IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 29 OF 2016

BETWEEN

COLLINS KISIVULI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

Kakamega (Bwononga, J.) dated 23rd July 2015

in

HCCRA No. 84 of 2014)

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JUDGMENT OF THE COURT

The appellant, ***Collins Kisivuli***, was charged in the Principal Magistrate's court with the offence of defilement of a child contrary to ***section 8(1) and (4)*** of the ***Sexual Offences Act No. 3 of 2006***.

The particulars of the offence were that on the 5th July 2013 in Vihiga County intentionally and unlawfully defiled a girl child namely **VA** by causing penetration of his genital organ, namely penis into the genital organ namely vagina of ***VA*** a child aged 17 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 caused his genital organ to make contact with the genital organ of the complainant, ***VA*** a girl child aged 17 years.

The appellant denied the offence, and merely stated that he was not responsible for defiling the complainant.

After hearing the evidence and the submissions of the parties, the trial court found the appellant guilty as charged and sentenced him to imprisonment as by law prescribed.

The appellant was aggrieved by the conviction and sentence, and appealed against that decision on the grounds that;

> *1.The learned judge erred in law by dismissing the appellant's appeal and upholding the conviction upon identification by a single identifying witness albeit without proof beyond reasonable doubt by the other available witnesses;*
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> *2. The learned judge erred in failing to reevaluate the evidence; and*
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> *3.The Learned judge erred in law by upholding the sentence of the trial court even when he found it manifestly excessive.*

Both ***Mr. M. Mwesigwa***, learned counsel for the appellant, and learned counsel for the State, ***Mr. Kakoi*** filed written submissions on behalf of the respondent, which were adopted in their entirety.

In his submissions the appellant complained that ***section 36*** (1) of the ***Sexual Offences A***ct allows the court power to direct that the appellant's blood sample or samples be taken for the purposes of forensic and other scientific testing including a DNA test in order to gather evidence and to ascertain whether the accused person committed the offence; that though medical tests were conducted on both himself and VA, his medical report was not produced in court and therefore no linkage was established that connected him to the offence, and no explanation was given as to the reason for the medical tests being conducted on the 16th of July 2013, nearly a week after the offence was alleged to have occurred; that furthermore, there is no collaborative evidence showing that for the duration of her disappearance from home she was with the appellant.

The respondent's submissions were that the ingredients of defilement those being the age of the complainant, penetration and the identity of the defiler were met. With regard to the identity of the appellant, it was submitted that this was proved to the required standard as the complainant's evidence was that she lived with the appellant for several days. The appellant also testified that he knew both the complainant and her aunt.

We have considered the submissions of the parties, and this being a second appeal, this Court is only concerned with matters of law. See also the case of ***Obanda vs Republic [1983] KLR***. Bearing this in mind we consider that the issues for determination are;

1. *Whether the learned judge was wrong in dismissing the appellant's appeal and upholding the conviction upon identification by a single identifying witness albeit without proof beyond reasonable doubt by the other available witnesses;*

2. *Whether the learned failed to reevaluate the evidence; and*

3. *Whether the learned judge wrongly upheld the sentence of the trial court even when it was manifestly excessive.*

Prior to determining the issues, a brief enumeration of the facts is necessary.

VA's case was that the appellant was her boyfriend and that on 5th July 2013 at about 2.00 p.m she left her home and travelled to Madzuu to see the appellant who was her boyfriend. She did not tell her aunt where she was going. She stayed with the appellant from the 5th July 2013 to the 11th July 2013 and while there, she would have sexual intercourse daily with the appellant without a condom. At about 1 p.m on 11th July 2013, her aunt came to look for her. At the time, the appellant had gone to work at [particulars withheld] Secondary School. Her aunt took her to Mahanga AP Camp and thereafter she was taken to Vihiga Police Station where she found the appellant had already been arrested. She was later taken to Vihiga Hospital for a medical examination and treatment, as she had begun to feel pain in her private parts. Whilst examining her, ***Sammy Chelule PW 6***, a clinical officer stated that, VA had informed him that she was to be married to the appellant, and that she had sexual intercourse with the appellant throughout the period of her stay with him. Following the examination, the clinical officer concluded that VA had been defiled.

VA's aunt stated that she lived with VA who was her sister's daughter. On 5th July 2013, VA left her home saying she was going to borrow some past examination papers for revision. When she did not return she went to look for VA at her friend's home in Mahanga but did not find her there. She reported her disappearance to her father, to a village elder, and also to ***Reuben Amuyunzu PW 3,*** the assistant Chief, Madzuu. ***APC Richard Biwott PW 4*** arrested the appellant at [Particulars withheld] school.

The appellant denied defiling VA. He stated that he worked at [Particulars withheld] Girls School; that both he and VA were assaulted following his arrest, and that VA was ordered to state that she was his girlfriend. The appellant further stated that he was married and that he used to work for VA's mother who had refused to pay him and that as a result, he has taken three of her chickens, which had led to his being framed for defilement.

When cross examined, he denied ever seeing VA, for the reason that he was living in Nairobi, and that during the period in question he had come home to visit his father.

As to whether the appellant was properly identified as the person who defiled VA, cannot be doubted. This is because VA's evidence was that she left her aunt's house and travelled to Madzuu to see Collins, her boyfriend. He was clearly someone who was known to her. While in Madzuu, VA lived with the appellant for six days, and would have seen him every day for the entire duration as they had sexual intercourse every day. This evidence would point to the fact that the appellant was intimately known to her. In our view this would be a case of identification through recognition, which evidence is always ***"…more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."*** See ***Anjononi & others vs Republic [1980] KLR***.

The appellant further argues that, no medical tests were conducted on him, and that even if there was, such evidence was not produced in court with the result there was nothing that connected him to the offence. In the case of ***Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010***, this Court found that;

> ***"…medical evidence arising from examination of the accused and linking him to the defilement would be welcome,...such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was***

perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

Indeed, in this case the trial court relied on VA's evidence which the trial magistrate found to be candid and truthful, as well as on the medical evidence. The medical report concluded that VA had been defiled, and even though her hymen had healed, visible rubbing and bruises were seen on the walls of her private parts, that were swollen. There was also the presence of a smelly whitish discharge. On the basis of this evidence, the trial court concluded, and rightly so, that the appellant was responsible for defiling VA.

In reevaluating the evidence, the learned judge found that the necessary ingredients for proving a case of defilement were met, that firstly, a birth certificate showed that VA was 17 years of age, thereby proving that she was a minor. Secondly, that in its totality the evidence demonstrated that there was penetration, and thirdly, that the appellant was properly identified, as he was known to VA. On the basis of such reevaluation, we are satisfied that the learned judge rightly concluded that the prosecution's case was proved to the required standard. In this regard, the appellant's complaints that the appellant was not properly identified and that the High Court did not reevaluate the evidence, are unfounded.

Finally, we turn to the issue of the sentence. The appellant complains that having regard to the circumstances of the case, the sentence was harsh and excessive.

By dint of ***Section 361(1)*** of the ***Criminal Procedure Code***, this Court has no jurisdiction to entertain appeals on severity of sentence. In ***Macharia v R, [2003] 2 EA 559***, this Court stated:

> ***"The principle upon which a court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor, [1954] EACA 270, wherein the predecessor of this Court stated":***
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> > ***"The Court does not alter a sentence on mere ground that if the members of the Court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v R, [1950], 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this, we would also add a third criterion namely; that the sentence is manifestly excessive. In view of the circumstances, of the case R v Sharshawsky (1912), CCA 28 TLR***
> >
> > ***268."***

That said, since the appellant was sentenced, the Supreme Court in ***Francis Karioko Muruatete & Another vs Republic SC Pet No 16 of 2015*** found that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** to be unconstitutional. The Court rendered itself thus;

> ***"Section 204 of the Penal Code deprives the Court of the use of official 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 a proper case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."***

In the case of ***Dismas Wafula Kilwake vs Republic [2018] eKLR*** this Court was persuaded that there was no reason for withholding the application of the Supreme Court decision on the mandatory death sentence to the mandatory sentences specified by ***section 8*** of the ***Sexual Offences Act***, which also deprive the court of judicial discretion in imposing of sentences.

In this case, after convicting the appellant, the trial court was constrained to impose the mandatory sentence of 15 years as prescribed by the Act. Consequently, the appellant having pleaded in mitigation for a lighter and non-custodial sentence of probation as his family depended on him, we would dismiss the appeal against the conviction, but allow the appeal against sentence. We set aside the sentence of 15 years and substitute therefore 10 years' imprisonment from the date of the initial sentence. To that extent only, this appeal is hereby allowed.

Dated and delivered at Kisumu this 3rd day of April, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL