IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 35 OF 2015

BETWEEN

ERICK OJWANG ONONO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisumu, (H. K. Chemitei J.) delivered on 27th *November 2014* ***in HC Cr. Appeal No. 25 of 2014)***

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JUDGMENT OF THE COURT

1 The appellant was charged with the offence of defilement contrary to **Section 8 (1) of the Sexual Offences Act No. 3 of 2006.** The particulars were that on diverse dates between 24th and 29th October 2012 in Bondo District within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of RNO, a girl child 11 years old.

2. The prosecution case was primarily founded on the testimony of the complainant RNO (PW1) and the clinical officer, Sammy Ombaso Okoni (PW4).

3. After *voire dire* examination PW1 testified as follows:

> *I am RNO…. On 24th October 2012 at 7.30 pm, I was sent to* buy paraffin by my sister called CAO. On my way I met the accused (pointing at the accused in the dock). I knew the accused who is a motorcyclist and also runs a barber shop at Uhanya center. The accused got hold of my hand and pulled me into a bush nearby where he told me to remove my inner pant. He then slept on me. I refused to remove my pant but he removed it. I saw the accused removing his long trousers after which he slept on me. He did bad things to me. The accused sexed me. The accused removed his penis and placed it in my vagina. I felt pain. I cried. I later told my sister at the kitchen. I put on my pants and left home. I went and purchased paraffin. The following day the accused gave me Ksh 5/= and told me not to tell anyone about the incident. I later told my sister about it the next day. This was the first time he did it. The accused did sex with me again the next day. He also did sex with me a 3rd time. He did not usually give me money. My sister was later asked at school who was giving me money because the teacher had seen me buying things at school. The accused used to give me money. I also told my teacher that Erick used to give me money. One day I was sent to buy pop-corn in the evening but I was called by the accused Erick who took me to a bush where he removed my pant and had sex with me. He promised to give me money. Later he gave me Ksh. 5/-. I bled on every occasion he had sex with me. My sister later found out I was limping and she asked me what had happened. I told my sister that Erick had had sex with me. My teacher took me to the police at Uhanya and at Usenge. Some papers were given to my sister at the hospital and at the police station…. I was taken *to Got Agulu hospital. I walk well nowadays.*

4. PW3, JAN, testified that she was a teacher at [Particulars withheld] school in Uhanya where the complainant is a pupil. That other pupils had reported that the complainant used to come to school with jussy cola drink. That she interrogated the complainant who told her that her sister used to give her money to buy the drink. That she assigned another teacher, M, to find out if the complainant's sister used to give her money.

> That it was established her sister never used to give her money. M later established that it was the appellant, Erick, who used to give the

complainant Ksh. 5/- in exchange for sexual intercourse.

5. PW4, Sammy Ombaso Okono, testified that he was a clinical officer at Got Agulu sub-District Hospital. That on 27th November 2012, he medically examined the complainant. That on examination, her genitalia were normal. That her hymen was broken. He produced the P3 Form on the complainant.

6. In his defence, the appellant pleaded the right to silence.

7. Upon evaluating the evidence on record, the trial magistrate convicted the appellant and sentenced him to life imprisonment with effect from 10th April 2014.

8. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed as follows:

> The minor simply stated what happened and not once but severally. Although there was no significant finding by PW4 save for the fact that there was no hymen, there was direct evidence to suggest recent defilement. However, the entire evidence does not exonerate the appellant. Neither did he offer any explanation as to whether or not the implication was malicious. Consequently, I do not find any merit in the appeal and the same is hereby dismissed.

9. Further aggrieved by dismissal of his appeal, the appellant has lodged the instant second appeal. In the memorandum of appeal, it is urged that the trial court erred in shifting the burden of proof to the appellant; that the prosecution evidence was marred with contradictions and inconsistencies;

> that the medical evidence used to convict the appellant was insufficient;

> that the two courts below erred in dismissing the appellant's defence that was well corroborated and cogent.

10. At the hearing of this appeal, the appellant appeared in person. The State was represented by the Principal Prosecution Counsel Mr. Sirtuy.

APPELLANT'S SUBMISSIONS

11. The appellant in his written submissions filed on 19th July 2019 urged that the two courts below erred in shifting the burden of proof. The appellant took issue with the learned judge's statement that "neither did he offer any explanation as to whether or not the implication was malicious." It was submitted that in exercising the right to remain silent, the appellant is not to be taken to have admitted his guilt.

12. It was further submitted that the medical evidence relied upon by the two courts below was insufficient to sustain a conviction. That if at all it was true that the complainant had been defiled, there was no reason for the delay in taking her for medical examination. That the delay was but a way to cook or fabricate the evidence against the appellant. That the complainant's testimony is full of contradictions and this made her an unreliable witness.

13. Finally, the appellant submitted that the sentence meted upon him was harsh and excessive.

RESPONDENT'S SUBMISSIONS

14. The respondent in opposing the instant appeal urged that the prosecution had proved its case beyond reasonable doubt. That the appellant was recognized as the person who defiled the complainant. That the testimony of PW1 and the medical evidence prove the fact of defilement. That the life sentence meted upon the appellant was lawful given the circumstances of the case and the nature of the offence.

ANALYSIS and DETERMINATION

15. This is a second appeal and our jurisdiction is confined to matters of law.

This was well explained in **Karani vs. R [2010] 1 KLR 73** where it was stated:

> "This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." See also **Karingo -vs- R** ***(1982) KLR 213***

16. In this matter, there is concurrent findings by the two courts below that the appellant committed the offence of defilement as charged. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two court below in the following terms:

> "As this court has stated many times before, it has a duty to 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." See **Aggrey Mbai Injaga v Republic [2014] eKLR**.

17. The first issue for our consideration is whether the appellant was properly identified or recognized as the person who committed the offence. In **Anjononi & others – v- Republic [1980] KLR 57** it was held:

> "…; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."

18. In the instant matter, the appellant was a person well known to the complainant. PW1 testified that she knew the appellant who is a motorcyclist and also runs a barber shop at Uhanya center. From the testimony of PW1, we are satisfied that the appellant was properly recognized by the complainant and there is no issue of mistaken identity.

19. A ground urged in this matter is that the evidence of PW1 is riddled with inconsistencies and contradictions. The appellant submitted that PW1 had told her teacher that she used to get money from her sister which fact was not true. That such inconsistency shows that PW1 was not a trustworthy witness. We have considered the ground of appeal. The alleged inconsistency is not material as it neither proves nor disproves any of the essential ingredients of the offence of defilement. In arriving at our decision, we are persuaded and guided by the decision of this Court in **John Nyaga Njuki & 4 others –v-R [2002] eKLR** where it was stated:

> "But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

20. Further, the appellant's submission that PW1 was not a truthful witness raises the issue of credibility of PW1.

21. A ground urged in this appeal is that the medical evidence tendered in court was insufficient to prove the offence of defilement. In **F O D - v -Republic [2014] eKLR,** it was stated in order to secure a conviction for the offence of defilement under the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child.

22. In this matter, there is direct evidence from the complainant that the appellant had sexual intercourse with her. The complainant testified that they had sex on three different occasions. In our considered view, the direct testimony by the complainant is corroborated by the medical evidence which shows that the complainant's hymen had been broken.

Even if we were to discount and ignore the medical evidence tendered in court, the direct testimony of the complainant proved defilement and was sufficient evidence by itself to convict the appellant.

23. The appellant further urged that the two courts below ignored the defence evidence. We have perused the record. The appellant offered to remain silent. There is nothing on record that could have been ignored by the two courts below. This ground of appeal has no merit. The upshot is that we uphold the conviction of the appellant for the offence of defilement as charged.

24. We now turn to consider the legality of the life sentence meted upon the appellant. The record of appeal shows the appellant when called upon to mitigate offered no mitigation. The prosecutor requested the appellant be treated as a first offender. It is noteworthy that the trial magistrate sentenced the appellant to a term of life imprisonment on 10th April 2014. The High Court dismissed the first appeal on 27th November 2014.

25. The decisions of the two courts below were delivered before the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015.** In its decision, the Supreme Court held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. By parity of reasoning, we apply the dicta and *ratio decidendi* in the **Francis Karioko Muruatetu & another – v- Republic (supra)** to all mandatory sentences.

26. This Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** considered legality of minimum mandatory sentences under the Sexual Offences Act No. 3 of 2006. It was held that such mandatory sentences are unconstitutional as they take away judicial discretion to determine an appropriate sentence in each individual case.

27. In the instant matter, we have considered if there are any aggravating circumstances that can lead us not to interfere with the life sentence meted upon the appellant. We have found no compelling aggravating factors. Consequently, guided by the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra**) and persuaded by the decisions of this Court in **Christopher Ochieng – v-R** (supra) and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014**, we are convinced and satisfied that the mandatory term of life imprisonment meted upon the appellant cannot stand. We are inclined to intervene as we hereby do. We set aside the life sentence meted upon the appellant and substitute the same with a sentence of fifteen (15) years' imprisonment with effect from 10th April 2014 when the trial court passed sentence.

28. This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, JA passed on before he could sign the

Judgment.

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

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL