IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU, & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 76 OF 2016

BETWEEN

TITUS MUSYOKA................................APPELLANT

AND

REPUBLIC ....RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Machakos (**Mutende, J**.) dated 12th June, 2014*

in

H.C.CR.A. No. 247 of 2011)

****

JUDGMENT OF THE COURT

Background

1. The appellant, **Titus Musyoka** was charged with the offence of defilement contrary to **section 8 (1) as read with section (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 15 th January, 2011 at about 6:00 pm at Mulani village, Munanga sub location, Miambini location in Kitui District of the Eastern province, he intentionally used his penis to penetrate the vagina of **KK** (name withheld) a child aged 13 years. He was convicted and sentenced to 20 years imprisonment.

2. In support of its case the prosecution called five (5) witnesses, including the complainant. It was the complainant's testimony that she was a 13 year old class 6 pupil at Miambani Primary School. On 15th January, 2011 at around 6:00pm she was in their farm watching over crops when the appellant whom she knew very well as her neighbor arrived. The appellant took her to Maakani river which was dry and while holding a knife forced her to lie down and subsequently removed her pants and defiled her. A neighbor, one **Mutua Mutuku** (**Mutua**) found the appellant in the act of defiling the complainant and the complainant ran away, leaving the appellant and Mutua. The complainant went home but did not inform her mother, that the appellant had defiled her until the next morning. This was because the appellant had

threatened to kill her if she told anyone that he had defiled her. The complainant informed her mother that the appellant had given her Kshs. 50/- with which she had bought a lunch box and body cream. On 19th January 2011, the complainant and her mother went to report the defilement to the area Chief's office at Malani. The complainant was then taken to Kitui District Hospital where she was attended. Thereafter, the complainant and her mother reported the matter at the Police Station. The complainant denied that she had a grudge against the appellant and his family. She identified the appellant as the person who defiled her.

3. ***Dr. Patrick Mutuku (Dr. Mutuku***) of Kitui District Hospital testified that the complainant was referred to him for treatment on 19th January, 2011 claiming to have been defiled by someone known to her. Upon examination Dr. Mutuku found no injuries on the complainant's private parts but noted that her genitalia had a whitish discharge and spermatozoa. He also conducted mental assessment on the complainant and found that she had ***a slow reasoning*** which is compatible with a moderate mental retardation as per her age. ***Dr. Mutuku*** concluded that the presence of spermatozoa indicated that there was penetration. An age assessment was carried out on the complainant and her age was assessed at about 13 years. ***Dr. Mutuku*** produced the P3 form, the age assessment report and the mental assessment report.

4. ***JNK*** the complainant's mother testified that on 16th January, 2011 she was at her farm. The complainant who had gone to church returned home at about 1 p.m. with a food box and body cream and upon inquiry, informed her mother that the appellant had given her the money to buy the two (2) items after he had defiled her. Upon checking the complainant's private parts, ***JNK*** found that she was bleeding. It was ***JNK's*** further evidence that the complainant informed her that ***Mutua*** had found the appellant in the act of defiling her, whereupon JNK proceeded to ***Mutua's*** home and Mutua confirmed the incident.

5. JNK informed the complainant's teacher and school Chairman about the defilement, and the school Chairman informed the sub-chief who caused the appellant to be arrested. The appellant sought reconciliation from ***JNK*** but she declined, and the matter was reported to Kitui Police Station. JNK and the complainant were referred to the hospital where the complainant was examined. JNK confirmed that complainant had difficulties in expressing herself since birth. She denied having any grudge against the appellant.

6. ***Inspector Charles Laboso (Insp. Laboso***) of the D.O's office Miambani Division testified that on 18th January, 2011, the Assistant Chief informed him that the appellant had defiled a school girl. The Assistant Chief led him to the appellant's home where they arrested the appellant. JNK and the complainant went to the Chief's Camp where JNK handed to the police officers the lunch box and the body cream that the complainant claimed to have bought from the money which the appellant gave her after defiling her.

7. In its judgment the trial court came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The trial court observed that the complainant was forthright and honest and believed her evidence. Consequently, the trial court rejected the appellant's defence. Convicted under Section 215 of the Criminal Procedure Code and sentenced him to 20 years imprisonment.

8. Aggrieved by that decision, the appellant filed an appeal in the High Court (**Mutende, J**), on the grounds that he was not accorded a fair trial as **Article 25(c)** of the Constitution was not complied with; that the charge was fatally defective; and that the prosecution failed to call a crucial witness who was purported to have been an eye witness. Upon hearing the appeal, the learned Judge dismissed the appeal, upheld the conviction holding that the evidence adduced by the prosecution was sufficient to prove the offence of defilement as provided by the law. As regards the sentence the learned Judge confirmed the sentence of 20 years imprisonment imposed by the trial court holding that the sentence imposed by the trial court was lawful.

9. Undeterred, the appellant filed this second appeal in which he impugns the judgment of the High Court on the grounds that the High Court failed: to sufficiently evaluate the entire evidence on record as required of a first appellate court; observe that the case of the prosecution did not meet the required standard of proof; adhere to Section 169 (1) of the Criminal Procedure Code in relation to the appellant's

defence and that the sentence imposed was harsh and excessive.

Submissions

10. When the appeal came up for hearing, the appellant was present in person while ***Mr. O'mirera***, the Senior Assistant Director of Public Prosecution (SADPP) was present for the State.

11. The appellant relied on his amended supplementary grounds of appeal and written submissions and submitted that the evidence of the complainant was not truthful; that the key element of the charge was not proven beyond reasonable doubt; that no DNA was taken to determine whose spermatozoa was found on the complainant; that penetration was not proved; that an essential witness was not summoned to court to shed light on the matter; and that the evidence of the complainant was inconsistent and contradictory.

12. The appellant further submitted that the clothes which the complainant was wearing at the time she alleged she was defiled were essential evidence but were not produced in evidence; that the investigation was shallow, shoddy and poorly conducted and relied entirely on hearsay; that this Court has jurisdiction to arrive at an independent finding; that the appellant's defence was not given adequate consideration; that points of determination were not noted in the judgment; and that the appellant's mitigation was not considered in sentencing.

13. ***Mr. O'mirera***, counsel for the prosecution opposed the appeal. He submitted that the appellant's defence was considered; that the two lower courts made concurrent findings on age, penetration and identification; that the trial court relied on the evidence of the complainant and ***Dr. Mutuku*** on the issue of penetration; that the complainant was able to identify the appellant as he was a neighbor; that there was medical evidence that spermatozoa was present in the complainant's private parts; that re-evaluation of evidence is apparent from the judgment of the High Court; and that the sentence meted out was lawful. Counsel urged us to dismiss the appeal.

Determination

14. This being a second appeal, section 361(1) of the Criminal Procedure Code obliges us to consider only questions of law.

Section 361 (1) provides as follows

> **"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against 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…"**

(See also ***Karani v. Republic*** ***(2010) 1 KLR 73, 77).***

15. We have carefully considered the record of appeal, the submissions by the appellant and counsel for the respondent, the authorities cited and the law. It is notable that most of the issues raised in the record were not raised in the High Court as the first appellate court.

16. Under the **Sexual Offences Act No. 3 of 2006,** the main elements of the offence of defilement are as follows:

(i) The victim must be a minor.

(ii) There must be penetration of the genital organ and such penetration need not

be complete or absolute. Partial penetration will suffice.

(iii) The identity of the perpetrator must be established.

17. For the offence of defilement to be proved to have been committed, the prosecution must prove each of the above ingredients beyond reasonable doubt. The learned Judge while addressing the issues of age stated as follows:

> **"The evidence adduced proved the age of the girl. She underwent an age assessment at Kitui District hospital and it was established that she was a child aged 13 years. The age was not in dispute".**

On the issue of penetration and identity, the learned Judge stated thus;

> **"there was evidence of penetration. Evidence adduced that it was the appellant who intentionally penetrated her vagina using his penis was believable.**
>
> **….**
>
> **the trial magistrate pointed out that he observed PW1 as she testified and noted that she was forthright in her evidence. She was not mistaken as to the appellant's identity as they were neighbours".**

18. The High Court in upholding the appellant's conviction and holding that there was no need for Mutua to testify stated that;

> **"the evidence adduced was sufficient to prove the offence of defilement as provided by the law. It cannot be said that the evidence adduced was inadequate such that it was mandatory for the prosecution to call some other eye witness."**

Further:

> **"the trial court having observed the demeanor of the witness and having been convinced that she was truthful, then, even if the eye witness was not availed, a conviction having followed was not irregular".**

19. A trial court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. The proviso to **Section 124** of the **Evidence Act** states as follows:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**
>
> See ***Jacob Odhiambo Omumbo v. Republic*, Cr. App. No. 80 of 2008 (Kisumu)).**

20. In the instant appeal, the trial court noted that the complainant was forthright in her testimony. The proviso to Section 124 of the Evidence Act is therefore applicable and the first appellate court accepted the trial Magistrate's finding on the complainant's evidence. Based on the proviso to Section 124 of the Evidence Act, the complainant's evidence was sufficient to found a conviction.

21. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge as the prescribed sentence is dependent on the age of the victim. In **Alfayo Gombe Okello v. Republic, Cr. App. No. 203 of 2009 (Kisumu*)*** this Court stated:

"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)..."

22. In regard to the appellant's contention that the two courts below failed to consider his defence adequately, we have carefully considered the judgments of the two courts below and we are satisfied that the appellant's defence, which in the main consisted of denial of the charges against him was considered but properly rejected as there was sufficient evidence implicating the appellant with the offence.

23. With regard to the sentence, we are guided by this court's decision in the case of **Hadson Ali Mwachongo v Republic [2016] eKLR** wherein the Court stated as follows regarding the issue of age of the victim of sexual offence:

"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment".

24. The appellant was sentenced to 20 years imprisonment by the trial court. On appeal, the High court confirmed the sentence imposed by the trial court.

25. In the instant case, the complainant was established to be 13 years of age. The High Court stated that the sentence imposed was the minimum prescribed for the offence and was therefore within the law. The appellant took advantage of the complainant who was mentally challenged and defiled her. We are alive to the recent jurisprudence regarding mandatory minimum sentence and the need for the court to exercise its jurisdiction in sentencing as guided by the Supreme Court in **Francis Muruatetu & Another V Republic** (the Muruatetu decision) Supreme Court petition No. 15 as consolidated with Petition No. 16 of 2016 and applied in **Dismas Wafula Kilwake V Republic, Criminal Appeal No. 129 of 2014** in relation to sentencing, we are satisfied that the sentence of 20 years imposed upon the appellant was lawful and appropriate in the circumstances of this case.

26. Accordingly, we dismiss the appeal and uphold the appellant's conviction and sentence as meted out by the trial Court and confirmed by the High Court.

27. This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji, JA having ceased to hold office by virtue of retirement.

Dated and delivered at Nairobi this 24th day of January, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

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<u>DEPUTY REGISTRAR</u>