



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), M'INOTI & MURGOR, JJA)

CRIMINAL APPEAL NO. 1 OF 2014

BETWEEN

ABDINASIR GUHAD BORE.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court at Garissa (S.N Mutuku, J.) dated 9th December, 2013

in

H.C.C.R.A 74 OF 2012)

JUDGMENT OF THE COURT

The main objective for the enactment of Sexual Offences Act in 2006 is expressed in its long title as the prevention and protection of all persons from harm and unlawful sexual acts. Defilement, as a form of sexual violence against children, is a debilitating experience for the victimized children. Its impact on the victims is detrimental to the psychological, social, educational and physical health outcomes, not only of the affected children, but also their families and society at large.

Rising to the call by the United Nations General Assembly in its resolution 44/25 of 20 November 1989 under the Convention on the Rights of the Child in which State parties were required to: **“take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence including defilement and sexual abuse”**, Kenya enacted the Sexual Offences Act in 2006. With it came stiff penalties which it was hoped deter against sexual offences and in turn see a decline in such cases. That, however, is not the case going by recent studies that point to a steep rise, instead. For instance, according to a report by UNICEF **‘Kenya Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood’** nearly 1 in 3 Kenyan girls under the age of 18 experience sexual violence. Further, the 2010 national police statistics, **“Kenya Police Service, “Annual Crime Report for the Year 2010”**, revealed that an average of over 200 cases of defilement reported every month in the country.

It is against this backdrop that we turn to consider the merits of this appeal, in which the appellant has challenged the decision of the High Court (S.N Mutuku,J.) dismissing his first appeal and upholding the life sentence imposed by the trial court for the offence of defilement of a child aged five years contrary to **section 8(1)(2)** of the Sexual Offences Act.

The prosecution led evidence to the effect that the child had been sent by her mother to buy meat in the neighborhood; that before she did so the appellant got hold of her and carried her to a friend’s house where he placed her on the bed and defiled her; and that after this she went home and reported those events to her mother. Her mother, in turn with others, proceeded to the appellant’s home and confronted him with allegations that he had defiled the child, upon which he slipped out and ran away but was later arrested. The doctor confirmed from the laceration and a tear on the anus that the child was defiled. The appellant, of course denied committing the offence or even knowing the child or her family.

The trial magistrate rejected the defence, holding that there was overwhelming evidence linking the appellant with the charge. His first appeal to the High Court was rejected hence this second appeal, in which he has faulted the learned Judge for proceeding to hear the appeal when the appellant had not been served with proceedings and judgment of the trial court; for denying the appellant a chance to file written submissions; for not appreciating that there was no medical evidence linking him with the child’s defilement; for failing to acknowledge that the evidence of his identification was inconclusive; for rejecting his defence without any basis; and for convicting and sentencing him when

the case was not proved beyond reasonable doubt.

Before us by Skype from Garissa prison, due to the Covid-19 pandemic, the appellant briefly highlighted these grounds and, in addition asked us to consider applying the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic** (2017) eKLR, to the circumstances of this appeal and to hold that the mandatory nature of life sentence in **section 8(1)(2)** of the Sexual Offences Act is contrary to and inconsistent with the Constitution; that we ought to consider remitting the case to the trial court for re-sentencing, or in the alternative consider ourselves passing appropriate sentence taking into account the fact that he has been in custody for 8 years, reformed and is a first offender.

Of these grounds and by **section 361** of the Criminal Procedure Code, we are only interested in matters of law and will not interfere with the concurrent findings of fact by the trial magistrate and the High Court unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or unless the two courts below were plainly wrong in their decision, looking at the evidence as a whole. Where it is demonstrated that these infractions exist the Court will treat them as matters of law and disturb the conclusions. See **Karani vs R** (2010) 1 KLR 73.

Starting with the last question, the child gave a consistent and detailed account of how she had a short conversation with the appellant before he defiled her by inserting his genital organs into the child's anus. In that conversation the appellant wanted to know whether the child's father and mother were at home, whether the child's father's motor vehicle (taxi) which appellant had knocked on a wall had been taken for repairs, where an employee in their home had gone to and the name of their maid. The significance of these series of questions is that, apart from spending some time with the appellant, the child knew him by his name and physical appearance even prior to the day of the incident. According to the child the appellant had been visiting their home from time to time. That being so, the child specifically told her mother who had defiled her and led the people including PW 3 to the appellant's home.

With respect, we find no basis for interfering with the concurrent conclusions of the two courts on the question of identification.

Again, both the trial and first appellate courts properly directed themselves on the weight to be attached to the child's evidence as a single witness. Citing the proviso to **section 124** of the Evidence Act the trial magistrate was satisfied that the child was a witness of truth. The High Court upon analysis of the evidence agreed that from its totality, the evidence pointed to the appellant as the defiler. Further, no material has been presented to us to warrant our interference with the finding that the child was five years old. Her mother, the most direct and accurate source of evidence as to the age of her child, confirmed this, in addition to the doctor's own assessment.

There was medical evidence that the child's anus had lacerations and a tear measuring 1.5cm long. That evidence coupled with the child's own testimony proved penetration. Genital organs are defined under **section 2** of the Sexual Offences Act for the purposes of the Act to include the anus.

The inevitable conclusion reached by both courts below, and with which we agree, was that the child had been sexually molested by the appellant and all the ingredients of the offence of defilement under **section 8(1)(2)** were established beyond any reasonable doubt.

The appellant's *alibi* defence was properly rejected as it failed to displace the prosecution evidence.

Failure by the trial court to order the appellant to be subjected to medical examination was not fatal. **Section 36(1)** of the Sexual Offences Act which requires the court to direct the taking of samples from the suspect for the purpose of forensic and other scientific testing, including DNA, in order to ascertain whether or not the suspect committed an offence, is undertaken as a matter of judicial discretion. Only where the circumstances dictate will the trial court order DNA samples to be drawn from the suspect to ascertain if the offence was committed by him. The trial magistrate in his absolute discretion, weighing the circumstances under which the offence was committed, found no purpose for directing that the appellant's DNA samples be analyzed.

Sentencing is also discretionary, following the decision in **Francis Karioko Muruatetu** (supra) that declared any law that deprives the Court of the exercise of judicial discretion by providing mandatory sentencing as "**harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose**" the mandatory sentence in appropriate cases.

In the instant case, taking into account the age of child and the manner in which the appellant committed the barbaric act of defilement, we are not sympathetic.

We affirm life sentenced imposed under **section 8 (1)** read with **8 (2)** of the Sexual Offences Act.

In the result, the appeal has no merit and fails. It is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

K. M'INOTI

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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