IN THE COURT OF APPEAL

AT KISUMU

CRIMINAL APPEAL NO. 173 OF 2016

(CORAM: OKWENGU, WARSAME & GATEMBU, JJ.A)

BETWEEN

PETER OMONDI JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu

(E. Maina, J.) delivered on 16th April, 2015 in Ksm. H.C.CR. Appeal No. 73 of 2014)

JUDGMENT OF THE COURT

1. The appellant, Peter Omondi Juma, was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars of the offence were that on 6th June 2013 at Siranga sub-location in Ugenya District within Siaya County, intentionally caused his penis to penetrate the vagina of RAL, a child aged 14 years. He was tried before the Magistrate's court at Ukwala and convicted in a judgment delivered on 4th August 2014. He was sentenced to imprisonment for a term of 20 years.

2. He appealed to the High Court at Kisumu against the conviction and sentence. That appeal was dismissed in a judgment delivered in April 2015. This, therefore, is his second appeal which, because of Section 361 of the Criminal Procedure Code, must be confined to matters of law. See ***Chemangong vs. Republic [1984] KLR 611*** and ***Karingo vs. R (1982) KLR 213***.

3. The substance of the appellant's complaints is that the offence of defilement was not proved to the required standard; that the evidence of the complainant was not substantiated; and that the medical evidence tendered was insufficient.

4. The appellant, who appeared before us in person via video link relied on his written submissions in which he submitted that although the alleged offence was committed on 6th June 2013, he was not arrested and charged with the offence until 23rd September 2013 and there is no explanation for that lapse of time; that the P3 form that was produced was not authenticated as it does not bear an official rubber stamp; that the investigations by the investigating officer were rushed as witnesses from the neighbourhood were not called to assist; that there was no medical evidence to establish the offence; that the judgment of the High Court is inconsistent and the court improperly relied on Section 124 of the Evidence Act to convict him.

5. Learned counsel for the respondent ***Mr. Kakoi***, relying on the respondent's written submissions urged that all the ingredients of the offence were proved and that contrary to the appellant's claim, his defence was considered.

6. We have considered the appeal and the submissions. To sustain the charge, the prosecution had to establish, to the required standard, the age of the complainant, proof of penetration and positive identification of the assailant. See ***Charles Karani vs. Republic, Criminal Appeal No. 72 of 2013***. See also ***John Mutua Munyoki vs. Republic, Nairobi Criminal Appeal No. 11 of 2016***.

7. The facts are that on 6th June 2013, the complainant RAL, who testified as PW1, was visiting her sister, JA, at Siranga. During the visit, RAL was informed by her sister JA that the appellant wanted her. That evening, RAL, was compelled by JA to go off with the appellant who picked her up at 9.00 p.m. JA threatened her that if she (RAL) refused to accompany the appellant, then she would not have a place to sleep. The appellant complied and accompanied the appellant to his house where he defiled her.

8. On returning to her sister's house the following morning, the sister (JA) told her to go back to the appellant. In RAL's words, "*I went back, and we had sex. This time round un-protected sex. Later after one month, I found that I was pregnant. I had not told mum about it. I refused to go to school and I told mum what had happened*." The matter was then reported to the children department. RAL was taken to

hospital where it was confirmed that she was indeed pregnant, and the appellant was thereafter arrested and charged.

9. RAL's mother, FL, who testified as PW3 stated in her evidence that on 5th May 2013 she sent her daughter (RAL) to Siranga to see her sister; that in September 2013 RAL became pregnant and she took her for a pregnancy test at a hospital in Ukwala where the pregnancy was confirmed; that RAL told her that the appellant was responsible for the pregnancy; that she reported the matter at Ukwala Police Station after which the appellant was arrested. She stated that RAL was born on 30th November 1998 and produced a birth certificate as well as the P3 form.

10. Corporal Nixon Lukwa (PW4) was at the time attached to Ukwala Police Station when the complainant's mother (PW3) reported that her daughter had been defiled by the appellant. He recorded statements, issued a P3 form and subsequently arrested the appellant and charged him with the offence of defilement.

11. At Ukwala sub-county Hospital, RAL who was accompanied by her mother was examined by a clinical officer, Judith Akoth, whose treatment notes and the completed P3 form were produced before the trial court on her behalf by Chris Opat Aliona, (PW2) a fellow clinical officer at the hospital.

12. In his defence, the appellant stated that he comes from Siranga where he is a farmer; that he was arrested on 23rd September 2013 when he took his bicycle for repair next to AP's post in Siranga; that he was approached by an administration police officer who,on confirming the appellant's name, ordered him to accompany him to the AP's camp where he was interrogated "*about the lady*" and he told them that he knew her as his in-law. Thereafter he was handcuffed and placed in cells before being taken to Ukwala Police Station the following day. On 25th September 2013 he was charged and taken to court on charges he knew nothing about.

13. The trial court was satisfied that the prosecution had discharged its burden and that the offence of defilement was established. The trial court had this to say:

> ***"Accused simply denies the offence, stating that he was only arrested while repairing his bicycle at Siranga market. From the entire evidence on record, I am satisfied that the complainant herein was sexually assaulted and became pregnant, by none other than the accused person herein. I also do find that there was a collusion between accused herein and the complainant's sister over this. The complainant sister, one*** [JA] ***ought to have been arrested and charged accordingly."***

14. Upon reviewing and evaluating the evidence, the High Court was also satisfied that the prosecution had established its case against the appellant. The learned Judge of the High Court had this to say:

"The age of the complainant was proved by production of a birth certificate. She was going to be 15 years at the material time. The medical evidence tendered confirmed that he had had sexual intercourse. I am satisfied that she positively identified the appellant as the person who defiled her. She vividly narrated how she visited his house on the material day and on subsequent days and how she spent the night with him. Initially he had carnal knowledge of her using a condom but there after they had unprotected sex. All this happened with the connivance of her sister one [JA] ***who I agree with the learned trial magistrate ought to have been arrested and charged. Had the complainant not become pregnant she may never have opened up to her mother. The appellant admitted at the trial that he was well known to her being her in-law. This could therefore not be a case of mistaken identity."***

15. There are, therefore, concurrent findings by the two courts below with which we can only interfere if it is shown that they are not based on evidence, or that they are based on a misapprehension of the evidence, or the courts below are shown demonstrably, to have acted on wrong principles in reaching their findings. See ***Alvan Gitonga Mwosa vs. Republic [2015] eKLR***; ***Jackson Wanyoike Njuguna & another vs. Republic [2019] eKLR***.

16. On our part, the issue is whether there was sufficient evidence on the basis of which the courts below concluded that the ingredients of the offence with which the appellant was charged were established to the required standard.

17. As regards the identity of the perpetrator of the offence, the complainant spent considerable time with the appellant. In her words, "*I went with him to his place and had sexual intercourse with him. He forced me to do this. He forced me to remove my panties. He used condom*." She went on to say that the following day she went back to the appellant's place on instructions from her sister. "*I went back, and we had sex. This time round un-protected sex. Later after one month, I found that I was pregnant*."

18. On cross examination by the appellant, the complainant was categorical that it was the appellant who picked her up from her sister's place and that she went to his place "*thrice*". Furthermore, the appellant was not a stranger to the complainant as he referred to her, in the course of his testimony in his defence, as, "my in-law." Moreover, when the complainant discovered that she was pregnant, she informed her mother, PW3, that it was the appellant who was responsible. There was sufficient evidence, therefore, on the basis of which the lower courts concluded that the appellant was the perpetrator. There was evidence of penetration based on the testimony of the complainant herself and the testimony of PW2 relating to medical examination undertaken at Ukwala sub-county Hospital.

19. As regards the contention by the appellant that penetration was not established because there was no evidence to show that he was responsible for the pregnancy, this Court dealt with a similar question in the case of ***Ambrose Mwawinda Ngwato vs Republic [2016] eKLR*** where the Court stated:

> ***"PW1 testified that on diverse dated between June and October 2009, the appellant had sexual intercourse with her; that whenever she went to visit the appellant they made love. This item of evidence was not challenged by the appellant. We are satisfied that penetration as an essential ingredient of the charge under Section 8 (1) of the Sexual Offences Act was proved beyond reasonable doubt. As this Court has stated time and again, by dint of the proviso to Section 124 of the Evidence Act, a***

court can convict on evidence of a victim of a sexual offence if it is satisfied that the victim is telling the truth and needs the reasons for being so satisfied.

In a defilement case, it is not an essential ingredient of the offence that the complainant must conceive a child. In the instant case, conception was a factual matter that is not part of the actus reus in a charge of defilement *[Emphasis added]*

We respectfully agree.

20. And as regards the age of the complainant, her mother, PW3, produced the birth certificate confirming the complainant's date of birth as 30th November 1998.

21. Based on the foregoing, we are satisfied that the findings by the two courts below are supported by cogent evidence. We have no basis for interfering with the conviction. Consequently, the appeal on conviction fails and is hereby dismissed.

22. As for the sentence, the trial court sentenced the appellant to imprisonment for a term of 20 year being the mandatory minimum sentence prescribed under Section 8(3) of the Sexual Offences Act.

That section provides that a person who commits the offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.

23. In effect, despite the mitigation by appellant upon his conviction, the trial court was constrained to impose the mandatory minimum sentence. The Supreme Court of Kenya has since pronounced in ***Francis Karioko Muruatetu & another vs Republic, SC Petition No. 16 of 2015*** in the context of a murder charge, that mandatory minimum sentences take away judicial discretion to impose appropriate sentences.

24. Recently, in the case of ***GN vs Republic [2019] eKLR Kisumu Cr.Appeal No. 47 of 2015***, this Court stated:

"We are persuaded by the decisions of this Court in Christopher Ochieng – v- R [2018] eKLR, Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 to the effect that mandatory minimum sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case. We are also cognizant of and bound by the dicta of the Supreme Court in Francis Karioko Muruatetu & another – v- Republic, SC Petition No. 16 of 2015 on constitutionality of mandatory sentences."

25. Guided by those principles and taking into account the circumstances in which the offence was committed, and the mitigation offered by the appellant before the trial court, we are inclined to interfere with the sentence. We accordingly set aside the sentence of imprisonment to a term of 20 years and substitute therefore imprisonment to a term of 15 years to run from the date of his conviction on 4th August 2014. To that extent only, the appeal succeeds.

Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar