IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 80 OF 2016

BETWEEN

EMS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 11th February, 2015 and delivered by (Sitati, J.) on 12th March 2015

in

H.C.CR.APP. No. 318 of 2012)

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JUDGMENT OF THE COURT

1. EMS, the appellant, was charged with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act. The particulars of the offence were that on 29th December 2011 in Navakholo District within the former Western Province unlawfully and intentionally caused his penis to penetrate the vagina of DK a child aged 6 years.

2. The appellant was tried before the Magistrate's court at Kakamega and convicted in a judgment delivered by ***Hon. Wesonga*** on 20th December 2012. Thereafter, he was sentenced to life imprisonment. His first appeal was rejected by the High Court at Kakamega (***Chitembwe J***.) in a judgment dated 11th February, 2015 but delivered by (***Sitati, J.***) on 12th March, 2015.

3. In this, his second appeal, the appellant in his grounds of appeal states that his right to fair trial was violated; that the charge sheet was defective; that the ingredients of the offence of defilement were not established; that the courts below did not consider that the victim may have been mistaken as to the identity of her attacker; that there were contradictions and inconsistencies in the prosecution case; that his defence was not considered; and that the High Court did not re-evaluate and analyze the evidence.

4. During the hearing of the appeal the appellant relied on his written submissions in which he only expounded on the complaint that his constitutional right to a fair trial under Article 50(2) of the Constitution and Article 48 on access to justice was violated as he was not afforded legal representation by the State. In that regard, he cited the Supreme Court decision in ***Republic vs. Karisa Chengo & 2 others, SC Petition No. 5 of 2015***.

5. The appellant also sought to rely on his further supplementary grounds of appeal during the hearing of the appeal, in which he brought to the attention of the Court that during the pendency of this appeal, he had successfully petitioned the High Court at Kakamega, in Criminal Petition No. 2B of 2019, (a petition from the original conviction and sentence of Hon. Wesonga on 20th December 2012) where the life sentence was set aside and substituted with imprisonment for a term of 30 years. He urged us to further reduce the sentence from 30 years. We will advert to this aspect of the matter later in our judgment.

6. Opposing the appeal, learned Prosecution Counsel, ***Mr. Kakoi*** for the respondent relied on his written submissions and urged that the ingredients of the offence of defilement, namely the identity of the assailant, penetration and the age of the victim, were proved to the required standard.

7. With regard to the claim that the appellant's constitutional right to fair trial was violated on the basis that he was not provided with legal representation by the State, counsel also referred to the Supreme Court decision in ***Republic vs. Karisa Chengo & 2 others, SC Petition (Supra) No. 5 of 2015*** and submitted that there can be no violation unless it is shown that substantial injustice resulted, which in this case was not demonstrated.

8. As for the sentence, counsel submitted that as the High Court has since re-sentenced the appellant to 30 years imprisonment, the same may be upheld by this Court.

9. We have considered the appeal and the submissions. On a second appeal such as this, our mandate is circumscribed. By dint of the provisions of ***Section 361(a)*** of the ***Criminal Procedure Code***, our jurisdiction is confined to matters of law only. Unless it be demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision that court was plainly wrong, we cannot interfere. If it is so demonstrated, our considering such matters amounts to considering matters of law in which case it would be accepted that the first appellate court failed to revisit the evidence that was before it afresh, analyze it and evaluate it as is required of it in law.

10. As held in ***Karingo vs. Republic [1982] KLR 213***:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]."***

11. Given the parameters of our mandate, there are two issues that arise in this appeal for our consideration. The first is whether the ingredients of the offence of defilement were proved to the required standard. The second issue is whether the appellant's right to fair trial was violated. There is also the question of sentence.

12. As to whether the ingredients of the offence were established to the required standard, we begin by observing that we can only interfere with the findings of the lower courts if such findings are not based on evidence, or are based on a perversion of the evidence or unless no reasonable tribunal would reach such findings. In ***Adan Muraguri Mungara vs. R [2010] eKLR***, this Court said that we must:

> ***"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."***

13. The facts of the harrowing experience by DK, the 6-year victim in the hands of the appellant are best captured in her own words. After explaining to the trial court that on the material day, her mother left her and her 3-year-old brother in the house to go to the shamba (farm), PW1 graphically narrated that:

> ***"it was in the morning when mother left us to go to the shamba. Mother left Job and I sleeping in the main house. I sleep without clothes because wet*** *(sic)* ***my bed. M came and asked if my parents were around, he pulled me from my beddings and told me to go to the kitchen and give him something to eat. I told him that mother had not left any food but he insisted and pulled me to the kitchen to make him tea. When we got to the kitchen he pushed me on the floor, he was wearing a torn trouser in the shirt and he removed "khatete" a thing that boys use to urinate, he parted my legs and inserted it into my vagina. It was painful, I cried and told him that I was in pain. He said that he would not do it any more and promised to buy me mandazi if I did not tell. I know M he is my uncle…"***

14. Two things emerge from that excerpt. The first is the identity of the defiler. It was a person well known to DK. She referred to the appellant by his name M and referred to him as her uncle. Indeed, when she subsequently reported the ordeal to her mother, PW2, she was clear that it was M, her uncle, who had defiled her. The appellant himself acknowledged his relationship with PW1 when in the course of his testimony in his own defence he stated that "*the complainant is my niece.*" The first ingredient of the offence was thus proved beyond any shadow of doubt.

15. The other necessary ingredient is penetration. Evidence in that regard also emerges from the excerpt of the victim's testimony captured above. She was clear that the appellant inserted his penis into her vagina. The testimony of the clinical officer, Robert Wanyonyi, PW3, who examined the complainant at Chwele sub district hospital corroborated PW1's testimony in that regard. PW3 confirmed that DK's hymen was absent, her labia majora and minora had bruises and were torn. As stated by the Court in ***Christopher Kipchoge Kibenei vs. Republic (2016) eKLR***, the medical evidence was corroborative of the minor's evidence. In that case the Court stated:

> ***"Therefore, what was the consequence of the medical examination that was carried out on the minor on 30th November, 2006" In our view the medical examination corroborated the minors' evidence of penetration on ENM due to the perforated hymen."***

16. As for the third ingredient, proof of the complainant's age, DK herself was clear that she was aged 6 years and in nursery school by the time she was testifying before the trial court. In any event, DK's mother, PW2, produced her birth certificate confirming her date of birth as 11th October 2005. There is no merit in the complaint that the victim's age was not proved to the required standard.

17. Moreover, where, as here, the trial court bases its findings on the credibility of witnesses, an appellate court should be slow to interfere with its decision unless no reasonable court could make such findings or it is shown that there exist errors of law. See in ***Nelson Julius Karanja Irungu vs. R (2010) eKLR*** and also ***R vs. Oyier [1985] KLR 353***.

18. In this case the trial court was undoubtedly impressed by PW1 as it remarked that her demeanor, during the hearing, clearly showed that she is a child without guile and that her story was convincing. The trial court was best placed to assess the credibility of the witnesses as it saw and heard them.

19. The result of the foregoing is that we are satisfied, as the two courts below were, that the ingredients of the offence of defilement were proved and the courts' findings in that regard are well supported by the evidence.

20. There is then the question of the appellant's legal representation. To start with, we note that this matter has been raised for the first time before this Court. It was not raised either before the trial court or before the High Court. Furthermore, there is no demonstration of any injustice to the appellant. As the Supreme Court of Kenya stated in ***Republic vs. Karisa Chengo & 2 others, SC Petition*** *(Supra)* ***No. 5 of 2015*** the right to legal representation at state expense, though a fundamental ingredient of the right to a fair trial is not open ended. *"It only becomes available if substantial injustice would otherwise result."*

21. Finally, there is the question of sentence. As already mentioned, the appellant petitioned the High Court during the pendency of this appeal and had the life sentence imposed by the trial court substituted with a custodial sentence of 30 years. The appellant asked this Court to further reduce the sentence.

22. It is not clear to this Court whether the appellant disclosed to the High Court, when he petitioned it for re-sentencing, that he had a pending appeal before this Court. It is irregular and an affront to the orderly administration of justice that parallel proceedings challenging the same sentence should simultaneously be pursued in different courts. In our view, it is incumbent upon the High Court when approached by litigants seeking resentencing pursuant to the Supreme Court decision in ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR***, to enquire from the litigant whether there is other pending litigation in respect of the same matter and if so, to demand the litigant to elect whether to pursue the appeal or the re-sentencing by withdrawing one or the other.

23. That said, the circumstances in which the offence in this matter was committed by the appellant deserves the severest of punishment. The medical evidence was that as a result of the defilement, DK developed hemorrhoids requiring surgical treatment. DK's mother testified that since the ordeal DK had become withdrawn. DK is scarred for life. In mitigation before the trial court, all the appellant could say was that he was a student and that a custodial sentence would ruin his life. He was not remorseful for ruining DK's life. He deserved a life sentence. We would not interfere with the life sentence meted out by the trial court as upheld by the High Court on first appeal.

24. This appeal is wholly devoid of merit. It is dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 31st day of January, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR