IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & J.MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 33 OF 2019

BETWEEN

SAMSON MUMBAA MURIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Kiambu (Majanja, J.) dated 13th February, 2018

in

H.C.CR.A No. 11 of 2018)

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JUDGMENT OF THE COURT

Samson Mumbaa Murigi, the appellant was charged and convicted for the offence of defilement contrary to ***Section 8 (1)*** *as read with* ***Section 8 (3)*** of the ***Sexual Offences Act*** in the Chief Magistrate's Court at Thika.

The particulars of the main charge were that on 26th February, 2016 at Gatea Village in Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of **PW1**, a child aged 15 years.

In convicting the appellant, the court relied on the evidence of the complainant PW1 and her mother PW2. According to PW1's testimony, she was leaving a neighbour's house when the appellant, who was also a neighbour invited her into his home. After a brief conversation about her education he proceeded to remove their clothes and defiled her. She then heard her mother yelling and banging on the door.

PW2, **JW**, stated that she received a phone call from one Agnes instructing her to go to the plot as her daughter was in a boy's house. She knocked on the door but the appellant locked it from inside. She then proceeded to lock the door from outside. She called the chief and reported the incident. The chief sent two policemen and both the complainant and the appellant were taken to the police station. The following day, she took PW1 to the hospital.

PW3, **Dr. Gachau Muthare** testified on behalf of his colleague and produced a P3 form and treatment notes. According to his testimony upon examination of PW1, there was no injury on her body parts, her hymen had been broken, there was a foul smell and there was no discharge or blood. Despite a 4-day delay in examining the complainant, it was his opinion that there was penetration.

In his defence, the appellant stated that he was framed and that on the material day, he was on his way home from Juja where he had sought casual work and not at the scene as alleged by the prosecution.

After considering the evidence tendered, the trial court convicted the appellant and sentenced him to 20 years imprisonment. Aggrieved with the decision, the appellant filed an appeal in the High Court, against both the conviction and sentence of the trial court. By a judgment dated 13th February, 2018, the High Court (Majanja, J.) dismissed the appeal and upheld the conviction and sentence. Unrelenting, the appellant has now filed this second appeal faulting the High Court for not invoking the provisions of **Section 333 (2**) of the **Criminal Procedure Code**; failing to comply with **Article 50 (2) (p) & (q)** of the **Constitution of Kenya** and failing to find that the age of the complainant was not conclusively proved.

At the hearing of the appeal, the appellant was present in person while the State was represented by **Mr. Moses O'Mirera**, Senior Assistant Deputy Public Prosecutor. The appellant relied on his memorandum of appeal and asked the Court to reduce his sentence. On his part, Mr. Mirera opposed the appeal and submitted that both Courts made concurrent findings that: the act was committed by the appellant and he was arrested in *flagrante delicto*; PW2, the mother of the complainant initiated the arrest of the appellant and PW3 confirmed that there was penetration.

On sentence, counsel urged the court to revisit the Supreme Court's pronouncement in ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu case)***. In his opinion the Supreme Court did not make any findings outside the parameters stated therein, consequently it was not applicable in this instance.

We have considered the record, submissions by both parties and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. The appellant has challenged his conviction and sentence of 20 years imprisonment, on three grounds. First, that the age of the complainant, was not proved beyond reasonable doubt. Second, that under the Constitution he is entitled to benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence had been changed between the time that the offence was committed and the time of sentencing and lastly, that the time spent in remand was not considered in his sentencing.

The three ingredients necessary to prove the offence of defilement include the age of the victim, penetration and identification of the accused as the perpetrator. The issue of age is an essential ingredient in proving that the complainant was a child at the time of the defilement and also for the purposes of mitigating or aggravating the sentence. As stated by this Court in ***Criminal Appeal No. 68 of 2015, Maripett Loonkomok vs. Republic:***

> ***"The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises".***

The most conclusive way of proving the age of a child is by the production of his/her birth certificate and possibly followed by the testimony of the parents. We have examined the record and are satisfied that the age of the complainant was proved by her birth certificate which showed that she was 15 years at the time of the incident. In addition, the complainant who was a class 7 student, her mother - PW2 and PW3, Dr. Gachau all confirmed her age to be 15 years. Consequently, we agree with the concurrent finding by both courts below that the complainant was a child falling within the age bracket of 12 to 15 years as envisaged under ***Section 8 (3)*** of the **Sexual Offences Act**. Accordingly, we have no doubt that the complainant was aged 15 years and that her age was conclusively ascertained.

On sentence, the appellant submitted that the sentence imposed on him was excessive and urged us to reduce it. In support of this proposition, he relied on **Article 50 (2) (p)** of the Constitution and **Section 333 (2)** of the Criminal Procedure Code.

Article 50 (2) (p) of the Constitution provides:

> ***"50 (2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***…;***
>
> ***…;***
>
> ***…;***
>
> ***(p) to the benefit of the least severe of the prescribed punishments for an offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;"***

Even though this issue was not raised at the High Court, **Article 50 (2) (p)** of the Constitution relates to a right that an accused person is entitled to in a case where the prescribed punishment has been changed between the time the offence was committed and the time of sentencing.

A perusal of the record before us indicates that the offence was committed on 26th February, 2016, the trial court delivered its judgment on 19th July, 2017 and the appellant was sentenced on 15th August 2017, under the Sexual Offences Act. At the time of sentencing, there were no changes in the said Act with regard to the punishment for the offence which the appellant was charged with. Consequently, **Article 50 (2) (p)** of the Constitution is inapplicable and offers no relief to the appellant.

Of relevance however, is the Supreme Court decision in ***Francis Karioko Muruatetu and Others vs. Republic SC Pet. No. 16 of 2015*** which was brought to our attention by the respondent. The Court in that decision held that the mandatory nature of the death sentence was unconstitutional as it denied courts their legitimate jurisdiction to exercise discretion depending on the circumstances of the case. The same principle has been applied in various sexual offences cases before this court where it was held that the minimum mandatory sentences under the Sexual Offences were similarly unconstitutional and that the provisions of Section **8** of the **Sexual Offences Act** must be interpreted so as not to take away the discretion of the court in sentencing. (See ***Christopher Ochieng vs. Republic [2018] eKLR, Criminal Appeal No. 202 of 2011; Jared Koita Injiri vs. Republic, Criminal Appeal No. 93 of 2014 and Evans Wanjala Wanyonyi vs. Republic [2019] eKLR, Criminal Appeal*** **No. 312 of 2018** and ***Dismas Wafula Kilwake vs. Republic [2018] eKLR)***.

In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty of 20 years imprisonment which was the prescribed sentence for the offence of defilement under **Section 8(3)** of the **Sexual Offences Act**. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial Court took into a consideration both aggravating and mitigating factors and arrived at the correct conclusion. Consequently, the appeal against sentence fails.

On the whole, we find that the prosecution proved its case beyond reasonable doubt and there is sufficient evidence to uphold conviction and sentence imposed by the trial court. Consequently, the appeal fails and is dismissed.

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

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR