IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 47 OF 2015

GN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (Sitati J.) delivered on 18th March 2015 ***in H C Cr. Appeal No. 172 of 2012)***

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JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.** The particulars were that on the 27th day of August 2011 a in Kakamega Central District within Western Province, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ of BN a girl child aged 7 years. The appellant faced an alternative charge of indecent assault with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006.**

2. Upon hearing and evaluating the evidence tendered, the trial magistrate convicted the appellant and sentenced him to life imprisonment. Aggrieved, the appellant lodged a first appeal to the High Court against both conviction and sentence. His appeal was dismissed in its entirety. Dissatisfied with the dismissal of his appeal, the appellant has lodged the instant second appeal to this Court.

3. The prosecution case is founded and grounded *inter alia* on the testimony of BN, a girl child of 7 years and the evidence of PW 2 Agneta Mdashi Luvanda, PW 3 Simon Simita Ochango and PW 5 Kennedy Njaya, a clinical officer attached at Kakamega Provincial General Hospital.

4. Initially, after a *voire dire* examination, the trial court observed the reluctance of the minor girl child BN to testify. BN was stood down as a witness. Later, she was recalled to take the witness stand and she testified as PW8 as follows:

> I know the accused, he is N, his home is at E. On 27th August 2011, I can remember at around 4.00 pm, I was sent to the shop by my mother to buy omena. I bought omena and went home. I was alone on my way home. I met N at the church outside the church. He held my hand and took me into the sugar cane field by the side of the sugar cane. He removed my underpants. He also removed his. I saw his penis. It was erect. I way lying on the ground. He put his penis here where I urinate. I felt pain. I cried then auntie came and found me. He ran away but he was later arrested. He is seated in court. I knew the accused before. I used to see him come home for lunch. My grandmother used to give him food. It is the accused it is not someone else.

5. PW2 Agneta Mdashi Luvanda testified that the complainant, BN, was her daughter aged 7 years old; that she was born on 23rd September 2003. She produced the complainant's birth certificate. She testified as follows:

> On 28th August 2011, I was at my home at around 4.00 pm. I sent my daughter BN to the shops to buy omena at E market. The child went alone. I do send her often. I heard my neighbour called Simon Ochango calling me. I ran and when I got to the roadside, I found a crowd of people who had arrested the accused. I was told by Simon that the accused had been caught raping my daughter…. I took the child to Kakamega Provincial Hospital. The child was examined by the doctor. She was given medication. I later went back home. I was issued with a treatment card in her name….. As a mother, I talked to the child. She told me she had used the path off the main road where they eat guavas. She used the path which is busy on her way home. She told me she met the accused near a church on the path. She told me the accused took her to a sugar cane plantation and removed her underpants and defiled her. The accused also undressed and that is when Simon found him on the act. I did not go to the place where the child was raped….. The police from Bukura recovered the accused's underwear and my child's underpants…. I know the accused. He goes to school on the

same school with my children **[particulars withheld]** (sic). The accused used to come over for meals at lunch time at my home. I used to cook for him and my daughters. My children know him very well. So I have known him also for a while – over 5 years.

6. PW3 Simon Simita Ochango testified as follows:

On 27th August 2011 at around 4.00 pm, I had left work at Bungoma. I was at home. I was told cows had damaged my sugar cane crop. I went to the sugar cane plantation. As I was patrolling the plantation, I saw someone lying down on his stomach…. I went to the place. I asked "wewe ni nani." As I approached him, he picked his trouser and started running away. When I got to the place he was lying, I found a child sleeping facing up. It was my brother's daughter. I gave chase. He was too fast. I screamed for help to have him held. I said "shikeni huyo." Someone on the road held the appellant. When he was held, he had just worn the trouser. He had carried from the scene but he had not buttoned up the trouser…… When I got home the mother examined her and found that "amemchafua". When I say mtoto amechafuliwa, I mean the accused had poured sperms on the child's thighs…. I can confirm the person I saw and who was later apprehended is seated in court – the accused.

7. PW 2 Naaman Muringa testified as follows:

On 27th August 2011 at about 4.00 pm I was going to the shop at E. I was alone. I heard screams saying "shika huyo, shika huyo" in Kiswahili. I heard someone screaming who I identified as Simon Ochango, I know him well. The person he was saying was to be held had escaped into some sugar cane. I headed to the road. I saw the accused run into the road close to me. I quickly held him and asked why he was running away. He did not answer me. Simon was about 600 metres away from me. Simon came immediately…. Simon came and told me he was walking in the shamba. When he saw the accused bent over he ran away and later a child came out of the same place in a hurry. We took the accused to the home of the complainant. We took him to Ematsayi AP camp and later to the police at Bukura…. The child was running away. She was very frightened due to the crowd that had gathered. I did not know the accused but he knew me. He called me by my other name Chirono and that is when I realized he knew me. I asked him is name and he told me he was Ndeta.

8. PW 5, Kennedy Njaya, a clinical officer working at Kakamega Provincial General Hospital testified as follows:

I work at Kakamega Provincial General Hospital. The complainant BN came with an informant paternal uncle on allegations of sexual assault by a person well known to her and the family. She had changed clothes and was scared. She came three hours from the time of assault on 27th August 2011. The person who examined the child was Celine Inzini who is currently in Dar es Salaam. Upon examination, it was found the complainant's labia majora and manora and the cervix were all normal. There was no discharge seen. Urinalysis was normal. No spermatozoa. High vagina swab was taken and nothing significant was seen. Her test was negative. Her hymen was partially open. I produce the P3 Form.

9. In his defence, the appellant gave sworn evidence and testified as follows:

My name is GN… I am a student at **[particulars withheld]**…. I am in Form 2.

I am aware of the charges I face.

On 27th August 2011 at around 2.00 pm I was at **[particulars withheld]**. My former primary school. After a short while, a young man came running past me at a high speed. I was shocked and heard screams asking us to get hold of him. As I was trying to see who it was I realized I am the one being held and arrested instead. They young man who arrested me was Cherono. The old man came by and when asked it was me he said "alikua amevaa nguo tena huyo huenda ni yeye." I was not told what it was all about. They told me they will tell me later. I kept quiet and the two said we go to the AP so that if I say it was not me then I disclose who it was when we get to the AP camp at Ematsai. I was placed in the cells…… After a while, I heard a woman's voice speaking to the AP's outside the cells. She said she had sent her daughter omena and she later received a report that someone was carrying or attempting to defile her daughter (sic). After I was arrested I was taken to a certain home claiming it was the complainant's home……. I had come home for school August holidays. It was a framed testimony. A girl of 7 years cannot tell that the penis was erect. It is not possible…. I was just on the road. The minor was told what to say. She does not know me. I do not know her. I have prior knowledge of Simon Onchango PW3. We were attending the same school. I was not where he claims. Cherono (sic) is the one who arrested me.

10. The trial magistrate in convicting he expressed himself as follows:-

I must commend the accused for his spirited defence which he did very intelligently, maturely and with tooth comb precision. I do not doubt he defended himself in every way he knew best but that does not change the fact that there is overwhelming evidence against him and the same was not rebutted or brought to doubt in the accused favour. … I believe the accused has had his day in court. I find the allegations against him to be true and there is proof beyond all reasonable doubt that on 27th August 2011 at around 4.00 p.m. he defiled the complainant. ….

Although he submits he was framed, I do not in my view find that to be true. The mother of the complainant did not show any demeanor of such a person and in my view all the other witnesses are unrelated to her and had no interactions that day. It is my view the issue of frame up is too farfetched in view of the overwhelming evidence against the accused. There was no evidence that PW1 (sic) had any ill feelings against him. All she said was the accused often came to her home and she gladly cooked him lunch along with her other daughters nothing more.

I find the accused guilty of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. … Having so found him guilty I make no findings on the alternative charge of indecent act with a child contrary to

Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

11. Aggrieved by the conviction and life sentence meted upon him by the trial court, the appellant lodged a first appeal to the High Court. His appeal was dismissed. In dismissing the appeal, the learned judge made a finding that there was ample evidence that the complainant was seven years old; that the prosecution produced her birth certificate and the complainant's mother also gave evidence on the exact date the complainant was born. The judge found there was penetration of the minor by the appellant; that the ingredients of defilement were proved; that it is not normal for a seven-year-old girl to have a broken hymen be it partial or complete.

12. In the instant appeal, in both the memorandum and the amended grounds of appeal, the appellant faults the learned judge for failing to consider that penetration was not proved; that the judge failed to find Section 8 (1) (2) of the Sexual Offences Act under which the appellant was charged does not exist in law; that there was no expert report tendered in evidence or a DNA test conducted on the appellant contrary to **Section 36 (1) of the Sexual Offences Act;** that the judge erred in failing to find that **Section 211 of the Criminal Procedure Code** was not followed; the judge erred in failing to find that the conviction was based on speculation and conjecture; the judge erred and failed to find the prosecution did not summon relevant and crucial witnesses; the judge erred and failed to exhaustively evaluate the appellant's alibi defence; and finally the judge erred in failing to find that the defence evidence was improperly rejected by the trial court.

13. At the hearing of this appeal, while the appellant appeared in person the State was represented by the Senior Prosecution Counsel, Mr. Ketoo.

APPELLANT'S SUBMISSIONS

14. The appellant relied on his written submissions and made oral highlights. He urged that his appeal is premised on the erroneous finding by the two courts below that penetration had been proved beyond reasonable doubt. He submitted that there was no eye witness to the alleged penetration; that the complainant's mother did not testify that she examined the minor, she only stated she took the complainant to hospital; that the medical report tendered in evidence by the prosecution does not prove penetration; that there are many ways in which hymen can be broken but not necessarily through penetration; that in this matter, it is not safe to conclude there was penetration.

15. On the issue of identification, the appellant submitted that he was mistakenly arrested and the two courts below erred in failing to find that indeed, the appellant had raised a plausible defence; that no witness testified on the hot pursuit of the appellant without losing sight of him; that in the absence of such evidence, PW 2 could as well have held and arrested a wrong person. Further, it was submitted that it was implausible for PW 3 to identify someone who was lying down on his stomach.

16. The appellant also faulted the medical report tendered in evidence stating that the maker of the report was Ms Celin Inzini who was reported to be in Dar es Salaam. That the two courts below erroneously admitted the report without complying with **Sections 33, 34 B** and **Section 77 of the Evidence Act**; that failure to comply with the foregoing provisions mean PW5 was not competent to testify on the contents of the P3 Form which had been filled by Ms Celin Inzini.

17. On the issue of defective charge sheet, the appellant submitted that he was charged with defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. That Section 8 (1) (2) does not exist. That the charge sheet should have stated he was charged contrary to Section 8 (1) of the Sexual Offences Act as read with Section 8 (2) of the Act. That failure to include the phrase "as read with" in the charge sheet renders the charge as drafted defective.

18. The appellant concluded his submissions by urging us to find that the two courts below did not properly evaluate the evidence on record; that had the two courts done so, they would have come to the conclusion that the prosecution had not proved its case beyond reasonable doubt. More particularly, the courts should have found that penetration was not proved beyond reasonable doubt.

RESPONDENT'S SUBMISSIONS

19. The State through the Senior Prosecution Counsel, Mr. Ketoo, in opposing the appeal submitted that all the ingredients for the offence of defilement were proved beyond reasonable doubt; that the age of the complainant was established to be 7 years; a birth certificate was produced in court to prove the age; that the appellant was identified through recognition by the complainant and that the testimony of PW2 and PW3 established a continuous chase of the appellant up to the point of his arrest; that the evidence of the complainant and PW3 place the appellant at the scene of crime; that the recovery of the appellant's underpants at the scene of crime also place him at the *locus in quo.*

20. As to penetration, it was submitted that the complainant testified that the appellant inserted his male genital organ into her vagina; that the medical report tendered in evidence proves the complainant's hymen was partially broken. On the issue of sentence, the respondent submitted that following the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015**, this Court has the duty to determine if the Supreme Court's decision is applicable to the facts of this case.

ANALYSIS and DETERMINATION

21. We have considered the record of appeal as well as submissions made by the appellant and the respondent. This is a second appeal against conviction and sentence. In ***Karingo -vs- R (1982) KLR 213*** at p. 219, this Court expressed:

> "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)"

22. In this appeal, one of the grounds urged is that the two courts below did not properly evaluate the evidence on record. Both the trial

magistrate and the learned judge made concurrent findings of fact that the appellant defiled the complainant. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial 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."

23. As a second appellate court, we have re-examined the evidence on record to ascertain if an error of law is disclosed in the judgment of the High Court. The charge against the appellant is defilement. In **John Mutua Munyoki - v- Republic [2017] eKLR**, this Court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

> (i) The victim must be a minor, and
>
> (ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

24. In this matter, the appellant testified he was mistakenly arrested; that he was arrested at 2.00 pm; when he was simply on the road. From this testimony, the identification of the appellant as the person who committed the offence became an issue. The record shows that the complainant knew the appellant prior to the alleged offence. This is evidence of recognition. Based on the testimony of recognition by the complainant, there is no doubt in our mind that the appellant was positively recognized and placed at the scene of crime.

25. Another item of evidence pertinent to identification of the appellant is the testimony by PW3 and PW2 on continuous chase. PW 3 testified that he found the appellant lying on the ground on his stomach and then a child (the complainant) also emerged from the same place. PW3 was emphatic it was the appellant whom he found in the sugar plantation. We find that the testimony of PW3 places the appellant at the scene of crime. PW3 further gave evidence on the continuous chase of the appellant stating that he shouted asking any member of the public to apprehend the appellant who was running away. The defence evidence did not shake or cast doubt on the evidence of PW3 that the person who was held and apprehended by PW2 is the same person whom he had found lying on the ground on his stomach. That this same person is the appellant. Further, the recovery of the appellant's underpants at the scene of crime place him at the *locus in quo*. Based on the testimony of PW2 and PW3 on the continuous chase, we are satisfied the two courts below did not err in placing the appellant at the scene of crime. For the foregoing reasons, we find there is no error in the identification of the appellant as the person who committed the offence as charged.

26. We observe that for there to be a positive and credible identification based on continuous chase of a suspect, the following conditions *inter alia* must be proved;

> a. The suspect must be placed at the scene of crime and must be connected to the crime.
>
> b. If the suspect runs away from the scene of crime, there must be a continuous chase.
>
> c. The chase must never be broken and the person chasing, must never lose sight of the suspect up to the point and time of arrest.
>
> d. There must be no intervening obstructions or interruptions during the continuous chase that cause the chaser to lose sight of the suspect.
>
> e. There must be consistency of the identity of the suspect during the continuous chase. Therefore the chaser must testify to a unique feature(s) of the suspect such as the clothing he was wearing or a distinctive physical feature(s).
>
> f. If the evidence of continuous chase is given by more than one witness, they must all testify that the chase was continuous, uninterrupted and that they never lost sight of the same suspect by identifying the same unique feature(s) of the suspect such as the clothing he was wearing or distinctive physical feature(s).

27. Another ground urged in this appeal is that there is no sufficient evidence proving that penetration of the complainant's genital organ had occurred. In **F O D - v -Republic [2014] eKLR,** it was stated that 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.

28. In this matter, the complainant testified that the appellant caused his male genitalia to enter her female genitalia. The medical report as contained in the P3 Form reveals that the complainant's hymen was partially broken. From this evidence, we are satisfied that the prosecution led evidence that proved there was penetration of the complainant's female genitalia. We remind ourselves that in a charge of defilement, penetration need not be complete, proof of partial penetration suffices. The complainant testified that the appellant put his penis in her vagina and she felt pain. Coupled with the recognition evidence given by the complainant and her testimony on penetration, we are satisfied and convinced it is the appellant who penetrated and thereby defiled the complainant.

29. In his written submissions, the appellant urged that the charge as drafted was defective. He asserts that he was charged with defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. That Section 8 (1) (2) does not exist in the Sexual Offences Act No 3 of 2006.

30. In **Sigilani -vs- Republic (2004) 2 KLR, 480**, it was held that: -

> "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

31. Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows: -

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

32. In the instant matter, we are satisfied that from the beginning, the appellant knew that the charge he was facing was defilement. The particulars of the offence are clearly spelt out in the charge sheet. The particulars include the date of the offence, the place of the offence, the act constituting the offence, and the name and age of the victim. Further, when he gave his sworn testimony, the appellant expressed *"I am aware of the charges I face."*

33. We have perused and examined the charge sheet. Indeed, in the charge sheet as drafted, it is written the appellant is charged under Section 8 (1) (2) of the Sexual Offences Act instead of being charged under Section 8 (1) as read with Section 8 (2) of the Act. *(Emphasis supplied)*

34. In considering the ground that the charge as drafted was defective, we have examined the record of appeal and the judgments of the two courts below. The record and judgments do not reveal that there was any prejudice or miscarriage of justice occasioned to the appellant by the defect on the charge sheet. The appellant in his testimony confirmed he was aware of the charge he was facing. We find this ground of appeal has no merit.

35. Auxiliary, in this appeal, the appellant submitted on various issues that were not raised before the trial court and the High Court. For instance, the issue of defective charge sheet; the alleged failure by the prosecution to call crucial witnesses; the contested admissibility of the medical report; that the two courts below convicted the appellant based on speculation and conjecture; that there was no expert report tendered in evidence or a DNA test conducted on the appellant contrary to **Section 36 (1) of the Sexual Offences Act;** and that the judge erred in failing to find that **Section 211 of the Criminal Procedure Code** was not followed.

36. The Supreme Court in **Coast Professional Freighters Limited - v - Welsa Bange Oganda & 2 others [2019] eKLR** held that an appellate court should not entertain additional issues that were not grounds of appeal in the court below. Guided by this decision, we find that all the grounds urged by the appellant that were not canvassed before the two courts below have no merit.

37. Notwithstanding, we are satisfied the two courts below considered and evaluated in detail the defence evidence tendered in court through the appellant's sworn testimony. The trial magistrate considered and correctly dismissed the appellant's assertion that he was framed; the magistrate correctly considered and rejected the appellant's professed alibi that he was not at the scene of crime at 4.00 pm and that he was arrested at 2.00 pm. In rejecting the alibi, the trial magistrate stated that the defence that the appellant was arrested at 2.00 pm was not relevant; that all witnesses agreed it was 4.00 pm. Convinced by the evidence of PW2, PW3 as well as the complainant testimony as to the time at which the offence was committed, we are satisfied the two courts below properly considered, evaluated and weighted the appellants defence. The ground of appeal that the two courts below did not consider the appellant's defence has no merit.

38. We now consider the life sentence meted upon the appellant. We note that the mandatory life sentence provided for in **Section 8 (2) of the Sexual Offences Act No. 3 of 2006** meted upon the appellant by the trial court (and as affirmed by the High Court on 18th March 2015) was before the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015.** In the decision, the Supreme Court held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case.

39. Following the Supreme Court decision, mandatory sentences as well as mandatory minimum sentences take away judicial discretion to determine the appropriate sentence based on the facts of each case.

40. This Court in **Christopher Ochieng – v- R [2018] eKLR, Kisumu Criminal Appeal No. 202 of 2011** 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.

41. We are persuaded by the decisions of 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** to the effect that mandatory minimum sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case. We are also cognizant of and bound by the dicta of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic, SC Petition No. 16 of 2015** on constitutionality of mandatory sentences.

42. In the instant matter, there is on record mitigation by the appellant and we see no reason to remit this matter for rehearing on sentencing. Accordingly, we find it appropriate to interfere with the life sentence affirmed by the first appellate court. We dismiss the appeal against conviction; we set aside the life sentence meted upon the appellant and substitute thereto a sentence of 20 years' imprisonment with effect from 17th July 2012 when the trial court passed the sentence.

Dated and Delivered at Kisumu this 31st day of July, 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