 of the Sexual Offences Act confers a discretionary power on the court to order appropriate sample, including DNA test to be taken from the accused person. See ***COI & another vs. Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR***.

27. The record of the trial court shows that on 31st August 2012, the prosecution informed the court that there was indication from PW1's hospital treatment notes that she was pregnant whereupon the court directed that *"DNA test to be carried out on the foetus (sic) upon birth to ascertain its paternity"*. The matter was then mentioned before the trial court on 3rd October 2012 when the prosecution confirmed that PW1 had delivered on 18th September 2012 and requested the court to order the appellant to report to the police station for purpose of DNA sampling procedure. As already indicated, the appellant signified his consent and stated, *"Ni sawa."*

28. Clearly, it was within the power of the trial court under Section 36 of the Sexual Offence Act to order the taking of the sample as it did. Although the consent of the accused person may be desirable for that to be done, as was granted in this case, it is not a requirement under the Sexual Offences Act. There is no merit in this complaint.

29. The next complaint was that his alibi defence was not considered. We have reviewed the record. Beyond denying that he committed the offences, the appellant did not offer an alibi. On the contrary, his own testimony was that "*I live with them (the complainants) in my home for about two months*." There was no suggestion that he was elsewhere when the offences were committed. This complaint is an afterthought and has no merit and we reject it.

30. All in all, the convictions on all three counts are based on cogent evidence and we are satisfied that the prosecution discharged its burden of proof and presented a watertight case against the appellant.

31. The last grievance relates to sentences. The appellant complains that the lower courts should have exercised discretion in meting out the sentences. It is correct that since the pronouncement by the Supreme Court of Kenya (albeit in the context of mandatory sentence of death for the offence of murder) in the case of ***Francis Kariokor Muruatetu & Another vs. Republic [2017] eKLR***, that sentencing is at the discretion of the court depending on the circumstances of each case, this Court has applied the principle in relation to sexual offences under the Sexual Offences Act.

32. The trial court while sentencing noted, correctly in our view, that the offences committed by the appellant against the complainants, his

grandchildren, were serious exacerbated also by the fact that the children were placed under his care. He was sentenced to 25 years on count 1, 30 years on count II and 30 years on count III. The sentences were to run consecutively. As stated, those sentences were reduced by the High Court to 15, 20 and 10 years respectively with a direction that the sentences would run concurrently. It has not been demonstrated that the sentences are illegal, and we have no basis for interfering with the same.

33. The result of the foregoing is that this appeal is devoid of any merit. It is accordingly dismissed.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. OUKO, (P)

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR