IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 127 OF 2015

BETWEEN

WOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu (E. Maina, J) dated 21st *July, 2015* **in HCCRA No. 111 of 2012)**

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JUDGMENT OF THE COURT

The appellant, WOO, was arraigned before the Principal Magistrate's Court and charged with defilement contrary to **section 8(1)** as read together **section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 10th January 2011 at [particulars withheld] Village, Hono sub-location in Siaya District within the former Nyanza Province, the appellant intentionally caused his penis to penetrate the vagina of S.A, a child aged 9 years.

The prosecution preferred an alternative charge of an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The added particulars were that the appellant intentionally touched the breasts and vagina of S.A, a child aged 9 years.

The brief facts of the case are that, the complainant, PW2, who was on orphan under the care of her grandmother had gone out to play, as is usual with children her age. It was while they were playing that the appellant, who is her uncle and neighbour called her, held her hand and led her to a bush where he proceeded to defile her. The complainant later reported the unfortunate incident to her grandmother who took her to the hospital for examination and reported the matter to the police station.

After the appellant was apprehended and charged, the prosecution called a total of 4 witnesses. The sister of the complainant, **WA (PW3)** corroborated the testimony of the complainant as she stated that she saw the appellant take the hand of the complainant while they were playing. Simon Nyamwembe, the clinical officer, PW4, testified that even though the hymen was not broken, there was evidence of tenderness of the labia majora and clinical trauma.

At the close of the prosecution's case, the magistrate found that the appellant had a case to answer and was therefore put on his defence. He gave a sworn statement and denied the charges. He explained that he was not near the homestead of the complainant as he left for Rangala at 3.30pm.

The appellant called two witnesses in proof of his alibi; Dickson Oduor Otieno, DW1 who attested that he spent the day with the appellant from 11am to 3.30pm when he went to board a motorbike saying he was heading to Rangala. DW2, Florence Anyango Otieno, the wife of the appellant, relayed the same information as DW1. She claimed that the appellant was in the house, was joined by DWI then left the house at 3.30pm on a motorbike.

The trial magistrate (R.B Ngetich) heard the testimonies, evaluated the evidence tendered before the court and found the prosecution had proved its case against the appellant. On the issue of penetration, the magistrate held that partial penetration still amounts to defilement. On the alibi defence, he held that the same did not explain where the appellant was at 4pm when the crime was said to have been committed. He therefore found the appellant guilty as charged and sentenced him to life imprisonment.

Aggrieved with the judgment and sentence of the Magistrate's Court, the appellant appealed to the High Court. E. Maina, J re-evaluated and re-analysed the evidence and concluded that the complainant gave truthful and credible evidence; identified the appellant by recognition; had

corroboration from PW1, her grandmother and PW3 and that the medical evidence was further evidence that partial penetration actually took place. The alibi defence did not indicate where the appellant was between 3.30pm and 6pm when the crime was committed. The appeal was dismissed and the sentence was confirmed.

Still dissatisfied with the finding of the High Court, the appellant preferred the instant appeal, based on 6 grounds, which we summarize that the judge erred in law and fact by;

a. Failing to appreciate that the evidence of the prosecution was full of contradictions.

b. Failing to appreciate that the medical evidence did not corroborate the evidence of the complainant.

c. Failing to appreciate the value of the appellant's alibi.

During the hearing of the appeal, the appellant appeared in person while the respondent was represented by **Mr Peris Gathu**, the learned Prosecution Counsel. Both parties had filed submissions.

The appellant submitted that the age of the complainant was not properly assessed hence the conviction and sentence cannot stand. The medical evidence indicated that the hymen was not broken, which did not corroborate the assertions of the complainant. The appellant contended that his alibi defence answered the criminal charge as it explained where he was when the crime was committed. Therefore the prosecution failed to prove its case beyond reasonable doubt. The Court was urged to allow the appeal.

The prosecution relied on the case of **CHEMAGONG V REPUBLIC [1984] KLR 611** and reminded the Court that its jurisdiction on a second appeal is restricted to matters of law. The prosecution proved its case beyond reasonable doubt by evidencing the age of the complainant; penetration; and the identity of the perpetrator as the appellant. Therefore the appellant was properly convicted and sentenced.

We have considered the record of appeal as well as submissions made by the appellant and the respondent. We do not take lightly the role of this Court as defined in **section 361** of the **Criminal Procedure Code.** As was stated in **DAVID NJOROGE MACHARIA V REPUBLIC [2011] eKLR**

> **"That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v. R [1984] KLR 611."**

The said **Section 361 (1)** of the **Criminal Procedure Code** is quite clear that a court on second appeal shall not hear an appeal on a matter of fact. This Court's jurisdiction has been restricted to issues of law. For purposes of discharging our mandate judicially, we ought to make clear what constitutes matters of law. The Supreme pronounced itself on what issues of law are in **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 3 OTHERS [2014] eKLR**

> **"[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows: a. the technical element: involving the interpretation of a constitutional or statutory provision;**
>
> **b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;**
>
> **c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."**

With that in mind, the appellant has invited this Court to look into the contradictions in the prosecution's evidence; the medical evidence tendered in order to establish whether it corroborated the complainant's evidence and to establish whether the alibi evidence was cogent. With respect, none of these call upon this Court to either interpret or apply constitutional; provisions, to evaluate the conclusions of the trial court. Rather it requires this Court to re-analyse and re-evaluate the facts of the case and this is a jurisdiction of a court of first appeal not of second appeal. It is trite that jurisdiction is everything without which the Court must down its tools. See **OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD [1989] eKLR**.

Notwithstanding the foregoing, we are aware that this Court on a second appeal has discretion to interfere with concurrent findings of the courts below in certain circumstances closely circumscribed as was pronounced in **IBRAHIM CHACHA MWITA V REPUBLIC [2004] eKLR**;

> **"An invitation to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."** *See F.K.N v Republic [2016] eKLR.*

From the record, we are convinced that the judgment of the trial court as was upheld by the High Court after a thorough re-evaluation of the whole evidence was based on legally sound principles and the sentence meted out was in accordance with the provision of **section 8(2) of the Sexual Offences Act**. We also note that by the time the High Court was upholding the sentence, the Supreme Court had not made the

ground-breaking decision in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC [2017] eKLR**.

In the said case, the Supreme Court held that sentencing is a crucial component of a trial. Therefore courts are mandated to apply the fair principles of trial during sentencing. It further held that the mandatory nature of sentences, like the one before us are unconstitutional as they deprive courts of their legitimate jurisdiction to exercise discretion in sentencing on an individualized case by case basis. Further, mandatory sentences were held to be discriminative in nature as they deprive those sentenced under such provisions a right to equal treatment with those sentenced under the non-mandatory sentencing provisions.

Based on the foregoing this Court has in appropriate cases interfered with sentences of that kind for instance, it being guided by the holding in **JTK V REPUBLIC [2019] eKLR** where, it reduced the sentence meted on an appellant who had committed incest. We find that the sentence of life imprisonment is harsh and excessive under the circumstances of the instant case.

For the reasons we have set out herein we dismiss the appeal against conviction. We allow it on sentence, however, to the extent that we set aside the life sentence and substitute it with one of 20 years imprisonment to run from the time the trial court imposed its sentence.

This judgment is delivered under **Rule 32(2)** of the Court of Appeal Rules, our learned brother Odek JA having died before signing it.

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