IN THE COURT OF APPEAL

AT ELDORET

CORAM: HANNAH OKWENGU, ASIKE-MAKHANDIA & SICHALE, JJ.A

CRIMINAL APPEAL NO. 35 OF 2018

DANIEL KIPKOSGEI LETTING.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the High Court (Githua,J)

dated 20th *July, 2016* **in H.C CR. C. No. 2 of 2013)**

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JUDGMENT OF THE COURT

Daniel Kipkosgei Letting, the appellant herein, was by way of a charge sheet dated 9th July, 2012, arraigned in Court for the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the charge were that on the 7th July, 2012 at **[Particulars Withheld] village** within **Nandi County** he unlawfully and intentionally did cause his penis to penetrate the vagina of **JC**, a girl aged 10 years. In the alternative he was charged with the offence of indecent act with a child contrary to section 11(1) of the sexual offences act. The particulars of this count are not necessary as the appellant was only convicted on the first count. The appellant pleaded not guilty to both counts.

The trial proceeded in the lower court with 5 state witnesses. **JC(PW1)** testified that she was 10 years old and was in standard two. On 7th July, 2012 she was asked by her mother to go pick vegetables from their vegetable farm with **EK** and **LC** who were her siblings. They bumped into appellant who asked her siblings to go pick sugarcane from his home which was 200 metres away from their vegetable farm. When the appellant was left alone with JC in the farm, the appellant forcefully removed her pants, and then removed his trouser and inserted his penis in her vagina. **JC's** brother **MK (PW2)** caught them in the act and he called **SK** who was not a witness from their home which was 300 metres away. She knew the appellant as **Daniel Kipkosgei** who was their neighbor. It was **JC's** evidence that the appellant had previously defiled her.

PW2 on the other hand testified that on the material day at 4.00pm, he heard the appellant laughing loudly and on arrival at the scene he found the appellant had inserted his penis in **JC's** vagina. He raised an alarm and his brother SK came and together they took the appellant to the village elder, who instructed them to take him to **Chepsonoi police station** where he was arrested. **JC** was taken to **Kapkangani health Centre** for treatment. **PW2** knew the appellant as a neighbor.

PC(PW3) the mother to **JC** had on 7th July, 2012, sent **JC, EK**, and **LC** who are her children to collect vegetables as she went to the river to fetch water. She proceeded to the scene and found the appellant dressing up, and on examining **JC** she noticed semen in her vagina; together with the appellant, **PW2** and **SK** they escorted JC to **Kapkangani Health Centre** and thereafter proceeded to **Kaimosi police station** and reported the incident whereat the appellant was arrested. **PW3** confirmed that the appellant was her neigbour.

Josephat Imbeko (PW4) a clinical officer, examined **JC** and found that her hymen was inflamed, and reddish and there was semen in her vagina. He concluded that she had indeed been defiled. He tendered in evidence the p3 form and the hospital treatment notes.

Lumumba Wangila (PW5) a police constable at Kaimosi police station received the complaint, arrested and booked the appellant in the police station for the offence of defilement. Following further investigations, he charged the appellant with the offence of defilement as already stated.

The trial Court found a prima facie case established against the appellant and put him on his defence. He opted to give unsworn evidence in which he denied committing the offences he was charged with. He explained that on the material day **PW2** owed him some money and when

he demanded payment, she beat him up, tied his hands, asked **JC** to dress up and took him together with JC to **Kapkangani Health Centre** where **JC** was examined and he was tested for HIV. He was later arraigned in court for offences he knew nothing about.

In its judgment the trial court found that the prosecution had proved the case beyond reasonable doubt and convicted the appellant of the main charge of defilement contrary to section 8(1) as read with 8(2) of the sexual offences Act. There was no finding on the alternative charge. Following mitigation, in which the appellant pleaded for forgiveness, he was sentenced to life imprisonment.

Aggrieved by the decision of the trial court the appellant filed an appeal in the High Court at Eldoret on the grounds that; the learned magistrate erred in convicting him yet the charge sheet was not read to him; by relying on the P3 form which was inconsistent with the evidence of **PW2**; his evidence was not considered; the prosecution evidence was inconsistent; and that the professional expert report was incomplete.

The High Court **(Githua.J)** upon hearing the appeal in plenary delivered its judgment on the 20th July, 2016, and held that the prosecution had proved the charges against the appellant beyond reasonable doubt and that the appellant was properly convicted. On appeal against the sentence, the High Court held that the appellant had been convicted with an offence of defilement whose mandatory minimum sentence was life imprisonment. She therefore did not disturb the sentence and accordingly dismissed the appeal in its entirety.

The appellant was once again aggrieved by the decision of the High Court and opted to try his luck on this second and perhaps last appeal in this Court. The appellant raised the following grounds on appeal, that the trial court erred by upholding the conviction and sentence with no clear explanation; that the P3 form was inconsistent with the evidence of the clinical officer; that the prosecution had not proved its case beyond reasonable doubt.

When the appeal on 4th May, 2021, came up for hearing, the appellant appeared in person while the respondent was represented by **Mr. Rop**, learned prosecution counsel. The appellant chose to rely on his written submissions that he had filed. In those submissions the appellant submitted that the P3 form tendered in evidence was not authentic as it emanated from Kaimosi police station instead of Kapkangani police station; that the village elder was not summoned to give evidence; the evidence of the clinical officer PW4 was contradictory yet the court relied on it. That the sentence imposed was harsh, excessive and unconstitutional. He therefore pleaded with us to find that his conviction and sentence could not stand.

On his part **Mr. Rop** learned prosecution counsel submitted that this court should confine itself to matters of law only and not facts, and that the evidence implicated the appellant in the commission of the offence; the p3 form showed that the vagina of PW1 was inflamed, reddish and had mild laceration and a discharge; the element of penetration had been proved; that the prosecution had proved all the ingredients of the offence of defilement; the sentence imposed was legal; the age of the minor had been proved to be 10 years as at the time of the commission of the offence. We were thus urged to dismiss the appeal. In reply, the appellant urged us to reduce the sentence imposed on him.

This being a second appeal, we are enjoined by the provisions of section 361 of the Criminal Procedure Code to entertain only matters of law. In the case of ***Njoroge v. Republic*** **[1982] KLR 388**, this principle was enunciated as follows;

> **"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence."**

In **Adan Muraguri Mungara v Republic, [2010] eKLR**, this Court stated the circumstances in which we may interfere with the concurrent findings of fact by the trial court and the first appellate court, as follows*:*

> **"As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."**

We have perused the record of appeal, the written submissions and the oral highlights. The issues of law that arise for determination are: whether the prosecution proved the offence charged and whether sentence imposed was unconstitutional. The issue as to as to where the P3 form emanated from is a matter of fact. Further whether or not the village elder was called to testify was neither here or there. However, we hasten to point out that the two courts below made concurrent findings that PW1 was aged 10 years old at the time of the commission of the offence, there was penetration of her genital organs and that the appellant was positively identified as the perpetrator of the crime.

In this Court the appellant has vehemently questioned those concurrent findings and maintained that the case against him was not proved as required in criminal proceedings. It thus behooves us to revisit the evidence tendered in support of the three ingredients of the offence viz; identification or recognition of the offender, penetration and age of the victim. See the case of **George Opondo Olunga v Republic c [2016] eKLR.**

PW1 identified the appellant as the person who defiled her. This evidence was corroborated in material aspects by **Pw2, Pw3** and **Pw5**; indeed **PW2** and **PW3** found the appellant at the scene of crime and in the act. Further the appellant was a neighbor well known to all the witnesses. The appellant did not dispute that fact. If anything in his defence he conceded to knowing **PW3.** Thus the identification of the appellant as the perpetrator of the crime was well established. Accordingly, the two Courts below did not err in reaching a similar conclusion that he was properly identified as the perpetrator of the offence.

With regard to the age of the complainant, the Clinical Officer who examined her estimated her on the P3 form as 10 years old. A clinic card was also tendered in evidence which indicated that she was born on 20th November, 2001, thus she was 10years old as at 7th July when

offence was committed. This was sufficient evidence to prove the age of the complainant as the two Courts below correctly held.

The prosecution had further to prove penetration as an element of defilement. Section 2 of the Sexual Offences Act defines penetration as follows:

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

PW1 in her testimony graphically detailed how she was penetrated by the appellant. PW2 found the appellant in the act whereas **PW3** came to the scene and found the appellant dressing up after the act and immediately examined **PW1** and noticed sperms from her genital organ. **PW4** testified that there was evidence of penetration when on examination of her hymen it was found to be broken and inflamed and there was presence of semen in the complainant's vagina. The ingredients of the offence were therefore well established.

The age of **JC** was established to be 10 years which was important for purposes of sentencing. As already stated the appellant was charged with the offence of defilement and section 8(2) of the Sexual Offences Act which was the Penal section in regard to the charge provides:

> **" A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

The trial court sentenced the appellant to life imprisonment which was upheld by first appellate court. Both Courts expressed the view that, that was the only available sentence for the offence. However, the Supreme Court in ***Francis Karioko Muruatetu v Republic*** **[2017] eKLR**, have since held that the mandatory death sentence provided by section 204 of the penal code deprived Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Further that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused persons pursuant to article 25 of the Constitution. This Court in ***Jared Koita Injiri v Republic*** **[2019] eKLR** guided by the sentiments of the Supreme Court aforesaid observed thus with regard to mandatory minimum sentences:

> **" If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court."**

With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.

In the premises we dismiss the appeal against conviction but set aside the sentence of life imprisonment imposed on the appellant and substitute it with twenty-five (25) years imprisonment effective from the date of conviction and sentence.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR