IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & MURGOR, JJ. A.)

ELDORET CRIMINAL APPEAL NO. 63 OF 2018

BETWEEN

TITUS KIPRUTO KIRUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret (Cecilia Githua, J.) dated 10th May, 2017

in

H.C.CR.A. No. 206 of 2014)

****

JUDGMENT OF THE COURT

1. The appellant herein was charged before the Eldoret Chief Magistrates' Court with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act No. 3 of 2006**, with an alternative charge of committing an indecent assault with a child contrary to **Section 11(ii)** of the same Act.

2. The particulars of the charge were that on the 9th day of July, 2013 in Keiyo South District within Elgeyo Marakwet County, he unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **BJK,** a child aged 5 years.

3. Having denied both the main and alternative charges, the matter proceeded to full trial with the prosecution calling a total of 5 witnesses in support of its case. On the other hand, the appellant is his defence gave an unsworn statement and called 3 witnesses. A summary of the evidence adduced before the trial court is as follows:-

The child BJK was aged between 5 to 6 years when the incident subject to these proceedings are said to have taken place. She testified on oath after a *voire dire* examination by the trial magistrate confirmed her ability to understand the nature of an oath and consequences of lying while on oath. She narrated how she went home on the material date and found the appellant, who was her father's employee. She said that the appellant called her to his room and caused her to lie on his bed after he removed her clothes and "did bad manners" to her on her private parts.

4. Her father (PW1) arrived home at the nick of time and saw the appellant in the act. He asked him what he was doing, and the appellant started shaking and begged for forgiveness saying the devil had led him astray. The matter was reported to the village elder and the appellant was later escorted to the Police Station. The child was escorted to Moi Teaching and Referral Hospital where she was examined and found to have been defiled. A P3 form was completed and later produced in court as exhibit by PW4, Dr. Joseph Embenzi. The appellant was subsequently charged with the offences referred to earlier.

5. In his defence, the appellant admitted that he was well known to the child and PW1? as he used to be PW1s employee. He also admitted that the child was in his room at the material time but said that she was changing from her school uniform into her home clothes when PW1 found them. His witness' testimony was that they had checked the child's private parts and had not seen any injuries. They were not present when the incident is said to have happened.

6. Having heard all the witnesses and after considering the evidence adduced before her, the learned trial magistrate, in a judgment rendered

on 18th December, 2014 found the main charge proved and after considering the mitigation proffered by the appellant sentenced him to life imprisonment "*as by law provided*".

7. Being aggrieved, the appellant challenged both conviction and sentence before the High Court mainly on grounds that the trial court had failed to consider the contents of the P3 form; that the court had failed to consider the contradictions in the evidence of the arresting and investigating officers, and that the appellant's defence and that of his witnesses had not been considered.

8. The High Court (Githua, J.) after analyzing the evidence before the court and the submissions by the appellant and learned counsel for the State, found the charge of defilement proved to the required standard, and dismissed the appeal against conviction. Addressing the issue of sentence, the learned Judge expressed that "life imprisonment was the only sentence prescribed in law for the offence of defilement where the victim is 11 years of age and below". Accordingly, she dismissed the appeal in its entirety.

9. The appellant has now moved to this Court on a second and possibly last appeal challenging conviction and sentence on four grounds of appeal which we can summarise as:- *The appellate court erred in failing to hold that there was no conclusive proof of penetration; not holding that the appellant's defence was plausible and failing to hold that the prosecution case was not proved beyond reasonable doubt.* Along with these grounds were written submissions basically expounding on the grounds, and also citing several decided cases. He urged us to allow the appeal.

10. In his response to these submissions, learned counsel for the State vide submissions dated 6thJune, 2019 maintained that the charge of defilement had been proved to the required standard. Counsel stated that the child's age had been proved to be 6 years through her father's evidence which was corroborated by the clinic card produced in court as an exhibit. Penetration was also proved as the child's evidence was corroborated by the doctor's (PW4) evidence, which confirmed that the child sustained injuries on her private parts. That evidence was manifest in the P3 form produced in court as exhibit. Learned counsel submitted further that the appellant was properly identified by recognition as he was well known to the child as he worked in their home as a herdsman. He had also been caught in the act by the child's father.

11. On the issue of the appellant's defence having not been found plausible, counsel submitted that the defence proffered by the appellant and his witnesses did not challenge the prosecution evidence and the same was therefore properly discounted by the two courts below. On the sentence, counsel maintained that the same was lawful, but he was not opposed to the matter being sent back to the High Court for resentencing should the court be minded to interfere with the sentence.

12. At the plenary hearing of the appeal, which proceeded through video link, learned counsel reiterated the above submissions. On his part, the appellant had nothing to add to his written submissions save for reiterating the same, but entreated us to reduce the sentence from life imprisonment.

13. We have considered these submissions along with the record before us. We remind ourselves that this is a second appeal and we must therefore eschew delving into the factual realm of the evidence and restrict ourselves to points of law as dictated by **Section 361(1)** of the Criminal Procedure Code and as religiously followed by this Court in its decisions. (See for example ***Boniface Kamande & 2 Others vs Republic [2010]*** **eKLR.).** The law also enjoins us to refrain from interfering with concurrent findings of fact by the two courts below without sufficient cause as outlined in several decisions of this Court. See **Chemagong v. Republic (1984) KLR 213 at page 219** wherein this Court pronounced itself thus:-

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)."**

14. With the above in mind, after considering the material before us, we distil the following as the issues calling for our determination:-

(a) Was penetration proved?

(b) Was the appellant properly identified as the defiler?

(c) Was his defence considered by the two courts below?

15. On the first issue, the child narrated to the trial court what the appellant did to her after ordering her to remove her clothes. He was in the process of inserting his penis into the child's vagina when her father (PW1) emerged. According to PW1, he found the appellant in the act and even slapped him once as the appellant started begging for forgiveness. PW1 said that the child was walking with difficulty. When examined by the doctor at Moi Teaching and Referral Hospital, the doctor found the child's labia minora had an "unusual redness referred to as erythema" which is an injury caused by friction. There was also a scar on the "roateria pochete and hymen". Although no semen was found inside the child, and there is possibility that penetration was not complete, we find that there was penetration. Penetration is defined as "*partial or complete insertion of the genital organs of a person into the genital organs of another person*".

It was clear from the medical evidence availed to court that the appellant had tried to penetrate the child and may have been interrupted by

her father's sudden and unexpected appearance at the scene. Partial penetration amounts to penetration. We are therefore satisfied that penetration was proved.

16. On the issue of identification; there is no doubt that the appellant was well known both to the child and PW2 before the date in question. He did not deny that he also knew the complainant and her father well, save for saying that the child's father had framed him. Identification was therefore proved.

17. Lastly, on the issue of whether the appellant's defence was considered by the two courts below; we have gone through the record and confirmed that the trial court considered the appellant's defence and even found that the appellant had not denied that he child was found in his house. The trial court also considered the evidence tendered by the other defence witnesses and rejected it. It is therefore clear to us that the appellant's defence was properly considered by the two courts below. All his grounds of appeal therefore fail. We find no reason whatsoever to interfere with the concurrent findings of fact by the two courts below.

18. On the whole, we find nothing on record to impeach the appellant's conviction as upheld by the High Court. We find no merit in the appeal against conviction and dismiss it accordingly.

19. On the sentence, it is evident that both courts below proceeded from the premise that life imprisonment was the only lawful sentence that could be meted out upon conviction for defilement of a girl aged 11 years and below. There has nonetheless been a paradigm shift and this Court is no longer beholden to minimum sentences prescribed under the Sexual Offences Act, and has been freed from the shackles hitherto preventing it from exercising its discretion when sentencing in sexual offences cases. The Court therefore has discretion to impose the sentence it finds most appropriate after considering the appellant's mitigation and the peculiar circumstances of the case.

20. In the present case, we note that the appellant had already mitigated; he was a first offender who was taking care of his parents. We nonetheless note that the child was very young – 6 years of age, and the experience she was put through by the appellant was horrendous and cannot be justified or tolerated under any circumstances. We find no reason to interfere with the sentence which is a lawful one. Accordingly, we dismiss the appeal in its entirety and confirm the life sentence of meted out by the trial court and confirmed by the High Court.

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

W. KARANJA

……

JUDGE OF APPEAL

D. K. MUSINGA

……

JUDGE OF APPEAL

A. K. MURGOR

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR