IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 175 OF 2017

BETWEEN

GEORGE NJAHI WANJIRU ALIAS SUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret (C. Githua, J), dated 25th May, 2017

in

High Court Criminal Appeal No. 173 of 2015)

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JUDGMENT OF THE COURT

[1] The appellant was tried and convicted by the Senior Principal Magistrate's Court at Eldoret for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**. He was sentenced to life imprisonment.

[2] Being aggrieved he appealed to the High Court at Eldoret, contending that the evidence adduced by the prosecution was insufficient to prove the charge against him, and that the trial magistrate erred in rejecting his defence. Upon hearing the appeal, the High Court (Githua, J.) dismissed the appeal, holding that the appellant was properly convicted, and that the sentence imposed upon him was the mandatory sentence provided under the law.

[3] The appellant is now before us in this second appeal in which he is challenging the judgment of the first appellate court. The grounds raised by the appellant includes: that the learned judge erred in failing to find that the age of the complainant was not proved, and in failing to consider the appellant's alibi defence; and that the appellant was placed on his defence under the wrong provisions of the law. The appellant also filed amended grounds of appeal and written submissions. The most notable grounds added by the appellant was that the two lower courts erred in failing to find that penetration was not proved.

[4] During the hearing of the appeal the appellant appeared in person while **Mr. Oyiembo**, Prosecuting Counsel from the Office of the Director of Public Prosecution (DPP) appeared for the respondent. Both parties relied on their written submissions that were properly filed and served.

[5] It was the appellant's contention that the age of the complainant was not proved beyond reasonable doubt; that the medical card relied on by the prosecution was questionable; that even though an order was made by the court for the age of the complainant to be assessed, the same was never done; that the prosecution failed to prove that there was penetration and that the medical evidence in this regard was inconclusive and unreliable; that the prosecution evidence when weighed alongside the defence fell short of proof beyond reasonable doubt; that the doctor gave testimony without being sworn and his evidence was not credible; and that he was prejudiced and his right to fair trial vitiated as he was not given the benefit of equality of arms as required under **Article 47(1)** and **25(c)** of the Constitution. He urged the Court to re-evaluate the evidence and find in his favour.

[6] In its written submissions the DPP opposed the appeal maintaining that all the ingredients of the offence were proved beyond reasonable doubt; that the age of the complainant was proved using her immunization card; that penetration was proved in three ways: by the evidence of the complainant, her mother's evidence and the report produced in court by the doctor; that no substantial miscarriage of justice took place; that the appellant gave sworn evidence after the court ruled that he had a case to answer; and that the appellant's submissions do not

go to the root of the matter.

[7] This being a second appeal, the court is obliged under **section 361(1)** of the **Criminal Procedure Code** to consider matter of law only and severity of sentence is a matter of fact. In addition, as explained in ***Boniface Kamande & 2 Others v Republic [2010] eKLR;***

> ***"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the current findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."***

[8] The particulars of the offence against the appellant were that on the night of 19th of August, 2014 at Huruma Estate in Eldoret, he intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely the vagina of MA (name withheld) a child aged 9 years. Four witnesses testified for the prosecution. These were MA, who testified that the appellant who was known to her was a neighbour; that he took her to his house and clothed her, removed his trouser and put his penis in her private parts; her mother FN (F), to whom MA reported what had happened, and who took MA to Moi Teaching and Referral hospital and also reported the matter to the police; and Dr. Jane Yatich of Moi Teaching and Referral hospital who examined MA and filed a P3 report showing that her genitalia had a fresh tear on the hymen; and Corpl. Lillian Tuwei of Eldoret police station who received the report of MA's defilement and took action.

[9] In his defence the appellant gave a sworn statement and called one witness. He denied the accusation that he had defiled MA and stated that on the material day he was on duty in town. His mother **Gladys Wanjau** testified in his defence maintaining that her son was framed.

[10] From the record of appeal and the submissions, various issues of law arise. These include: whether the appellant was subjected to a fair trial; whether the particulars of the charge including the age of MA and the element of penetration was established; whether the appellant's alibi defence was considered; and whether the prosecution proved its case against the appellant to the required standard.

[11] From the record of the proceedings before the trial magistrate the appellant participated in the trial, cross examined all the witnesses, gave sworn evidence in his defence and even called a witness. At no time did the appellant complain about the trial nor did he complain to the court that he had sought and been denied any evidence intended to be used by the prosecution. The issue of fair trial was never raised before the trial court or the first appellate court. It is clear that it is an afterthought and we reject the same.

[12] As regards the particulars of the charge MA testified that the appellant was known to her as a neighbour and that he appellant took her to his house and put his penis into her private parts. Although no birth certificate was produced to prove the age of MA, F testified that she was 8 years at the time the offence was committed. This was consistent with MA's evidence who claimed to be 9 years and in class 2 at the time she was testifying. It was also consistent with the estimated age of MA which was given by Dr. Yatich who filled the P3 form as 8 years old. MA who was clearly a child of tender years, was subjected to a *voire dire* examination, and the trial magistrate having formed the opinion that she did not understand the nature of an oath allowed her to give unsworn evidence.

[13] Section 124 of the *Evidence Act* has a proviso that states as follows:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."***

[14] In ***P M v Republic [2014] eKLR;*** this Court stated:

> ***"It is important to bear in mind that in sexual offences the evidence from one witness, even from a complainant, would be sufficient to sustain a conviction as long as the court is satisfied with the veracity of the testimony of the complainant. Section 124 of the Evidence Act Cap 80 Laws of Kenya***

[15] This means that the evidence of MA could be acted upon without corroboration, provided that the trial court had made a finding that MA was telling the truth. In this case, the trial magistrate made a finding that MA was telling the truth, and therefore her evidence was sufficient to sustain the appellant's conviction. That notwithstanding, MA's evidence that she was defiled was corroborated by both F and Dr. Yatich who testified that she had a fresh hymen tear which confirmed that there was penetration of her private parts. The evidence of MA in regard to the person who molested her was also consistent with the evidence of F who testified that she saw MA coming from the appellant's home and that she was crying. Although the appellant raised an alibi defence denying having been present at the scene, the defence was rightly rejected as the evidence of MA and her mother placed him at the scene and was sufficient to dislodge that alibi. We find that both the trial court and the first appellate court made concurrent findings on the credibility of MA, and believed that she spoke the truth. We have no reason to depart from this finding.

[16] We come to the conclusion that all the ingredients of the charge were established and that both the trial court and the first appellate court came to the right conclusion that the case against the appellant was proved to the required standard.

[17] As regards the sentence of life imprisonment it is evident that neither the trial court nor the first appellate court exercised their discretion in sentencing as they were of the view that they were bound by the mandatory sentence provided under the Sexual Offences Act. In ***Dismus Wafula Kilwake vs Republic [2019] eKLR*** this Court (differently constituted) applying the Supreme Court decision of Francis Karioko Muruatetu &Anorther SC Petition No. 16 of 2015 stated:

> ***"In principle we are persuaded that there is no rational reason why the reasoning of the Supreme Court which holds that***

mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded 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 court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offences 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."

[18] As sentencing is an exercise of judicial discretion the trial magistrate ought to have properly exercised his discretion. For this reason, we find that the learned judge erred in failing to address the appropriateness of the sentence of life imprisonment. Taking into account that the victim was an innocent child of 8 years and that the mitigation offered by the appellant did not provide any justification for the trial court exercising leniency, a prison term of 20 years imprisonment rather than the sentence of life imprisonment would have been appropriate.

The upshot of the above is that we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the sentence of life imprisonment and substituting thereto a sentence of 20 years imprisonment.

Those shall be orders of the Court.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR