IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 37 OF 2018

BETWEEN

CM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

at Malindi (Chitembwe, J.) dated 7th December 2016

in

HCCRA No. 4 of 2015)

****

JUDGMENT OF THE COURT

The appellant, ***CM***, was charged in the Chief Magistrates' court at Malindi with the offence of defilement of a child contrary to ***section 8(1) and (3)*** of the ***Sexual Offences Act No. 3 of 2006***.

The particulars of the offence were that on the 7th September 2012 at [particulars withheld] area, [particulars withheld] District within Kilifi County he intentionally and unlawfully caused penetration of his male genital organ namely, penis, into the female genital organ namely, vagina, of ***GRM,*** a child aged 5 ½ years.

The appellant was also charged with an alternative offence of Indecent Act with a child contrary to ***section 11 (1)*** of the same Act, the particulars of which were that the appellant intentionally and unlawfully committed an indecent act by touching the vagina of the complainant, ***GRM*** a girl child aged 5 ½ years using his fingers. The appellant denied committing the offence.

After hearing the evidence and the submissions of the parties, the trial court found the appellant guilty as charged and sentenced him to life imprisonment as by law prescribed. The appellant was aggrieved by the conviction and sentence and appealed against that decision to the High Court (Chitembwe, J.) which upheld that decision. Further aggrieved, the appellant has appealed to this Court on the grounds that;

> *1.The learned judge erred in law in failing to find that the charge was not proved since penetration was not proved;*
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> *2. That the learned judge failed to appreciate that the arresting officers were not called to testify;*
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> *3.That the learned judge erred in failing to find that that the prosecution did not prove its case beyond reasonable doubt; and 4.That the learned judge failed to appreciate that the sentence was harsh and excessive.*

The appellant who appeared in person filed written submissions wherein it was submitted that the learned judge only took into account the prosecution's case and disregarded the appellant's evidence; that the complainant's evidence was not believable, as, if the complainant who

was 5 ½ years was defiled by a grown up person, she would have sustained external injuries to her genitalia; that the medical report showed that even though the report showed that her hymen was broken, she did not sustain any injuries on her body, and that for this reason, penetration was not proved.

The appellant further submitted that he was framed by the complainant's mother as, despite the allegation that she found the appellant and the complainant naked she did not alert any members of the public; that further the oil container was not produced in court as an exhibit. The appellant also asserted that the arresting officers did not testify.

On the life imprisonment sentence imposed, the appellant asserted that it was harsh and excessive in that the words "shall be liable to imprisonment" in ***section 8 (2)*** of the ***Sexual Offences Act*** entitled the court to exercise its judicial discretion to impose a sentence that was commensurate with the circumstances of the case.

Mr. Ketoo, learned Senior Prosecution counsel for the State also filed written submissions wherein he opposed the appeal. In response to the complaint that the prosecution did not prove its case, counsel submitted that all the ingredients for the offence of defilement, being the complainant's age, proof of penetration and identification of the assailant were proved to the required standard.

Counsel submitted that though the complainant's birth certificate was not produced in support of the complainant's age, a Child Health Card produced specified that the complainant's date of birth as 28th June 2007 and proved that she was 5 ½ years of age at the time the offence was committed.

On proof of penetration, counsel submitted that the clinical officer's evidence, and the medical report indicated that even though she was examined 6 days after the incident, her hymen was torn and that the examination showed that there was penetration.

On identification, counsel submitted that since the appellant had been living with the complainant and her mother, he was known to her. And with respect to the appellant's complaint that the trial magistrate did not caution herself on the evidence of a single identifying witness, counsel argued that ***section 124*** allowed the court to receive the complainant's evidence and if satisfied she was being truthful, the court could proceed to convict the accused on the strength of such evidence.

Turning to the sentence, counsel urged us to consider the aggravating circumstances of the case notwithstanding the Supreme Court's decision in ***Francis Karioko Muruatetu & Another v Republic*** ***[2017] eKLR***, and uphold the life sentence imposed by the courts below.

We have considered the record the grounds of appeal and the parties' submissions. This is a second appeal and our duty at this instance is to determine only matters of law. In the case of ***David Njoroge vs Republic*** ***[2011] eKLR,*** it was stated;

> ***"Only matters of law fall for consideration as 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 the courts below are shown demonstrably to have acted on wrong principals in making the findings."***

Taking the above in to consideration, we are of the view that the following issues are for consideration;

> *i) Whether the prosecution proved its case beyond reasonable doubt;*
>
> *ii) Whether the arresting officers should have testified; and iii)Whether the sentence was harsh and excessive.*

Before going into the issues, a brief consideration of the facts and evidence that was before the trial court is necessary. On 7th September 2012, when the complainant, GRM, a girl child aged 5 ½ years of age was at home, the appellant, her step-father, removed her clothes, placed her on a mattress, oiled her private parts and defiled her. Her mother, PW4, who had gone out to work earlier returned and found the appellant naked, and GRM lying on the mattress, also naked. GRM informed her that the appellant had done 'bad manners' to her. GRM reported the incident to GRM's uncle, ***CGM, PW2*** *(C)*, who thereafter reported to the police.

C stated that he was at home when the complainant's mother came and informed him that the appellant had defiled GRM; that she had left to go to work, but on realizing that she had forgotten something, she had returned home. She found the door locked, and called out to the appellant. When he opened the door he was naked, and she also found GRM lying on the mattress without clothes. There was oil on her private parts. After alerting her neighbours, she had reported the matter to C, her brother, and he had advised her to take the child to the hospital. When he later leant thatPW4 had not taken the child to the hospital because she did not have any money, he took the child to the Malindi Police Station where he reported the incident. He thereafter took GRM to the hospital where ***Ibrahim Abdulahi (PW 5),*** a senior clinician, examined her and found that though she did not have external injuries, her hymen was broken, and he assessed the injuries as grievous harm. The clinician issued them with treatment notes and the P3 form. Charles also produced GRM's immunization card. GRM's mother to a large extent repeated the evidence as narrated by Charles, save to add that she recalled that she had given birth to her daughter on 28th June 2007.

On 13th September 2012, ***PC MC (PW4)***, received information that a suspect had been arrested for defiling a child. After locating the complaint filed on 7th September 2012 in the Occurrence Book, she telephoned C who brought the complainant to the police station. As the child had not been taken to the hospital, she accompanied both C and the complainant to the Malindi General Hospital, where the child was examined and treated. She also sought a statement from GRM's mother whom she found to be uncooperative. According to her investigations, the child was defiled.

In his defence, the appellant denied committing the offence, and stated that he was arrested and charged with the offence of defilement

because he had disagreed with Charles.

Returning to the issues, we begin with whether the prosecution proved its case to the required standard.

Addressing this question, the High Court stated that;

> ***"Given the evidence on record, it is evident that PW1 was defiled. It is PW1's evidence that it is the appellant who defiled her. PW1's immunization card was produced and shows that she was born on 28.6.2007. She was five years old by 7.9.2007. It is the evidence of PW4 that she had forgotten something and decided to go home. The appellant therefore had the opportunity to commit the offence. Further, the evidence of PW1 is believable. She knew the appellant."***

On analysing the evidence, the court concluded that the prosecution had proved its case beyond reasonable doubt.

To ascertain whether the offence was proved the prosecution must demonstrate that, the complaint's age was established, that there was penetration and that the perpetrator was properly identified.

Turning to the complaints' age. The complainant told the court that she was 5 ½ years old. Though a birth certificate was not produced, the Ministry of Health Immunization Card that was produced, indicated that she was born on 28th June 2007, which confirmed that she was 5 ½ years of age when the offence was committed. Her mother also confirmed having given birth to the child on that date. In the case of ***Francis Omuromi vs Uganda , Court of Appeal criminal Appeal No. 2 of 2000*** it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victims parents or guardian and by observation and common sense…."***

Accordingly, we agree with the courts below that GRM's age was properly established.

On whether or not there was penetration, the appellant contended that penetration was not proved as the complainant had not sustained any external injuries. In this regard it was the complainant's case that, the appellant had taken off her clothes, lay her on a mattress, oiled her private parts and done 'bad manners' to her. When her evidence is considered together with the medical report and the clinician's evidence, it becomes clear that though she was examined 6 days after having been defiled, the examination showed that her hymen was torn, and that there was penetration. The report assessed the injuries she had sustained as grievous harm. In effect, the totality of the evidence proved beyond doubt that there was penetration.

On whether the appellant was identified, the complainant stated that the appellant lived with them and was therefore known to her. In addition, the complainant's mother found both the appellant and the complainant in the house without clothes, which led the learned judge to conclude, *"…The appellant therefore had the opportunity to commit the offence."* As such, we are in agreement with both the trial court and the High Court that the appellant was properly identified.

In the premises, the ingredients for the offence having been proved to the required standard showed that the appellant defiled GRM. We therefore find that this ground is without merit.

With respect to the complaint that the persons who arrested him were not known and did not testify, much as the evidence does not show who arrested him, we are of the view that this is not relevant to the circumstances of the case. This is because the evidence of the prosecution witnesses that testified, sufficiently proved that the appellant committed the offence, and therefore any evidence that the persons who arrested him could have given was superfluous. In addition, ***section 143*** of the ***Evidence Act*** provides that no particular number of witnesses is required to prove a particular fact. This ground also fails.

We turn next to consider assertion in the appellant's submissions that he was charged with the offence because of a grudge that existed between PW4, C and himself. Though this issue was not raised in the grounds of appeal, we have reexamined the evidence, and are satisfied that there is nothing that points to the existence of a grudge, and we accordingly dismiss the assertion.

In view of the above, the appeal against conviction is dismissed. Finally on the sentence, the appellant has complained that the sentence

imposed on him by the trial court is harsh and excessive. In sentencing him to life imprisonment as stipulated by ***section 8 (2)*** of the ***Sexual Offences Act***, the trial court stated;

> ***"The accused person is convicted of a defence of defilement which carries a maximum mandatory sentence. The accused person is also not remorseful a demeanor he demonstrated all through the trial, sometimes acting in utter contempt of the court. Be that as it may and as per the provisions of section 8 (1) (2) of the Sexual Offences Act, the accused person is sentenced to serve life imprisonment."***
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> ***Section 8(2)*** of the ***Sexual Offences Act*** stipulates that;
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> ***"A person who commits an offence of defilement with a child of 11 years of age or less years is liable upon conviction to life imprisonment."***

The provision specifies that a person convicted of an offence under this provision will be liable to life imprisonment. But upon considering the sentence for the offence to be mandatory, the trial magistrate sentenced the appellant to life imprisonment. However, the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic*** ***[2017] eKLR*** recently found mandatory sentences to be unconstitutional. But having said that, in the instant case, the appellant having mitigated, and the trial magistrate having discerned that he was unremorseful in spite of his conviction for defiling a child of 5 ½ years or the likely ramifications of his actions on the child's future, we are satisfied that the life imprisonment sentence imposed by the trial court and upheld by the High Court was not harsh or excessive, and we have no reason to disturb the sentence.

In sum the appeal is unmerited and is herby dismissed.

It is so ordered

Dated and delivered at Mombasa this 24th day of April 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPTY REGISTRAR