IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 312 OF 2018

EVANS WANJALA WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya

at Bungoma (S.M. Githinji, J.) delivered on 24th July 2017

in

HC Cr. Appeal No. 174 of 2015)

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JUDGMENT OF THE COURT

1. The appellant was charged with defilement contrary to Section 8 (1) and (4) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 23rd June 2013 at [particulars withheld] village in Bungoma West District within Bungoma County, he intentionally caused his penis to penetrate the vagina of MNM a child aged 14 years.

2. The appellant was tried and convicted by the magistrate court. He was sentenced to 15 years' imprisonment. His appeal to the High Court against conviction was dismissed. The sentence of 15 years' imprisonment was set aside and enhanced to imprisonment for 20 years. In enhancing the sentence, the judge stated the 15 years was below the minimum sentence provided in **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The Section provides:

> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.**

3. Aggrieved by the judgment of the High Court, the appellant has lodged the instant second appeal to this Court.

4. During hearing, the appellant appeared in person while the State was represented by Ms Gloria Mokua, learned prosecution counsel. The appellant and the State filed written submissions in the appeal.

5 The grounds supporting the appeal are that the charge sheet was defective; the medical evidence tendered before the trial court did not prove penetration; the learned judge did not re-evaluate in entirety the evidence on record and the appellant's defence was not considered.

6. The prosecution grounded its case *inter alia* on the testimony of MNM PW 1 who testified as follows:

> *"…My name is MNM. I come from [particulars withheld] village. I am 14 years old. I was born in 1999. I have my certificate of birth…..On 23rd June 2013, I do recall, around 11.00 am I had been sent by one of the congregants in the church to go and find out how much offering had been given. The treasurer who is the accused we used to congregate with him. He told me we go home to count the offerings. I had been sent by Annette. The church is called Spiritual Church of God [particulars withheld]. I went with the treasurer to his house. We entered his house and he told me he wanted to sleep with me and have sex. I told him I had just completed my menses. He told me that even if we have sex I cannot get pregnant. I refused to have sex with him. He however forced me to have sex with him. After having sex, I went home. I did not inform anybody…. The accused was well known to me for more than one year.*

One of the congregant noticed that I was pregnant. She went and informed my brother in law, Fredrick. He went and informed the Charmian of the accused clan. The accused confessed having impregnated me. I was taken to Chwele Health Centre and it was found I was about 5 months pregnant. The incident was reported by my father at Sirisia Police Post. I recorded by statement. My father is Fredrick. He also recorded a statement. I was issued with a P3 Form…"

7. Tom Baraza PW5 testified as the clinical officer attached to Kabuchai Health Centre. He stated he examined the complainant PW1 on 5th December 2013. The complainant stated she had been defiled on 23rd June 2013 by a person known to her. Upon medical examination, he established that the complainant was five months pregnant; her genitalia was normal and laboratory examination revealed she had no venereal disease.

8. In his defence, the appellant gave unsworn statement. He denied impregnating the complainant; he asserted it is the complainant's parents who insisted he impregnated her. He stated he was arrested and charged with defilement which he had not committed.

APPELLANT'S SUBMISSIONS

9. In his written submissions, the appellant assert that the charge sheet as framed was defective as it refers to a wrong penalty clause; the defect was not curable under **Section 382 of the Criminal Procedure Code**. The charge referred to Section 8 (1) of the Sexual Offences Act instead of Section 8 (2) of the Act. The appellant submitted the particulars of the charge as given did not support the ingredients of the main charge in Section 8 (1) of the Act. It was further submitted that the medical evidence presented before the trial court did not prove penetration; that there was no indication in the medical report that the victim was penetrated; that failure to include evidence of penetration in the medical report weakened the prosecution case and that the medical report did not indicate any injury to the genitalia of the complainant; the age of the injuries or any weapon used on the complaint is not stated. It was submitted that there was no indication as to why the testimony of PW1 should be believed.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that the prosecution had proved its case beyond reasonable doubt; that during trial, it was proved that the complainant's age was 14 years; this was established by her birth certificate which showed she was born on 3rd September 1999.

11. On the defective charge sheet, the trial magistrate correctly held that the proper section which the appellant ought to have been charged with is Section 8 (2) as read with Section 8 (3) of the Sexual Offences Act because age is crucial in sexual offences as it will determine the sentence to be meted upon a convicted person. Counsel submitted that the fact that the appellant was charged with a wrong penalty clause was not fatal to the prosecution case and the error is curable under Section 382 of the Criminal Procedure Code; that no prejudice or miscarriage of justice was occasioned to the appellant due to the wrong penalty clause cited in the charge sheet.

12. Responding to the ground that no DNA was conducted on the complainant who was pregnant, the State submitted that failure to conduct a DNA test was not fatal to the prosecution case as what needed to be proved was penetration and not paternity. It was urged that the prosecution had proved penetration and sexual intercourse which led to the pregnancy.

13. The respondent further submitted that there was nothing to show that the learned Judge did not properly evaluate the evidence on record. On the contestation that the appellant's defence was not considered, the respondent submitted that the appellant gave an unsworn statement which was a bare denial and as such the defence tendered did not weaken the prosecution case.

14. In concluding its submissions, the respondent submitted that the learned judge correctly appreciated the law and observed that the age of the complainant was 14 years and the mandatory and minimum sentence was a term of 20 years imprisonment. In this regard, the respondent submitted that the judge did not err in enhancing the sentence meted upon the appellant from 15 years to 20 years' imprisonment.

ANALYSIS and DETERMINATION

15. We have considered the appellant's grounds of appeal, submission by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal Procedure Code***, *a second appeal is confined to* matters of law only. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219;

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 C/O Karanja -vs- R (1956) 17 EACA 146)"

16. In the impugned judgment in this matter, the judge in upholding conviction of the appellant expressed himself as follows:

I have re-evaluated the entire evidence in the file, considered the grounds of appeal and submission by both sides. The court's judgment shows that the evidence was correctly analyzed and weighed. Issues for consideration in a defilement case were explicitly stated as the age of the victim, penetration and identification or recognition of the appellant as the culprit. The trial court went through each of them and vividly indicated how it was established beyond reasonable doubt. It was the correct finding of the trial magistrate that the complainant was 14 years old and was impregnated by the appellant through sexual intercourse of which involved penetration by the appellant of her vagina with his penis. The evidence and the issues raised in this appeal presents nothing of which would entitle this court to make a different finding. I do confirm conviction of the appellant for the offence of defilement.

17. In this appeal, the two courts below arrived at concurrent findings of fact that the appellant committed the offence of defilement as charged. In **Adan Muraguri Mungara v Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will

disturb concurrent findings of fact by the trial court and the first appellate court, in the following terms:

> *"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."*

18. On our part, we have examined the record to ascertain if any error of law or miscarriage of justice was occasioned by the learned Judge affirming and upholding the conviction of the appellant. The record reveals that the appellant was a person known to the complainant; his identification as perpetrator of the offence was by way of recognition.

19. The complainant PW 1 testified she had sexual intercourse with the appellant as a result of which she became pregnant. On his part, the appellant did not challenge the evidence on having sexual intercourse with the complainant; the age of the complainant as 14 years is not disputed; his defence is that he is not the one who impregnated the complainant.

20. An essential ingredient in the offence of defilement is penetration not impregnation. In **F O D - v -Republic [2014] eKLR,** it was stated in order to secure a conviction for the offence of defilement under the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

21. The appellant asserts he is not the person who impregnated the complainant. Whether the victim of a sexual offence is impregnated or not is irrelevant to the ingredient of the offence of defilement. The appellant contends that no DNA was conducted to prove that he was responsible for impregnating the complainant. In **Aml v Republic [2012] eKLR (Mombasa)**, this Court upheld the view that:

> *"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."*

22. This was further affirmed in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** where the court stated:

> *"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

23. Guided by the foregoing judicial decisions, we are satisfied that the ground that no DNA was conducted on the complainant has no merit in this appeal. We are further satisfied that the appellant was identified by way of recognition as the person who committed the offence as alleged. We find no error of law on the part of the learned judge in upholding the conviction of the appellant. Accordingly, we affirm and uphold the conviction of the appellant for the offence of defilement.

24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015** held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25 of the Constitution.** Guided by the aforestated Supreme Court decision, this Court in **Christopher Ochieng – v- R** *(supra***)** stated:

> *In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & another – v- Republic (supra)**, we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.*

25. In this appeal, guided by the merits of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra**) and persuaded by the decisions of this Court in **Christopher Ochieng – v- R** (supra) and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014** in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.

Dated and delivered at Eldoret this 6th day of June, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.