IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & ASIKE -MAKHANDIA, JJ.A)

CRIMINAL APPEAL NO. 59 OF 2019

BETWEEN

SIMON NGOLE KATUNGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Machakos, (Hon. Kemei, J.) dated 19th April, 2018

in

HC. CR.A. NO. 77 OF 2015)

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JUDGMENT OF THE COURT

EMD a girl aged 10 years **(herein after referred to as "PW1")** was on the 18th July, 2015 alone at home. Her mother and grandmother had gone for a pre-wedding ceremony. The appellant who used to work occasionally for **EMD's** mother went to the house and inquired from **PW1** where her grandmother and mother were and she volunteered the information. PW1 then proceeded to the kitchen but the appellant followed her and asked her to lie down. He then pulled down his trouser, undressed PW1 and defiled her twice. She did not raise alarm since the appellant had covered her mouth with a white piece of cloth. She neither informed anyone of the incident since the appellant had threatened to beat her up if she did.

While at school, a teacher by the name Ann noticed that she had urinated on herself and upon inquiring from her what had happened, she informed her that she had been sexually assaulted. **TM,** (PW2) and **TMM,** (PW3) mother and grandmother to PW1 respectively were then called to the school and informed of the case. PW1 told them that she had been sexually assaulted by the appellant. PW2 and PW3 in turn reported the matter to Kangundo police station. The report was received by **CPL Susan Kwach,** (PW7), who upon interrogating PW1 issued her with a P3 form and escorted her to Kangundo hospital.

John Mutua, (PW5) a clinical officer at Kangundo Hospital examined PW1 and found her external genitalia to be normal. He however found laceration when he did a 6 o'clock examination and she showed pain on examination. Her labia and the hymen was torn and there was foul smell from the discharge. PW5 formed the opinion that **PW1** had been defiled.

Based on the above evidence, the appellant was arrested and charged with the offence of defilement contrary to **section 8(1)(2**) of the Sexual Offences Act with particulars being that the appellant on 18th July, 2015 at Isinga location in Kangundo District within Machakos County, unlawfully and intentionally caused his penis to penetrate the vagina of PW1, a child aged 10 years. He faced an alternative charge of committing an indecent act with a child contrary to **section 11(11)** of the Sexual Offences Act. However, this count is of no relevance to this appeal.

The appellant when put on his defence stated that he was on 24th July, 2015 building a house for his son when he was approached by two people who took him to Kangundo police station where he was charged with the offence he knew nothing about. Blood and urine samples were taken from him but he was not informed for what reason.

The trial court having heard both the prosecution and defence case, found for the prosecution, convicted the appellant and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence, the appellant filed an appeal in the High Court of Kenya at Machakos on grounds that the age of PW1 was not proved; exhibits were not identified by witnesses; the case was poorly investigated and that his defence was not given due consideration.

The appeal was heard by Kemei, J and in a judgment delivered on 19th April, 2018 found no merit in the appeal and dismissed it in its entirety, thereby provoking this 2nd and perhaps last appeal.

The appeal is pegged on the grounds that the learned judge of the High Court erred in failing to; find that the ingredients of the offence of defilement had not been proved; appreciate that the prosecution case was not proved beyond reasonable doubt and finally, find that the appellant was not accorded a fair trial contrary to Article 50 of the Constitution by not being supplied with witness statements and having been compelled to conduct his defence when he was not ready.

The appeal was argued on behalf of the appellant by **Mr. Ratemo Oira**, learned counsel. He submitted that the evidence tendered by the prosecution in the trial court was insufficient to sustain a conviction; that the ingredients of the offence of defilement were not proved; that PW1 did not even bother to mention the incident to her mother. This omission therefore cast doubt as to whether PW1 was actually defiled by the appellant. According to counsel this doubt should have been resolved in favour of the appellant. Turning on sentence counsel submitted that we should invoke the Supreme Court's dictum in **Francis Karioko Muruatetu & Another V Republic (2017) eKLR** and interfere with the mandatory minimum sentence imposed on the appellant by the trial court.

Opposing the appeal **Mr. Maliku**, learned prosecution counsel submitted that the ingredients of the offence of defilement were proved beyond reasonable doubt as required, and that PW1 was well known to the appellant even by name. Accordingly the identification of the appellant cannot be impugned. There was also evidence of penetration tendered by PW5 that went unchallenged. As regards age, counsel submitted that an affidavit sworn by PW2 was tendered in evidence which confirmed the age of PW1 as being 10 years at the time of the incident. On sentence, counsel urged us not to interfere with it as it was merited given the manner in which the offence was committed. He therefore urged us to dismiss the appeal in its entirety.

Given that this is a second appeal, our jurisdiction to entertain it is limited to consideration of matters of law only by dint of section of 361 of the Criminal Procedure Code. Indeed this Court in the case of **Karani V Republic (2010) 1KLR 73** delivered itself on the issue as follows;

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court 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 be treated as matters of law."***

Having considered the record, submissions by respective counsel and the law, we discern that only two issues of law call for our determination. Those issues are whether the case against the appellant was proved and sentence imposed on the appellant.

On the first issue it is the appellant's position that the victim's age was not proved by any credible evidence. That the affidavit tendered in evidence as prove of the victim's age was not sufficient. That the age indicated in the P3 form could not be relied on. According to the appellant, it was possible that the victim was aged over 10 years.

For the respondent it was urged forcefully that the age of the victim was proved through the affidavit tendered in evidence, by PW2, PW1's own testimony as well as the P3 form.

Section 8(1) as read with section 8(2) of the Sexual Offences Act provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Section 2 defines Penetration as partial or complete insertion of the genital organs of a person into the genital organs of another person. In essence therefore for the offence of defilement to be proved the prosecution must lead evidence to establish the identity of the perpetrator, age of the complainant and penetration. From the appellant's submissions, it appears that penetration and identity of the perpetrator is conceded for no submissions were made in that regard. However, even without submissions in that regard, there is sufficient evidence on record with regard to the identity of the perpetrator of the crime as well as penetration. The appellant was well known to PW1 as he used to work for her mother. The appellant did not dispute this fact. On penetration, there is undisputed medical evidence by PW5 that proved beyond any shadow of doubt that there was actual penetration of PW1's genitalia. In any event, on both issues, the two courts below made concurrent findings that it was the appellant who defiled PW1 and that there was penetration.

What however appears to be in dispute is the age of the victim. It is trite law that the age of the victim can be proved by medical evidence or other cogent evidence like birth certificate, child immunization card or even baptismal card. The importance of establishing the age of a victim of defilement was reiterated in the case of **Hadson Ali Mwachongo VS Republic (2016) eKLR** in the following terms.

> ***"…It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello V Republic (2010) eKLR, this Court stated as follows;***
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> > ***"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 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)…."***

In this regard, PW2 testified that PW1 was aged 10 years old when the incident happened. She tendered in evidence an affidavit in which she deposed that PW1's birth certificate was destroyed in an inferno which engulfed her house. She further deposed that at the time she was testifying PW1 was now aged 11 years. This was a year after her house had been burnt down. She confirmed that at the time of defilement, PW1 was aged 10 years.

The appellant did not challenge the contents of the affidavit at all which therefore means that the depositions therein are uncontroverted. Since the incident happened over a year before the affidavit was sworn it means that at the time of the incident the victim was less than 11 years of age as correctly observed by the trial court and confirmed by the 1st appellate court. The mother of a child is best placed to know the age of the child and her evidence in that regard was sufficient to determine the age of the victim. It is therefore neither here or there that the P3 form was filled by a clinical officer and not a medical Doctor with regard to the age of the victim. In any case the two courts below reached concurrent findings that the age of the victim was 10 years at the time of the incident. We have no reason or basis to impugn that finding.

Accordingly, we are satisfied just like the two courts below that all the ingredients of the offence of defilement were proved, contrary to the submissions of the appellant.

With regard to sentence, we note that in sentencing the appellant to life imprisonment the trial court stated that, that was the only sentence that the appellant could be sentenced to. In the premises the trial court's hands were tied and had no option but to sentence the appellant to life imprisonment. On first appeal, the High Court stated thus on the issue.

> ***"A person who commits the offence of defilement with a child of less than 11 years shall upon conviction, be sentenced to life imprisonment as provided in section 8(2) of the Sexual Offences Act. The minimum sentence here is life imprisonment and accordingly I upheld and affirm the conviction and sentence of the trial court."***

The Supreme Court of Kenya in the case of **Francis Karioko Muruatetu** & **Another vs Republic (2017) eKLR** held that mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The court stated:

> "***Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of a fair trial that accrue to the accused persons under article 25 of the constitution; an absolute right."***

Applying the same reasoning in the case of **Christopher Ochieng V Republic (2018) eKLR**, this Court found that the minimum mandatory sentences under Sexual Offences Act should be considered as unconstitutional as well.

By parity of reasoning, this Court has discretion to review the mandatory minimum sentence imposed in appropriate cases. We have considered the mitigation on record, the fact that the appellant was a young man and was a first offender. We have also considered the circumstances of the offence and the trauma the victim went through. However we think that the ends of justice will be best served if we imposed a sentence of 25 years imprisonment.

Accordingly, we dismiss the appeal on conviction but allow the same on sentence. We substitute the sentence of life imprisonment with imprisonment for 25 years effective from the date the appellant was sentenced by the trial court.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR