IN THE COURT OF APPEAL

AT KISUMU

[CORAM: KOOME, SICHALE & KANTAI, JJA]

CRIMINAL APPEAL NO. 153 OF 2015

BETWEEN

JOHNSON OGEGA MAKORI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

[Being an appeal from the judgment of the High Court of Kenya

at Homabay (D. MAJANJA, J) dated 4th September, 2015

IN

HOMABAY HC.CRA NO. 3 OF 2015

****

JUDGMENT OF THE COURT

On **9th January, 2015**, the appellant, **Johnson Ogega Makori,** was tried and found guilty of the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act. He was convicted and sentenced to twenty (20) years imprisonment. In the charge sheet, it was alleged that on **15th May, 2014**, the appellant had carnal knowledge of **DAO**, a child aged 14 years.

Dissatisfied with the conviction and sentence of the trial court, the appellant filed an appeal to the High Court of Kenya at Homa Bay which was dismissed on **26th August, 2018** by **Majanja, J**. Undeterred, the appellant filed the instant appeal before us.

In an undated Memorandum of Appeal, the appellant raised five (5) grounds of appeal. These were that:

(i) the age of the minor was not proved;

(ii) penetration was not proved;

(iii) the medical evidence was insufficient;

(iv) Section 169 of the Criminal Procedure Code was not complied with and finally, that

(v) the appellant's defence was not considered.

On **30th July, 2019** when the appeal came up before us for plenary hearing, the appellant relied on his undated written submissions in which he contended that the sexual intercourse was consensual; that he was under the mistaken belief that the minor was over 18 years old; that the medical report did not link him to the offence and that the prosecution failed to call an independent witness. In his oral address before us, the appellant stated that P.W 1 had been sent away from her home and he feared to send her away from his place lest she got harmed.

In opposition to the appeal, **Mr. Muia**, the learned Prosecution Counsel (PC) relied on the respondent's submissions filed on **29th July,**

2013. Counsel contended that the grounds raised by the appellant are factual and hence this Court has no mandate to consider them. According to him, all the ingredients necessary to establish the offence as charged were proved. Firstly, it was his view that there was penetration, secondly, that P.W 1 was below the age of majority and finally, that the appellant was positively identified. As for the sentence, counsel pointed out that the sentence of twenty (20) years was within the law.

The appeal before us is a 2nd appeal. Our mandate in a second appeal is as stipulated in Section 361(I) (a) of the Criminal Procedure Code. It provides:

> ***" 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****see also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Kaingo versus Republic [1982] KLR 213*** it was held as follows:

> ***"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]."***

On our part, we have considered the record, the rival written and oral submissions and the law.

P.W 1 told the trial court that on **12th May, 2014** at about 1 p.m., she arrived at her home and found her mother who asked her to go and be with the appellant, apparently, as a wife. Following this "**advice**", on **13th May, 2014,** P.W 1 left to go and join the appellant who lived in Kisii and the duo thereafter lived as husband and wife. In her cross-examination, P.W 1 stated that she was 17 years old and not 14 years and that she had been friends with the appellant from **1st January, 2013** (the date of the alleged commission of the offence being **15th May, 2014**). Her evidence of her age was in stark contrast with what her father **M.O** (P.W 2) told the trial court. P.W 2 produced a baptismal card showing that P.W. 1 was born on **14th February, 2000**, hence about 14 years as at **15th May, 2014.** P.W 2 reported the disappearance of her daughter on the same day (**15th May, 2014)** at Ndhiwa Police Station. Following this report, **CPL Wilson Cheruiyot** (P.W 3) re-arrested the appellant who had been arrested in Kisii. When P.W 1 was recalled on **16th September, 2014**, and in cross-examination, she stated:

> ***"My mum packed my clothes so that I could leave"***.

P.W.4, **Stephen Kerario**, a Clinical Officer at Ndhiwa District Hospital examined P.W.1 on **21st May, 2014**. From his clinical observation, he established that there had been no penetration. He explained that his findings may be attributed to the fact that it took long (6 days from the date of the alleged commission of the offence) before P.W 1 was examined.

In his sworn statement of defence, the appellant denied defiling P.W.1. He called **Samuel Ogendo**, (D.W.2), his younger brother as his witness. However, D.W.2's evidence did not advance the appellant's defence in any way.

In a trial conducted by **Kipyegon**, the then Resident Magistrate, Ndhiwa Law Courts, the appellant was found guilty and sentenced to 20 years imprisonment. As stated above, the appellant's first appeal was dismissed.

P.W.1 tried to tell the court that she was 17 years old (at the time of the alleged offence) but her father (P.W.2) produced a baptismal card showing that P.W.1 was born on **14th February, 2000**, hence she was about 14 years at the time of the alleged commission of the offence. Whatever the case, P.W.1 was below the age of 18 years and the law criminalizes sexual contact with a girl below the age of 18 years. There were concurrent findings of fact by the two courts below that P.W.1 was a girl below the age of majority.

As regards the issue of penetration, it is not disputed that P.W.1 and the appellant lived together as husband and wife and freely engaged in sexual intercourse. There is also no issue on identification as the two knew each other and considered themselves as lovers. In our view, all the elements of the offence of defilement were satisfied. We find no merit in the appellant's appeal on conviction and accordingly dismiss his appeal on conviction.

However, as regards the sentence and given the circumstances of this case, where P.W.1 considered herself a wife to the appellant and freely engaged in sexual intercourse, that P.W.1's mother encouraged P.W.1 to get married to the appellant who was himself a young man of about twenty one (21) years (when the appeal was heard), and the fact that the Supreme Court in the case of **Francis Karioko Muruatetu &**

another vs. Republic SC Petition No. 16 of 2015 outlawed the mandatory nature of a death sentence for the offence of murder contrary to section 204 of the Penal Code and that this Court has also had occasion to apply the dictum in the above case in sexual offences. In **Christopher Ochieng vs. Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, this Court stated:

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis…. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another vs. Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court"***

By parity of reasoning, we deem it fit to interfere with the sentence meted to the appellant. Accordingly, we vary the sentence from twenty (20) years imprisonment to the period already served. The upshot of the above is that the appellant shall forthwith be released unless he is otherwise lawfully held.

It is so ordered.

Dated and Delivered at Kisumu this 31st Day of January, 2020.

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR