IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 45 OF 2018

BETWEEN

RBT ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.) delivered on 12th March 2018

in

H.C.CR.APP.No. 10 of 2017)

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JUDGMENT OF THE COURT

1. In this second appeal, the appellant, RBT, has challenged his conviction and sentence for the offence of defilement. He was charged, tried and found guilty by the Magistrates' court at Kilifi for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. He was sentenced to imprisonment for a jail term of 15 years. His first appeal against the conviction and sentence was dismissed by the High Court at Malindi (***Njoki Mwangi, J.***) in a judgment delivered on 12th March 2018 after which he lodged this appeal.

2. The particulars of the offence were that on 28th March 2014 in Matsangoni location within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MZL, a child aged 17 years.

3. Based on the prosecution case before the trial court, the facts are that in the early morning of 28th March 2014, at about 6.00 a.m., the complainant, MZL (PW1), was at home preparing to go to school. She had gone outside the house to pick firewood when the appellant, who apparently had earlier borrowed her book, passed by. The appellant was well known to her as he is related to her by marriage in that the appellant's sister is married to her brother's wife.

4. As the appellant passed by MZL'S house, she asked him about the book. The appellant asked her to follow him so that she could go and collect the book. They reached a house where the appellant told her to get inside. She resisted. The appellant then forced her inside the house, pushed her to the ground, held her throat and defiled her. Her attempts to scream were in vain. After defiling her, the appellant left.

5. After the ordeal, MZL returned home and informed her mother what had happened. ES (PW2), the complainant's sister, was called and came and took the complainant to Chumani Medical Centre where they were referred to Kilifi Hospital for treatment. At the hospital, she was examined by a doctor who completed a medical examination report, P3 Form, which the complainant identified during the trial and was marked as MFI. A post rape care form, identified as MF2, was also filled out. On the same day, a report was made at Kilifi Police Station.

6. Corporal Philip Dzombo (PW4) of Kilifi Police Station took over investigations from Sergent Kagwiria upon the latter's transfer from the station. He stated that on 28th March 2014 a report of the defilement was made by the complainant at the gender desk of the police station. Based on that report the appellant was arrested and charged with the offence. PW4 stated that the complainant was taken for age assessment by the medical superintendent at Kilifi District Hospital. Her age was assessed at 17 years. He produced the age assessment report.

7. Dr. Aziz Manji (PW3) of Kilifi District Hospital produced the P3 form and the post rape care form before the trial court on behalf of Dr.

Chiro who had examined the complainant. Based on those reports, the complainant, on examination, had pain on her neck and shoulder as well as bruises on the shoulder and her hymen was broken.

8. The appellant cross examined all the prosecution witnesses. In his sworn testimony in defence, which was more of mitigation than anything else, all the appellant stated was that he stays in Roka and is unemployed; that he is the first-born son; that his father passed away, and that "*I pray the court looks at both sides*."

9. Satisfied that the appellant was positively identified by the complainant as the person who defiled her and that the prosecution had proved the necessary ingredients of the offence of defilement beyond any reasonable doubt, the trial magistrate, as already stated, convicted the appellant in a judgment deliveredon 26th April 2017 and sentenced him to the prescribed minimum sentence of 15 years' imprisonment.

10. As indicated, the appellant appealed against the conviction and sentence to the High Court. That appeal was based on the grounds: that the charge sheet was at variance with the evidence; that the trial court did not consider that he was a minor and his rights as a child had not been taken into account; that medical evidence was insufficient; that the *voire dire* conducted on the complainant was contrary to the law as the victim was not below the age of 12 years; that the prosecution did not prove its case to the required standard; and that his defence was not considered.

11. After reviewing the evidence afresh, the High Court concluded that the conviction and sentence were well founded and dismissed the appeal in its entirety.

12. During the hearing of the appeal before us, the appellant appeared in person and relied entirely on his amended grounds of appeal and written submissions. The significant part of his grievance is that the learned Judge failed to consider that the mandatory sentence prescribed under Section 8 of the Sexual Offences Act violates Sections 216, 329 of the Criminal Procedure Code; that the charge sheet was defective as there was a discrepancy between the charge sheet and the evidence regarding the age of the victim; that the medical evidence was not authenticated; that the Judge failed to consider that the appellant and the complainant were both minors; and that his conviction violates Article 53 of the Constitution and Sections 189, 190 and 191 of the Children Act.

13. Expounding on those complaints, the appellant submitted that: the minimum sentence prescribed under Section 8 of the Sexual Offences Act denies the trial court discretion to consider the mitigating circumstances and to pass appropriate sentences in accordance with Sections 216 and 329 of the Criminal Procedure Code. In that regard, he referred to the decision of this Court in ***Eliud Waweru Wambui vs. Republic, Cr. Appeal No. 102 of 2016***. It was submitted that the provisions of Section 8 of the Sexual Offences Act, and like provisions imposing minimum sentences, are unjustified and discriminatory and violate Article 27 of the Constitution in that persons facing and serving lesser sentences were heard and their mitigation considered.

14. The appellant's other grievance is that the conviction is founded on a defective charge sheet. He submitted that the age of the complainant was indicated in the charge sheet as 17 years while the medical evidence shows that she was 14 years 8 months at the time of commission of the offence. Accordingly, he argued, the charge should have been based on Section 8(3) as opposed to Section 8(4) of the Sexual Offences Act and to the extent that the evidence does not accord with the charge, the same is defective. Reference was made to the case of ***Nyongo vs. Republic, Cr.Appeal No. 1 of 1993***.

15. The appellant submitted further that the medical report, P3 form, was not authenticated; had material information missing; and that the doctor who filled the form was not called as a witness and consequently the origin and authenticity of the details of the P3 form is unknown and is in doubt with the result that penetration was not proved to the required standard.

16. It was also submitted that the appellant and the complainant were both minors; that the appellant was 17 years while the complainant was 14 years rendering the trial proceedings a nullity. Furthermore, as the appellant was a minor, his conviction and sentence violate Article 53 of the Constitution and the Children Act.

17. In his concise submissions in opposition to the appeal, learned Senior Prosecution Counsel, ***Mr. E. Ketoo***, submitted that all the necessary ingredients of the offence of defilement were proved to the required standard; that the appellant, being a person who was well known to the complainant by virtue of their relationship through marriage, was positively identified; that the age of the complainant was established to be 17 years through age assessment; that penetration was also established through medical evidence confirming the injuries the complainant sustained and the fact that her hymen was broken.

18. Regarding the claim that the appellant was a minor, counsel submitted that the matter received consideration by the court; and that an age assessment carried out in respect of the appellant established he was 18 years old.

19. With regard to sentence, counsel submitted that in light of the Supreme Court decision, this Court may reconsider the sentence meted out by the trial court, bearing in mind that the complainant was 17 years while the appellant was 18 years.

20. We have considered the appeal, the submissions by the appellant and the submissions by counsel for the respondent. As this is a second appeal, our mandate under Section 361(1) of the Criminal Procedure Code (CPC) is limited to considering matters of law. In ***Dzombo Mataza vs. R [2014] eKLR*** the Court stated:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court– see Okeno v Republic (1972) E.A. 32***.

By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

21. Accordingly, we must not "*interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law*." See ***M' Riungu vs. R [1983] KLR 455;*** and also, ***David Njoroge Macharia vs. R [2011] eKLR*** and ***Chemagong vs. Republic (1984) KLR 213)*.**

22. Guided by those principles, the main issue for determination in this appeal is whether the prosecution proved the necessary ingredients of the offence of defilement to the required standard.

Related to that are the questions whether the charge sheet was defective; the age of the complainant was established; and whether the appellant's rights as a minor were violated.

23. The first ingredient of the offence of defilement is identification. In that regard, the appellant did not contest the claim by the complainant that he is her relative by marriage and is well known to her. As the trial court correctly stated:

"I note that the accused was positively and visually identified by the complainant. She knew him before the offence. She had lent him a book. They further walked together to his house."

There is no question of mistaken identity.

24. The second ingredient of the offence that the prosecution was obliged to prove was the age of the complainant. In the charge sheet, the complaint's age was stated to be 17 years when the offence was committed on 28th March 2014. In her testimony before the trial court on 2nd February 2015, the complainant stated that she was 17 years old. In the P3 form, the age of the complainant was indicated as 16 years. An age assessment report dated 4th April 2014 produced before the trial court, placed the complainant's age at "*approximately 17 years old*."

25. Although in the course of cross examining PW3, the appellant pointed out that the complainant's age was stated as 16 years in the P3 form, there was no suggestion during cross examination or at any stage of the proceedings that the age assessment was incorrect. As this Court stated in ***Evans Wamalwa Simiyu vs. R [2016] eKLR*** and subsequently in ***Jackson Mwanzia Musembi vs. R [2017] eKLR***, proof of the apparent age of the complainant is sufficient. There is accordingly no merit in the appellant's complaint.

26. Regarding penetration, the third ingredient of the offence, there was the testimony of the complainant that was not shaken that the appellant pushed her inside his house, held her throat, put her down and defiled her. Consistent with that testimony was the medical evidence that the complainant had pain on her neck, bruises on her shoulder and her hymen was broken. In effect, the medical evidence corroborated the complainant's testimony as was the case in ***Christopher Kipchoge Kibenei vs. Republic (2016) eKLR***, where 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."

27. The upshot is that we have no basis for interfering with the concurrent findings by the two courts below that the ingredients of the offence of defilement were established to the required standard. 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 can 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."

28. The findings by the lower court are well supported by the evidence. The appellant has not demonstrated otherwise.

29. There is then the complaint that the charge was defective on account of alleged variance with the evidence in relation to the age of the complainant. We have already addressed the issue of the complainant's age and the evidence in that regard. Even assuming, as the appellant argues, that the complainant was younger than 17 years, we do not think that would have resulted in a failure of justice so as to rendered the charge defective. No prejudice would have been occasioned to the appellant. If anything, he would have been liable for a higher penalty. In the case of ***John Muchiri Arithi vs. Republic Criminal Appeal No. 348 of 2007*** the Court held:

"In our view, it is not all cases in which a defect detected in the charge on appeal will render a conviction invalid. Section 382 of the Criminal Procedure Code, is meant to cure such irregularities where prejudice to the appellant is not discernible."

30. And in the case of ***Michael Bwana Orienyi Criminal Appeal No. 342 of 2008*** the court repeated the holding in the case of ***JMA vs. Replblic (2009) EKLR Criminal Appeal No. 348/2007*** and subjected claims of defective charges to the test of failure of justice. We do not think there is merit in this complaint.

31. We turn to the claim that appellant was a minor and that he was tried as an adult and his constitutional rights as a child were violated. In that regard, the learned Judge of the High Court had this to say:

> ***"The appellant submitted that he was a child when he was charged with the offence of defilement. This court has considered the foregoing submission and noted that when the appellant was put on his defence, he did not inform the trial court that he was under the age of 18 years when he was charged with the offence of defilement. The said court would have sent the appellant for age assessment. It is therefore too late in the day for the appellant to bring up at the issue on appeal."***

32. Under the provision, "*apparent age*" in the charge sheet, it was indicated that the appellant was an adult. The record of proceedings of the trial court of 23rd May 2014 show that the trial court ordered "*the accused to be escorted for an age assessment*". On 6th June 2014, the prosecutor reported to the court that "*the age assessment report is ready*" whereupon the court noted:

> ***"I have seen the report dated 6/6/14. The accused has been assessed to be 18 years old. He shall be remanded at Kilifi G. K. Prison."***

33. Subsequent trial court proceedings indicate that the appellant requested to be released on bail terms in order to undertake KCPE examinations whereupon, on 9th July 2014, the court ordered that a pre-bail report be provided and proof to be supplied that the appellant "*is school going and undertaking KCPE exams*". On 17th July 2014, the pre-bail report was presented in which a letter from the Head Teacher, Uyombo Primary School, confirmed that the appellant was sitting for his KCPE exams that year, whereupon he was given a bond of Kshs.50,000 with two sureties.

34. That notwithstanding, there was no suggestion by the appellant throughout the trial that he was a minor when the alleged offence was committed. Indeed, in his closing submissions before the trial court, the appellant stated that "*I am the sole bread winner in our family*". In effect, the question of the appellant being a minor at the time the offence was committed was never raised at any stage of the trial.

35. Although it appears to have escaped the learned Judge's attention that an age assessment was in fact undertaken in respect of the appellant, we are fully in agreement with the Judge of the High Court that the trial court did not have an opportunity to interrogate the age of the appellant as at the time the offence was committed, the matter not having been raised and it not being apparent that the appellant may have been a minor at the time. On the contrary, all evidence pointed to the appellant being an adult.

36. Based on the foregoing, we are satisfied that the conviction is well founded.

37. On sentence, the trial court expressed:

> ***"I have considered the charges against the accused. He is a first offender. He is remorseful. However, the hands of this court are tied by the law as the offence herein is serious and imposes a minimum sentence. In the circumstances, the accused is sentenced to serve 15 years imprisonment."***

38. In ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*** the Supreme Court held, in the context of the offence of murder under Sections 203 and 204 of the Penal Code, that the mandatory nature of sentence that denies the court the opportunity to pass a lesser sentence even after considering an accused's mitigation was unconstitutional. The Supreme Court stated:

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

39. The principle in that Supreme Court decision has since been applied to offences under the Sexual Offences Act in appropriate cases. As noted, the trial court expressed that its hands were tied and did not take into account the mitigation and neither did the first appellate court. Considering the mitigation by the appellant, that he expressed remorse for his action and considering his age, we are inclined to interfere with the sentence. We hereby set aside the sentence of imprisonment for a term of 15 years and substitute therefor imprisonment for a term of 10 years from the date the initial sentence was passed on 26th April 2017. To that extent only we allow this appeal.

40. In conclusion therefore: The appellant's appeal on conviction fails and is hereby dismissed. The sentence of imprisonment for a term of 15 years is hereby set aside and substituted with imprisonment for a term of 10 years from 26th April 2017.

It is so ordered.

Dated and delivered at Nairobi 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