IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 64 OF 2017

BETWEEN

LOKITESA LOKISA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret (C. Kariuki, J), dated 24th July, 2015

in

High Court Criminal Appeal No. 50 of 2013)

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JUDGMENT OF THE COURT

[1] The appellant Lokitesa Lokisa, was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. It was alleged that on the night of 4th December and early morning of 5th December 2010, at [particulars withheld] Village in Mogotio District within Baringo County, he intentionally and unlawfully caused his penis to penetrate the vagina of JK (name withheld) a child aged 16 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

[2] The facts leading to the arrest of the appellant were that on 4th of December 2010, JK was helping her brother SK who was employed at [particulars withheld] Livestock Development, take care of sheep. At about 6.30pm, they returned the goats to the pen and JK went into a house within the vicinity where the workers stay to return a basin. The appellant who was a herdsman for the local Chief Aaron Kigen Keptoo (Chief Keptoo), was apparently living in the house that JK entered.

[3] As soon as JK entered the house, the appellant followed her into the house. Before JK could raise an alarm, the appellant removed a knife from his pocket put the knife on JK's chest and threatened to kill her if she raised any alarm. He then closed the door of the house. At this time, 13 year old GK (G), entered the same house looking for a jug. She was alarmed, when she saw the appellant with the knife and she ran away. Undeterred, the appellant proceeded to defile JK for about 30 minutes. The appellant thereafter took the minor into a bush where he sodomized her severally until 10 pm in the night.

[4] The appellant continued to threaten JK with death if she raised any alarm so she kept quiet. After going round with JK in what seemed like in circles while crossing rivers, JK realized that they were back to where they started, and therefore pleaded with the appellant to let her go which he did. On her way home, the minor met with her father and younger brother Musa who rushed her to the hospital where she was treated and discharged.

[5] Dr Joram Kipsang Marachi who examined JK and filled the P3 form, confirmed that JK was indeed defiled and sodomized. He noted that JK had injuries on her neck and bruises on the labia majora. In addition, JK's hymen was broken, the anus was inflamed which in the Doctor's view was evidence that there was forceful penetration in both the vagina and anus.

[6] G confirmed that as she entered the house, she heard JK's voice, and saw the appellant holding the knife while JK who was with him was in tears. G fled in fear and went to report the incident to her father who subsequently alerted JK's father.

[7] Chief Keptoo confirmed that the appellant was indeed his herdsman. He received a report from JK's father of JK's defilement and

disappearance. Chief Keptoo was part of the search party involved in looking for JK. The appellant was subsequently arrested by members of the public and handed over to the police. Chief Keptoo identified a knife that was allegedly recovered from the appellant as one belonging to the appellant. JK's Birth Certificate which indicated that she was born on 6/4/1994 was also produced in evidence. Additionally, the investigation officer produced the clothing that JK wore on the day of the assault together with the knife said to be owned by the appellant.

[8] The appellant gave an unsworn statement in his defence in which he denied the charges against him. He explained that on the material day, 4th of December, 2010 he went to work as usual and on the morning of 5th of December 2010 he was called by the Chief and beaten unconscious by members of the public.

[9] In his judgment the trial magistrate found that the prosecution had proved its case beyond reasonable doubt. He therefore rejected the appellant's defence, found him guilty, convicted him of the main charge and sentenced him to 25 years imprisonment.

[10] Being aggrieved by the judgment of the trial Court, the appellant appealed to the High Court raising five grounds. These were that the prosecution failed to prove the charges beyond reasonable doubt; that the charge sheet was defective with regard to the name of the minor; that failure to call the material witness caused a miscarriage of justice; and that the trial Magistrate failed to consider his defence.

[11] Upon hearing the appeal and the submissions made before him, the learned Judge dismissed the appeal holding that the prosecution proved its case beyond reasonable doubt; that the element of penetration was proved through JK's testimony and corroborated by the Doctor; that the age of JK was sufficiently proved; and that the sentence of 25 years was within the law as the minimum is stipulated as 15 years.

[12] Being aggrieved by the judgment of the first appellate court, the appellant has now lodged this second appeal before us. The appellant has raised four grounds that may be condensed as follows:

(i) The trial Judge erred in law by convicting the appellant of defilement while the evidence adduced was doubtful and contradictory.

(ii) The trial Judge erred in law by convicting the appellant based on evidence that lacked corroboration.

(iii) The trial Judge erred in law by convicting the appellant while disregarding his defence.

(iv) The trial Judge erred in law by convicting the appellant and not giving him the benefit of a least severe sentence.

[13] During the hearing of the appeal the appellant appeared in person while **Mrs Oduor**, Prosecuting Counsel from the office of the Director of Public Prosecution appeared for the respondent. Both parties relied on written submissions that were duly filed and served.

[14] In his submissions, the appellant contended that his right to a fair trial was violated; and that the prosecution evidence was marred with inconsistencies. He argued that the evidence of G was contradictory as she referred to the appellant as Musa. that the evidence of JK, lacked corroboration and her account of events was illogical; that it was it was illogical that the appellant had them leave their clothes in the said house only to come back and collect them; nor was it believable that a girl of JK's age could have been dragged around for such a long time; or why it took so long for JK's father to locate his daughter; and finally that it was dangerous for the Court to convict him based on JK's evidence alone. The appellant insisted that the charge sheet was defective contending that the same ought to have included the words "intentional and unlawful" as per the ingredients of the charge. He thus urged the court to find that the prosecution had failed to prove their case beyond reasonable doubt, and therefore allow his appeal.

[15] In the written submissions, the Director of Public Prosecution opposed the appeal maintaining that all the ingredients of the offence were proved beyond reasonable doubt; that the age of JK was proved through her birth certificate; that penetration was proved by the testimony of JK and corroborated by the doctor's report; that the identification of the appellant by JK was by recognition as he was known to both JK and G, and finally that the appellant's defence did not raise any doubt on the evidence tendered by the prosecution.

[16] In regard to sentence, the prosecution affirmed that sentencing is discretionary, but noted that since the minimum sentence for the offence for which the appellant was convicted was15 years, in sentencing the appellant to 25 years, the trial magistrate gave a lawful sentence and the same was rightfully upheld by the learned Judge in the first appellate court.

[17] This being a second appeal, we are mindful of the fact that under **section 361(2)** of the Criminal Procedure Code, it is limited to matters of law only. Secondly, the duty of a second appellate court as was explained by this Court in ***Boniface Kamande & 2 other v Republic [2010] eKLR;*** is that:

> ***"….we are under legal duty to pay proper homage to the concurrent 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."***

[18] We have considered this appeal, in light of the submissions and the law. The following legal issues arise for our determination:

(i) Whether the appellant was accorded a fair trial;

(ii) Whether the charge sheet was defective;

(iii) Whether the particulars of the charge of defilement were established and if so whether the appellant was positively identified as the perpetrator.

(iv) Whether the sentence of 25 years meted on the appellant was legal

[19] In his submission the appellant contended that he was not accorded a fair trial during the hearing of his case. We note that this ground was never raised before the first appellate court. It is certainly an afterthought. Moreover, our perusal of the proceedings reveal that the appellant was accorded a fair trial. He was able to understand and appreciate the prosecution evidence, and had opportunity to cross examine the witnesses, and be heard in his defence. During the trial he never raised any complaint with regards to the violation of his right to fair trial. The trial was partly held in camera, but this was justified given the circumstances, in and any case the appellant was not prejudiced. The appellant's complaints regarding violation of his right to fair trial had therefore no substance, and this ground of appeal fails.

[20] The appellant was charged with defilement under section 8(1) as read with section 8(4) of the Sexual Offences Act. The relevant sections state as follows:

> **"1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) ----**
>
> **3-------**
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> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

[21] Thus, in order to prove the charge of defilement against the appellant, the prosecution had to establish the particulars of the charge, the crucial particulars being that there was penetration; that the penetration was a deliberate act caused by the appellant; and that JK the victim of the act was a child aged 16 years old.

[22] The main evidence relating to the charge was that of JK. A Birth certificate for JK was produced in evidence by the investigation officer. The certificate was identified by JK and marked for identification before it was produced in evidence. In addition JK testified that she was 16 years old, the Doctor also estimated her age as 16 years. There was therefore sufficient evidence confirming JK's age as 16 years.

[23] JK's evidence that there was penetration of her vagina and anus was corroborated by the Doctor whose examination confirmed physical marks and injuries consistent with penetration. The evidence regarding who was the perpetrator of the offence was that of JK who identified the appellant as her assailant. The appellant was well known to JK, as he had been working in the neighbourhood. The evidence of JK that the appellant held her in the house using threats and intimidation was consistent with the evidence of G who chanced upon them and noticed that the appellant was holding a knife and JK was in tears.

[24] In ***Johnson Muiruri vs. Republic [1983] KLR 445*** this Court held:

> ***"Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."6***

[25] The Children's Act defined a child of tender years as one under 10 years. We note that G was 13 years old. Therefore although he trial magistrate subjected her to a *voire dire* examination she was not a child of tender years whose evidence would require corroboration. She gave evidence on oath and therefore her evidence was sufficient to provide adequate corroboration of JK's evidence. In any case under the proviso to **section 124** of the Evidence Act, JK's evidence could be acted upon without corroboration. That section states as follows:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***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."***

[26] Therefore, the evidence of JK could be acted upon without corroboration provided the trial court was satisfied that JK was speaking the truth. In ***P M v Republic [2014] eKLR;*** it was stated:

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

[27] Although the trial court did not make any specific finding regarding the credibility of JK, it is evident that she believed her evidence to be truthful. There was a misconception by the learned judge of the first appellate court who referred to G as a lady, and this explains the failure to address the need for corroboration of her evidence. However, this did not cause any prejudice because the evidence of JK was sufficient and indeed was corroborated by G.

[28] The appellant pointed out what he considered were glaring inconsistencies in the evidence tendered by the prosecution urging that the

evidence ought not to have been accepted. The discrepancies alluded to was first, the testimony of G who referred to the appellant as Musa. As we have already stated without independent corroboration, the evidence of G was inconsequential.

[29] The other inconsistency highlighted by the appellant was his contention that the account of events as given by JK, was in the appellant's view illogical. We take note that JK had suffered a beastly and traumatic experience that defied any logical explanation. It is evident that the conduct of her assailant was illogical, and that is precisely what JK was narrating. JK's account tallied with the evidence tendered by the other witnesses, and it is clear that her assailant was able to gain her silence by threatening her with a knife.

[30] While the recovery of the knife would have provided crucial corroboration, no evidence was adduced by the person who arrested the appellant. The evidence of the recovery of the knife was therefore hearsay and inadmissible evidence. Nevertheless, the Doctor' s evidence regarding the bruises found on JK, and the physical evidence confirming penetration, and the evidence of the Chief on the search party which showed that JK's disappearance had been reported and efforts made to find JK; all lend credence to JK's account of the events. Moreover, the two lower courts believed JK's evidence and we have no reason to doubt her credibility.

[31] We, therefore, find that the inconsistencies, if any, were inconsequential and did not prejudice the appellant. Further, the appellant was misguided when he stated that it was dangerous for the Court to convict him based on JK's evidence alone. JK's testimony was enough to form the basis for the appellant's conviction as her testimony was consistent and truthful and corroboration was not necessary. In light of the evidence adduced by the prosecution, the defence tendered by the appellant being mere denials, could not hold and the two Courts were right to reject the defence. We come to the conclusion that the offence of defilement was properly established and that the appellant was properly identified as the perpetrator of the offence. Accordingly, his conviction was safe.

[32] As regards the issue of sentence, under section 361(1)(a) of the Criminal Procedure Code, severity of sentence is a matter of fact and therefore not open for consideration in a second appeal where the Court's jurisdiction is limited to matters of law only. We are satisfied that the trial judge properly exercised her discretion in sentencing given the circumstances in which the appellant acted in a most despicable, beastly and callous manner.

[33] In ***Bernard Kimani Gacheru V Republic [2002] eKLR;*** this court stated:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

[34] We have not been persuaded nor do we see any justification for interfering with the sentence. We come to the conclusion that the appellant's conviction and sentence is proper and that the learned judges of the two lower courts cane to the right conclusion. Accordingly, this appeal has no merit. It is dismissed in its entirety.

Dated and delivered at Kisumu 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