IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 72 OF 2018

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Mutende, J.) delivered on 22nd January, 2015

in

HC. CR.A. No. 71 of 2013)

****

JUDGMENT OF THE COURT

The appellant, **JMM**, was well known to the complainant, **ENM (PW1),** a girl aged 9 years old, a pupil at a local school and the daughter of **"AMK" (PW2),** with whom the appellant had lived with in a form of marriage at PW2's home for about 1 year.

The case for the prosecution as narrated by the witnesses was that on the night of 9th April, 2012, while PW2 was away having attended a "chama", the appellant visited PW2's home where PW1 was preparing to go to bed. When he knocked at the door, PW1, who called him "dad" opened for him after she and her siblings (she was the eldest) had lit a lamp. The appellant ushered the other 3 children to a different room asking them to go to sleep. He held PW1 by the hand and took her to PW2's bed, removed her clothes and proceeded to defile her after which he fell asleep. When the day broke he left the house telling the children that he was going to bring tea. He did not return.

Those are the events that led to the appellant being arrested and when he was presented before the Resident Magistrate, Kangundo, he was charged in the main with the offence of defilement contrary to **Section 8(1) (2)** of **The Sexual Offences Act No. 3 of 2006** particulars being that on the said day at the place disclosed in the charge sheet he intentionally caused his penis to penetrate the vagina of PW1, a child aged 9 years. The alternative charge was an indecent act on a child contrary to **Section 11(1)** of the said **Act**. Particulars here were that on the said date at the same place he intentionally touched the anus and vagina of PW1.

In addition to the testimony we have already set out, PW1 testified that she informed her mother (PW2) about the events of the night when PW2 returned home that morning and had also informed "mama Eliza". Further, that PW2 took her to Nunguni Police Post where a report was made and later to Kangundo Hospital where she was treated and was issued a P3 Form. Of the appellant she testified that he resided with them for a while but then left, but that, even after leaving, he was a frequent visitor to their home.

PW2 testified that the appellant was her friend with whom she had lived in her house for 1 year. She confirmed that upon her return home on 10th April, 2012 her daughter revealed to her how she had been defiled by the appellant in her bed. She examined her and saw blood in her genitals and also noted that she was limping. She took PW1 to Kangundo hospital where she was treated. She reported the case to the police and confirmed that PW1 was born on 6th November, 2002 as was supported by a birth card.

Dominic Mbindyo, a **Clinical Officer** at Kangundo District Hospital received PW1 on 10th April, 2012 with a history of having been defiled by a person known to her. He noted injuries and penetration of the vagina and the anus. He produced P3 Form and a medical note as part of the evidence in the case.

Corporal Ruth Mutuku was the **Investigations Officer** who received the report and arrested the appellant who she charged with the

offences before the trial court.

That was the case made out by the prosecution and upon consideration the trial court found that *prima facie* case had been established and the appellant was placed on his defence.

In sworn testimony the appellant testified that he was arrested on 10th April, 2012 by police who were accompanied by PW2; he was released but later re-arrested after PW1 had been medically examined. He denied committing the offence and challenged evidence of PW2 and the Clinical Officer. In conclusion he stated that on the material night he had driven to a river where the car developed mechanical problems forcing him to remain there the whole night. In cross-examination he confirmed that he had lived with PW2 who was his "partner".

The trial court reviewed the evidence by both sides, found the case proved to the required standard, convicted the appellant and sentenced him to life imprisonment in the Judgment delivered on 19th February, 2013. The appellant filed an appeal to the High Court of Kenya, Machakos, and the same was heard by Mutende, J., who in a Judgment delivered on 22nd January, 2015 found the appeal to be unmerited and dismissed it both on conviction and sentence.

This is a second appeal from the findings of the High Court sitting as a first appellate court. In a second appeal like this one our mandate is limited by **Section 361(1) (a) Criminal Procedure Code** to deal only with issues of law but not revisit matters of fact that have been dealt with by the trial court and re-evaluated by the first appellate court – See the case of **M'Irungi v Republic [1983] KLR 455** where the following passage appears on the mandate of the court in a second appeal:

> ***" ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

There are five grounds set out in the homemade Memorandum of Appeal filed by the appellant on 8th March, 2016. We may sum them thus: the appellant faults the Judge of the High Court who he says did not reconsider or re-evaluate the evidence; that the case was not proved to the required standard; that **Section 150** of the **Evidence Act** was violated as essential witnesses were not called; that **Section 169 Criminal Procedure Act** was not complied with and, finally, that medical evidence produced was unsatisfactory.

The issues of law raised that call for our consideration are whether the High Court, as first appellate court, re-evaluated the evidence as required (**Okeno v Republic [1972] E.A. 32);** whether there was violation of Section **150** of the **Evidence Act** and **Section 169 Criminal Procedure Code** and whether crucial witnesses were left out of the trial to the prejudice of the appellant.

On whether the High Court carried out its mandate of re-evaluating the evidence we have carefully reviewed the record. The Judge considered the facts of the case which were rather straight forward. The appellant had lived in the home of PW2 and even after the union broke down and he left the home he was a constant visitor to that home. He was well known to the children including PW1 who called him "dad". On the material day – 9th April, 2012 – the appellant took advantage of the absence of PW2 when he visited her home and defiled PW1 spending the whole night with her in PW2'S bed. Medical evidence confirmed that he had not only defiled her but was a beast who even penetrated her anus, a girl aged 9 years. The Judge was satisfied that conviction was properly entered by the trial court. Upon consideration we are of the same view.

Section 150 of the **Evidence Act** forbids leading questions, if objected to, being asked in examination in chief. We do not find any relevance of this provision to the appeal before us.

Section 169 Criminal Procedure Code on **"contents of judgment"** – we have gone through the Judgment of the High Court. The Judge identified issues for determination and proceeded to determine the same. The Judgment is properly written and we cannot find any merit in that ground of appeal.

On whether some witnesses were left out of the trial we note that the charge facing the appellant related to a sexual offence.

The proviso to **Section 124** of the **Evidence Act** permits a trial court to accept the testimony of a victim of sexual offence if the same is believable and such evidence may be accepted without corroboration. In the case before the trial court PW1 informed her mother PW2 as soon as she returned home that morning that she had been defiled by the appellant that night. Medical evidence confirmed that defilement had taken place. The case was proved by the prosecution to the required standard in law.

On the issue of which or how many witnesses to call the issue was squarely addressed in the case of **Bukenya v Uganda [1972] E.A. 549** where it was stated:

> ***"It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

The witnesses called by the prosecution proved the case to the required standard and it was not necessary to call any other witnesses.

The appellant was convicted and sentenced on 19th February, 2013 and the appeal to the High Court was dismissed on 22nd January, 2015. He was sentenced to life imprisonment, a sentence confirmed by the High Court. The minimum sentence provided by the Sexual Offences Act for defilement of a child aged 9 years is life imprisonment.

The Supreme Court of Kenya was asked in the case of **Francis Kariako Muruatetu & Others v Republic [2017] eKLR** to answer the question whether it was constitutional for Parliament to provide minimum sentences in murder trials. The court returned that it was unconstitutional for Parliament to do so as courts must be left to give appropriate sentences depending on particular circumstances of the case being tried. That decision of the apex court in the land has freed the courts from the straight-jacket situations the court faced when discretion in awarding sentence was not allowed.

We note that the court prosecutor informed the trial magistrate that the appellant was a first offender. In mitigation the appellant implored the court for leniency, pleading that he had 2 children who depended on him, stating, further, that his mother had passed away.

Considering the whole matter the appeal on conviction has no merit and is dismissed. We set aside the sentence of life imprisonment imposed against the appellant and substitute thereof a sentence of 25 years' imprisonment from the date of conviction.

Dated and delivered at Nairobi this 25th day of September, 2020.

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

…….....

JUDGE OF APPEAL

S. ole KANTAI

…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR