**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MUSINGA & J. MOHAMMED, JJ.A.)**

**CRIMINAL APPEAL NO. 10 OF 2019**

**BETWEEN**

**STEPHEN KISILU KITUKU……………..……………..………APPELLANT**

**AND**

**REPUBLIC……………………………………………………..…RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya at Kiambu (L.N. Mutende, J.) dated 19th April, 2017**

**in**

**H.C.CR.A. No 103 of 2016)**

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**JUDGEMENT OF THE COURT**

1. In this second appeal, ***Stephen Kisilu Kituku*** (the appellant), challenges the judgment of the High Court at Kiambu (**Mutende, J.**) whereby his appeal against conviction and sentence was dismissed. The appellant was charged, tried and convicted by the Chief Magistrates' Court at Thika with the offence of defilement contrary to ***Section 8(1) (3)*** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that on 1st July, 2011 at about 6.45 am in Thika East District within Kiambu County, the appellant intentionally used his penis to penetrate the vagina of **AB** (real name withheld), a child aged 14 years. Upon trial the appellant was convicted and sentenced to 20 years' imprisonment and as aforesaid, his appeal before the High Court was dismissed.

2. This being a second appeal, the jurisdiction of this Court is circumscribed under the provisions ***Section 361(1)*** of the **Criminal Procedure Code** as follows: -

> **"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in tis appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**
>
> > **a) on a matter of fact, and severity of sentence is a matter of fact; or**
> >
> > **b) against sentence, except where sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence..."**

See also **Karani vs. Republic (2010) 1 KLR 73, 77)**

3. The background facts of the matter were as follows; on 1st July, 2011, at about 6.45 am, a minor, **PW2** (AB) testified that she was a class 4 pupil at [Particulars withheld] primary school (school) ; on the morning of 1st July, 2011 as she was on her way to school she met the appellant who she said was well known to her by the name ***Kisilu***; the appellant held her hand and led her to the bushes where he removed her clothes and defiled her. The appellant had defiled her on three other occasions. She described how she knew the appellant, as a casual worker in the village whose home was near Chomba's house, along the road she used to go to school. Immediately he finished defiling her, they were found by **Mama *Damaris***, (PW5) and ***Baba Dommie*** who scared off the appellant by chasing him with a stick. The appellant managed to run away.

4. The incident was witnessed by ***LWM*** (PW5), a neighbour and a parent at the school. PW5 was on her way to hospital on the material day

when she met **AB** who emerged from a bush near the road. When PW5 asked her what she was doing in the bush instead of being in school, **AB** told her she had been sexually assaulted by ***Kisilu***. PW5 said that she also saw ***Kisilu*** (appellant) emerge from the same bush. **PW5** proceeded to **AB's** school and reported that she suspected **AB** had been defiled on her way to school by ***Kisilu***. The Head teacher immediately dispatched ***BMM*** (PW6) to rescue AB, and he ran towards the scene where he met **AB** and walked her to school. Another teacher by the name ***MNM*** (PW4) also followed (PW6). She interrogated **AB** who disclosed that she had been defiled by ***Kisilu***, and on checking her private parts she realized that **AB's** pants were wet.

5. The school administration summoned ***RN***, (**PW1**) **AB**'s mother to school, and informed her that AB had been defiled on her way to school the same morning. PW1 examined **AB**, she found that her panties were blood stained and she disclosed that it was '***Kisilu***' who had defiled her while on her way to school. PW1 told the trial court that AB was born on 3rd March, 1997 therefore at the material time she was aged 14 years, she produced a hospital clinic card as an exhibit. PW1 said she knew the appellant as a neighbour and they had never had a disagreement.

6. The matter was reported to the Assistant Chief, one ***Barasa Mutuga Makau***, (PW7) who testified on how he received a report from the school administration that a pupil, **AB,** whom he described as mentally challenged, had been sexually assaulted by ***Kisilu***. He arrested the appellant and escorted him to the police station. At the police station, PW1 was issued with a P3 Form and in the company of a police officer they escorted **AB** to Ithange Health Center where **AB** was treated. She was later taken to Thika Level 5 Hospital where the P3 Form was completed.

7. At the Thika Level 5 Hospital, the P3 Form was filled by ***Dr. Oganga*** but the report that was adduced in evidence by ***Dr. Stephen Maina*** (PW3) because ***Dr. Oganga*** who examined AB and prepared the report had left the hospital. According to PW3, the report indicated that **AB**, a child aged about 12 years, was examined and found with injuries that were about, 3-5 days old; that the injuries had been inflicted with a blunt object and that although the patient had no laceration on the vagina there was evidence of sexual assault. PW3 produced the P3 Form and treatment notes as evidence.

8. The matter was investigated by **PC *Edwin* (PW8**), attached at the material time to Ithanga Police Post. He received the complaint from PW1 of how **AB** who was mentally challenged was defiled by someone known to her. PW8 interrogated **AB** and noted that she was mentally challenged but nonetheless, she was able to explain what had happened to her. He escorted **AB** and her mother to the Ithanga Health Center where she was examined. He produced the complainant's blood-stained panties which he had retained as evidence. He also recorded witness statements from other witness and re-arrested the appellant who was brought to the police post by the Assistant Chief.

9. The appellant pleaded not guilty, but after hearing the evidence by a total of eight (8) prosecution witnesses, the learned trial magistrate ruled that the appellant had a case to answer. Upon being placed on his defence, the appellant gave an unsworn statement of defense and did not call any witnesses. The appellant denied the charge, contending that on the material day, he worked at a farm until 1.00 pm. He stated that he was later arrested and taken to the area Assistant Chief, before being taken to the police where he was informed of the allegations of defilement which he knew nothing about.

10. After the close of the case, and after evaluating the evidence by the prosecution and the appellant's defence, the learned trial magistrate was satisfied that the Prosecution had proved its case beyond reasonable doubt. In convicting the appellant, the learned Magistrate observed that notwithstanding **AB** had some mental challenges, she was coherent and demonstrated sufficient intelligence as she testified; he concluded that **AB** was a forthright and honest witness. Consequently, the trial court rejected the appellant's defence, convicted him and sentenced him to 20 years' imprisonment.

11. Aggrieved by that decision, the appellant filed an appeal in the High Court at Kiambu (**Mutende, J.***)* on the grounds that the prosecution evidence was not credible; that vital witnesses were not called; that the police conducted shoddy investigations; and that the prosecution had failed to prove their case to the required standards. Upon hearing the appeal, the learned Judge dismissed it, thereby upholding the conviction and sentence imposed by the trial court

12. Undeterred, the appellant filed this second appeal in which he impugns the judgement of the High Court on the grounds that the learned Judge erred in law by relying on incredible evidence which did not comply with the provisions of ***Sections 77 (2)*** and ***163 (1)*** of the **Evidence Act**; failing to find that the provisions of ***Sections 43*** and ***2 (1) (6)*** of the **Sexual Offences Act** were not complied with and for dismissing his *alibi* defence which was plausible.

13. When the appeal came up for hearing, the appellant, who was acting in person, relied on his amended supplementary grounds of appeal and written submissions. He argued that the evidence of the complainant was not credible as both courts acknowledged she was mentally retarded but nonetheless accepted her evidence; that the key elements of the charge of defilement were not proven beyond reasonable doubt and that he did not give sworn evidence because he was unaware of the court processes.

14. The appeal was opposed by **Mr. Obiri**, learned Senior Assistant Deputy Director of Public Prosecution. He submitted that the medical report was properly produced as evidence as provided under ***Section 77(2)*** of the **Evidence Act;** since the maker of the report, a public officer, was no longer stationed at Thika Level 5 hospital could not be availed without unreasonable delay. In any event the appellant did not object to the production of the medical report. On the evidence by **AB**, counsel argued that it was corroborated by other witnesses; that **AB's** age was sufficiently proved by her mother who in addition produced a Health clinic card. Moreover, the appellant was caught red-handed at the scene of the crime by PW5 who saw **AB** and thereafter saw the appellant running away. Conceding that *voire dire* was not conducted, counsel argued that the trial court had satisfied itself of the complainant's intelligence and ability to give reliable testimony. Counsel urged us to dismiss the appeal.

15. We have carefully considered the record of appeal, deliberated on the submissions by the appellant and counsel for the respondent and the law. We find the key issue for determination is whether the prosecution proved the case of defilement to the required standard. We begin with the provisions of the **Sexual Offences Act**, which provides the main elements of the offence of defilement as follows:

***(i) The victim must be a minor.***

***(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.***

***(iii) The identity of the perpetrator must be established.***

For the offence of defilement to be proved to have been committed, the prosecution must prove each of the above ingredients beyond a reasonable doubt.

16. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge as the prescribed sentence is dependent on the age of the victim. In **Alfayo Gombe Okello vs. Republic, [2010] eKLR** this Court stated: -

> **"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently 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) ..."**

The record shows that both courts below addressed the issue of age. The trial magistrate was satisfied that although **AB** herself was not able to tell her age due to her mental disability, documentary evidence was adduced by PW1 who was her mother and even the P3 form indicated that she was less than 15 years. Before the High Court, the issue of age was similarly addressed by the learned Judge as indicated in a key statement which we reproduce here below verbatim: -

> ***"The complainant herein was a minor aged fourteen (14) years. PW1 her mother adduced in evidence a child health card issued at the complainant's birth. She was born on 3rd March 1997. This was proof of her age. At the time, the complainant's age was 14 years and three (3) months."***

On this issue of age, we also wish to refer to the provisions of ***Section 2*** of **The Children's Act** which defines an age of a child to mean the "**apparent age"** in cases where the actual age is not known. See **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** where this Court further acknowledged that age assessment of a minor may come in many forms.

17. On the second ingredient that is penetration, again the two courts below arrived at a concurrent finding which was based on the evidence contained in the medical report, the soiled pants that were produced by PW8 and the evidence of **AB** herself whom the trial court found was a credible witness. This is what the learned Judge stated in her own words: -

> ***"The complainant was examined by Dr. Maina, who confirmed that she was defiled. At the point of examination, her vagina had dry blood and the hymen was broken. For a hymen to be broken there must have been penetration of her vagina. The issue to be determined is therefore, whether the person responsible was the appellant. The complainant identified the appellant as the person who took her to the bush and had penetrative sex with her. She referred to him by the name 'Kisilu' and gave a vivid account of what transpired. She concluded by stating that she knew the appellant before as he had engaged in the act with him previously and he was a casual labourer in the area"***

18. In the final analysis the learned Judge found that the appellant's conviction was wholly justified, in the face of the evidence by the prosecutions' witnesses which was not at all dented by the *alibi* defence which was dislodged by the evidence of PW5 and **AB**. This is what the Judge said about the quality and quantity of evidence;

> ***"The prosecution called evidence of PW5 that corroborated evidence adduced by the complainant which put the appellant at the scene of the incident. She saw the complainant coming from the bush and soon thereafter the appellant followed. He was a person well known to PW5. The complainant told her that she had been defiled by the appellant. the complainant was examined soon thereafter and evidence of penetration into her genitalia confirmed. The complainant must be believed must be believed when she states that she was defiled."***

19. Regarding the quantity of evidence, it is to be noted that a court can convict an accused person who is charged with sexual offences by relying on the evidence of the victim alone if the court believes the victim is truthful and records the reasons for that belief. The proviso to **Section 124** of the **Evidence Act** states as follows:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**
>
> See **Jacob OdhiamboOmumbo v. Republic [2008] eKLR**

In the instant appeal, the trial court noted that **AB** was forthright in her testimony which brings her case within the said proviso. **AB's** evidence although sufficient to found a conviction was corroborated by PW5, and exhibits that were produced in court of her soiled pants and the medical report that confirmed she had injuries consistent with a sexual assault. We also find the appellant's defence was carefully considered by the two courts below and was rightly rejected as there was sufficient evidence implicating the appellant with the offence which was not dislodged by the defence. We therefore find the conviction was merited.

20. With regard to the sentence, we take note of this Court's decision in the case of **Hadson Ali Mwachongo vs. Republic** **[2016] eKLR** which stated as follows regarding the issue of sentencing for sexual offences: -

> **"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years' imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years' imprisonment".**

The appellant was sentenced to 20 years' imprisonment and as stated above, there was concurrent findings that the age of **AB** was fourteen (14) years at the material time. The learned Judge also re-stated that the sentence imposed was the minimum prescribed for the offence and was therefore was within the law.

21. We have further taken note of the emerging jurisprudence regarding mandatory minimum sentence and the need for each court to exercise its discretion in sentencing as guided by the Supreme Court in **Francis Muruatetu & Another vs. Republic** **[2017] eKLR (*the Muruatetu decision*)** and applied in **Dismas Wafula Kilwake** **vs. Republic** **[2018] eKLR** where this Court stated as follows:

> "**We hold 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. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."**

22. We are satisfied the sentence of twenty (20) years is not only lawful but one which is appropriate in the circumstances of this case even when the sentencing guidelines in the ***Muruatetu case*** (supra) are brought to bear. This is because the appellant took advantage of **AB**, a mentally challenged child and defiled her on her way to school; and allegedly, not for the first time. Accordingly, we dismiss the appeal and uphold the appellant's conviction and sentence. The appeal is accordingly dismissed in its entirety. Orders accordingly.

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

**M. K. KOOME**

**………..……………...**

**JUDGE OF APPEAL**

**D. K. MUSINGA**

**……………………….…**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**……………………….....**

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

*Signed*

***DEPUTY REGISTRAR***