IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 38 OF 2019

BETWEEN

GARISON KAMAU WAITHANJE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kiambu,

(Hon. L. N. Mutende, J) dated 23rd August, 2017

in

CRIMINAL APPEAL NO. 44 OF 2017)

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JUDGMENT OF THE COURT

Over a period of time, **Garishon Kamau Waithanje** "**the appellant**" had been luring **MKM,** "the **complainant**", to his house. He would then give him money to buy cakes and would thereafter defile him. Things came to a head on the **7th March, 2015**, when the appellant took the complainant to his house once more and defiled him. This time around the complainant did not return home. His brother PW2, **"JCM"** was concerned and went looking for him. He found the complainant inside the appellant's house without clothes on. That is when the complainant disclosed to him that the appellant had defiled him repeatedly in the past and used to threaten him not to tell anybody regarding those encounters. Together they reported the matter to Gatundu Police Station. The complainant was examined by PW4, **Doctor Matu James Kamau** who concluded that he had been defiled. The appellant was then arrested and charged with the offence of **defilement contrary to section 8(1) (2) of the Sexual Offences Act. Particulars being that on diverse dates between the month of April, 2014 and 7th March, 2015 in [Particulars Withheld]village of Gatundu South sub-county within Kiambu County, the appellant intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely anus of the complainant, a child aged 10 years old.**

The appellant also faced an alternative charge of **committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act.**

However, this alternative charge does not concern us in this appeal. The appellant denied the charges and he was tried before the Principal Magistrate's Court at Kiambu.

When put on his defence the appellant opted to make an unsworn statement and stated that he arrived home on 5th and was arrested on the 6th. Ultimately, the appellant was convicted and sentenced to life imprisonment. His appeal to the High Court, (Mutende, J) was dismissed.

The appellant is now before us on a 2nd and perhaps last appeal complaining that he did not go through a fair trial as he was denied witness statements. He cited the case of **Hilary Nyongesa vs. Republic, (2010) eKLR** for the contention that he was entitled to the witness statement prior to the hearing of the case. That the age of the complainant was not proved; that medical evidence adduced did not prove the fact of penetration by his sexual organ and that the evidence adduced by PW1 as to where he was found in appellant's house was contradicted by that of PW2.

The appellant relied wholly on his written submissions in support of the above grounds of appeal; which we have carefully read and considered. In response the State through **Ms Wang'ele,** learned Senior Prosecution Counsel opposed the Appeal. She submitted that PW1's

evidence was corroborated by that of PW2 his brother. That the complainant had been defiled thrice in the past. On the two previous occasions he had failed to disclose to anybody his tribulations at the hands of the appellant for reason that the appellant threatened to harm him if he did so. On the 3rd occasion the complainant was found naked in the appellant's house whereupon he was taken to hospital where it was established that penetration of his anus had occurred.

Counsel further submitted that having taken plea on 9th March, 2015 the appellant was given until 15th November, 2015 to prepare for his defence. The first witness only testified after the appellant had been given witness statements. With regard to the age of the complainant, counsel submitted that it was proved by production in evidence of his Birth Certificate. She submitted further that the medical evidence adduced proved that there was penetration. It was submitted that evidence adduced by the prosecution was consistent and corroborative. According to counsel, the defence put up by the appellant did not shake the case presented by the Prosecution contrary to the submissions of the appellant.

On sentence, counsel maintained that the sentence of imprisonment imposed on the appellant was well deserved in the circumstances.

This being a second Appeal, we are by dint of the provisions of section 361 of the Criminal Procedure Code enjoined to consider only matters of law. We cannot interfere with the decision of the two courts below on facts unless it is demonstrated that the trial court and 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 **Karani V Republic (2010) 1KLR 73.**

The contention of the appellant in the first ground of appeal is that his rights were violated when he was not provided with witness statements before his trial commenced and therefore he was not accorded a fair trial. We agree that **Article (50)(2) (c) and (d)** of the **Constitution of Kenya**, guarantees an accused person the right to a fair trial which includes the right to have adequate time to prepare his defence and also facilities required to attain that objective. He is also entitled to be informed in advance of the kind of evidence the prosecution intends to rely on which will entail the accused being provided with witness statements in advance.

In this case the appellant was arraigned in Court on the **9th March, 2011**. The record shows that on this day the appellant was informed of the nature of the offence he was facing and he pleaded not guilty. On the **21st April, 2015** he sought to be supplied with witness statements. An order to that effect was made by the trial Court. On the **5th May, 2015** he renewed the application to be furnished with copies of the witness statements. Again the Court made an order that he be supplied with the statements at his own expense. On the **2nd June, 2015** appellant pointed out the fact that he had not been supplied with statements despite the previous court orders. On that particular date the Court ordered that he be remanded at **Gatundu Police Station** for purposes of being supplied with copies of the charge sheet and witness statements. The Court further gave a mention date to confirm if witness statements would have been supplied as ordered. Ultimately the matter proceeded to hearing on the **16th November, 2015** after the Appellant told the Court that he was now ready to proceed with the trial. As the High Court properly observed, the appellant could only have agreed to proceed with the case after he had been supplied with the witness statement. It is important to note that the Court did not hear the case until the Appellant was ready to proceed. We note that eight months had elapsed prior to the commencement of the hearing. The case proceeded only to hearing after the Appellant stated emphatically that he was ready to proceed. This was a person who all along notified the Court of his unpreparedness to proceed with the matter having been inhibited by not being supplied with witnesses' statements. Stating that he was ready to proceed eight (8) months later is a clear indication that witness statements had been availed to him in compliance with the trial Court's order. In the premises, we come to the same conclusions just like the 1st appellate court that the appellant's rights during his trial in the magistrate's court were not violated and he was supplied with witness statements before the commencement of his trial and had sufficient time to prepare his defence.

In the second ground of Appeal, the Appellant argues just like he did in the High Court that at the outset the complainant's age was given as 13 years. It was after the amendment of the charge that the age was indicated to be 10 years. His argument is that he should have benefitted from this discrepancy in the age of the complainant.

In the case **Alfayo Gombe Okello Vs Republic, Criminal Appeal No. 203 of 2009 (Kisumu)** this Court stated that:

> ***"… the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)….."***

Age in the instant case was proved beyond reasonable doubt by production of the birth certificate of the complainant. Though initially the charge sheet indicated that the age of the Complainant was 13 years old; however, when the Birth Certificate was availed, it confirmed the age of the complainant as 10 years as at the time of the commission of the offence. It was then that the prosecution moved the court to amend the charge sheet as they were perfectly entitled to do so as to give the proper age of the complainant. The appellant did not oppose the amendment. He cannot thus claim that he should have benefitted from that discrepancy. Nor was he prejudiced. He fully participated in the trial knowing fully that the age of the complainant was 10 and not 13 years.

On penetration, both courts below came to concurrent findings that penetration was proved. Based on the evidence on record, we have no reason to interfere or depart from that concurrent finding. Penetration is defined in the Sexual Offences Act thus:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

Genital organs are defined in the same Act as:

> ***"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."***

The complainant was subjected to medical examination on the same date the act was said to have been committed. The Medical Officer who filled the P3 form examined the Complainant for purposes of filling the P3 form. It was his finding that the complainant's sphincter was loose and he had bruises around the anus which was inflamed and tender. He also had some whitish discharge in the anus. He therefore concluded that the complainant had been defiled. Injuries and the discharge noted in the anus was proof of penile – anal penetration and that therefore the Complainant had been defiled. We agree.

The last ground of Appeal was in respect of contradictions. The appellant submitted that evidence adduced by PW1 as to where exactly the complainant was found in the appellant's house was contradicted by that of PW2. That whereas PW1 stated that when PW2 entered the appellant's house, he found him inside one of the rooms without clothes on; PW2 on the other hand testified that he found the complainant on the Appellant's bed and he did not have his clothes on. It was therefore his contention that this contradiction was material and should have been resolved in his favour.

We appreciate that in any trial, there are bound to be contradictions as witnesses appreciate things differently. If the contradictions are not material, they can be ignored. In the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA 6** it was stated thus:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that a rare contradiction unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

The fact that the complainant testified that PW2 found him inside one of the rooms while PW1 testified that he found him on the appellant's bed, point to a minor contradiction. It is not even material. The fact of the matter is that the complainant was found in the appellant's house naked at 12.00 a.m.

Having been found in the house of the appellant at wee hours of the morning and with injuries in his anus, this evidence could only point to the appellant as the perpetrator of the offence as stated by the complainant and PW2. The identification of the appellant as the perpetrator of the crime cannot therefore be doubted.

The appellant was sentenced to life imprisonment. He complains that the sentence is harsh and excessive. Citing the declaration of the Supreme Court in the case of **Francis Karioko Muruatetu & another V Republic (2017) eKLR** regarding the constitutionality of mandatory sentences; the appellant urged us to review the sentence imposed on him in the spirit of the dictum of the Supreme

Court in the aforesaid case. However, the state was of the view that the sentence imposed, was well deserved considering that the complainant was aged 10 years.

We note that at the time the appellant was tried, convicted, and sentenced for the offence, the Sexual Offences Act provided for imprisonment of the offender for life. However with the advent of Muruatetu case, minimum mandatory sentences are now being viewed as unconstitutional as well. This is because they equally impede the exercise of discretion of the trial court to impose appropriate sentence on case to case basis.

Having looked at the record, and appellant's mitigation, we are inclined to set aside the sentence of life imprisonment imposed on the appellant and instead order that the appellant serves 20 years imprisonment effective from the date of sentence in the trial court. Otherwise the appeal on conviction is dismissed.

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

R. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR