IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 46 OF 2018

BETWEEN

JUMA SAID WANJE …….....…….…..….....APPELLANT

AND

REPUBLIC …….……..... REPUBLIC

(An appeal from the Judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.) delivered on 13th April, 2018

in

Criminal Appeal No. 8 of 2016)

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JUDGMENT OF THE COURT

1. The appellant was convicted of defilement of a girl child, EM, aged 3 years. He was sentenced by the trial court to imprisonment for life.

2. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court of Kenya at Malindi.

3. During the hearing before the Chief Magistrate's Court at Malindi, the prosecutor applied for the mother to give evidence on behalf of the child as she could not talk. The trial court invoked ***section 31*** of the ***Sexual Offences Act*** and permitted the child's mother to testify on behalf of the child.

4. The child's mother, PW1, told the trial court that on 22nd October 2013 at about 1 p.m. a woman by the name ***RK, PW3***, told her that she had seen a man holding a child; and that he had lifted up the child's skirt while the child sat on him, facing him as she cried. The man was inside a house that was under construction. The scene was not far from the place where both PW1 and PW3 were working.

5. PW1 rushed to the scene and when the man saw her, he put down the child and took off. PW1 took the child to Malindi Sub-County Hospital where she was attended to by ***Ibrahim Adullahi***, ***PW2***, a Senior Clinical Officer.

6. PW2 examined the child and found that her hymen had been broken. He concluded that the child had been defiled. The child said that she had been defiled by someone known to her.

7. After the child was treated, PW1 and another woman reported the incident to ***Mohamed Gogo Ndoro***, ***PW4***, a member of Community Policing, and the appellant was arrested and escorted to a police station. The appellant did not challenge the evidence of PW3 and PW4 by cross examining them.

8. In his unsworn statement of defence, the appellant simply stated that he did not know the reason for his arrest, until he was arraigned in court.

9. The appellant's appeal before this Court is on two main grounds, namely; that there was no sufficient evidence of identification; and that the sentence passed by the trial court and affirmed by the first appellate court is harsh and excessive.

10. The appellant fully relied on his written submissions. He stated that both PW1 and PW3 did not properly identify the person who defiled

the complainant. According to the appellant, he was not identified by PW3, (who had testified as an eye witness), but instead it was PW1 who purported to identify him, based on information given to her by PW3.

11. The appellant further submitted that although PW3 stated before the court that "*I saw Said defiling the child*," later on she told the same court: "*I didn't know the accused by name, just by face."* That, in his view, raised serious doubt as to whether PW3 was a credible witness.

12. ***Mr. Ketoo***, ***Senior Prosecution Counsel***, opposed the appeal. On the issue of identification, ***Mr. Ketoo***, stated in his written submissions that PW3, who was an eye witness, saw the appellant defiling the child; that she knew the appellant by face; and that she told PW1 what she had witnessed; that PW1 went to the scene and found the appellant with the child, having dressed her up; and that PW1 knew the appellant well, even where he lived, and had taken police officers there, but they did not find him. On the following day when PW1 sighted the appellant she alerted village elders, who arrested him.

13. We have looked at the evidence adduced by both PW1 and PW3 regarding identification of the appellant. According to PW1, PW3 told her she had seen a man holding a child with her skirt lifted up, the child was seated facing the man and was crying. PW1 rushed to the place where the man was said to be with the child and she came face to face with the appellant before he took off.

14. Later on PW1, reported the incident to the police and subsequently led PW4 to arrest the appellant.

15. PW3, who was breaking chip stones together with PW1, had gone to the bush to relieve herself. It was about 1.00 p.m. As she was leaving the bush, she heard a child crying inside a house that was under construction. She saw a person, who she later said was the appellant, defiling a child. When PW3 returned to her place of work, she found PW1 looking for her child. PW3 told PW1 that she had seen a child being defiled, but did not know whose child it was. The witness said that she did not know the appellant by name, she knew him by face. She identified the appellant as the person she had seen defiling the child on the material day.

16. On our own summation of the evidence regarding identification of the appellant, there is no doubt that both PW1 and PW3 saw him with the child at different times. According to PW3, she saw the appellant defiling the child inside a house that was under construction. The evidence of PW3 reveals that at the material time she did not know the appellant's name but all the same she was positive that the person she had seen was the appellant.

17. On the other hand, PW1 knew the appellant and found him still holding the child. When the appellant saw PW1 he took off. PW1 told the police that she knew the person who had defiled her child. The child told the police that she had been defiled by a person well known to her.

18. We agree with the learned judge that the appellant was positively identified as the person who defiled PW1's child. We must therefore dismiss the appeal against conviction, which we hereby do.

19. Turning to the issue of sentence, the appellant submitted that as a first offender, the sentence to life imprisonment that was imposed upon him was harsh and excessive and urged this Court to reduce it.

20. On the other hand, Mr. Ketoo submitted that considering the aggravating factors in this matter, this Court ought to pass an appropriate sentence or better still find that the sentence of life imprisonment is sufficient.

21. ***Section 8(2)*** of the ***Sexual Offences Act*** states as follows:-

> ***"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."***

22. The appellant cited to us this Court's decision in ***Daniel Kyalo Muema v Republic [2009] eKLR***, where the Court made reference to ***Opoyo v Uganda [1967] E.A.C.A 752***. The Court at page 754 held:-

> ***"...It seems to us beyond arguments that the words "is liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court."***

23. In ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, the Supreme Court of Kenya held that the mandatory nature of sentences deprives courts of their legitimate jurisdiction to exercise discretion in passing sentence.

24. While we agree that the wording of ***section 8(2)*** of the ***Sexual Offences Act*** does not prescribe life imprisonment as the mandatory sentence for a person convicted of defilement of a child of 11 years or under, in the circumstances of this case, where the child defiled was 3 years old, we think the sentence that was pronounced by the trial court and affirmed by the first appellate court was appropriate.

25. Consequently, we are not inclined to interfere with the sentence at all. That in effect means that this appeal fails in its entirety. We dismiss the appeal and affirm the appellant's sentence to life imprisonment.

It is so ordered.

Dated and delivered at Nairobi this 22nd day of May, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

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

DEPUTY REGISTRAR