



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL No. 51 OF 2015

RICHARD OUMA OMBAI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Homa Bay, (Majanja J.) delivered on 9th March 2015

in

H C Cr. Appeal No. 127 of 2014)

JUDGMENT OF THE COURT

1. The appellant was charged with defilement contrary to **Section 8 (1) and (2) of the Sexual Offences Act**. The particulars were that on 12th November 2009 in Ndhiwa District within Nyanza Province he caused his penis to penetrate the vagina of EA a child aged eight (8) years. He faced an alternative charge of indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**.
2. Upon denying the offences, the appellant was tried, convicted and sentenced to life imprisonment by the trial magistrate. His appeal to the High Court was dismissed. He has filed the instant second appeal to this Court. At the hearing of the appeal, he abandoned his appeal against conviction and now appeals against the mandatory minimum life sentence meted upon him by the trial magistrate and affirmed by the High Court.
3. The prosecution case was founded *inter alia* on the testimony of the complainant, PW1 EA, a minor aged 8 years old. After *voire dire* examination, PW1 testified as follows:

I stay at [Particulars withheld] village near Rarage Primary School..... I recall on 12th November 2009 at 6.00 pm. I had gone to collect sugarcane near George's place. He got hold of me and asked me who had sent me to go and collect the sugar cane. It was George (pointing to where the accused seated).

He held my hand and told me to go and show him where I could get the sugar cane. I went with him up to another sugarcane plantation next to our home. There he told me to lie down and that he was to give me strokes of cane. I did hesitate, but he told me that the more I did hesitate the more strokes of cane I was to get. I did then agree to lie down. After I lied down, he told me to remove the pant and then see what I had hidden. He thereafter removed the pant. He then told me to close the eyes and open up my legs while on the ground. He then slept on top of me having unzipped his long trouser.... He drew his thing and then put it into my vagina. I felt painful while he was inserting his penis into my vagina. He did it for a short while. He told me to clean my person using tree leaves. He asked me to wipe his penis too with the leaves. I could see some whitish thing with red. He asked me not to tell anybody. However, when I went home I told my mother because I was feeling pain. I could walk with difficulties.....

4. PW 4 Mr. Jared Obiero Opundo testified that he is a medical doctor working at Isebania District Hospital. That on 15th November 2009, he examined the complainant who was 8 years old. Her general condition was fair. Detailed examination revealed that her hymen was perforated and she had bruises to the vaginal walls. That there was pus discharge from the vulva. At the time of medical examination, the age of injury was three days. He produced a medical report he prepared after examination of PW1. PW 4 further testified that on 1st February 2010, he received the appellant at the hospital for medical examination. He was uncircumcised and was HIV negative. He did not have any injury. He produced in evidence a medical report on the examination conducted on the appellant.

5. Having analyzed the evidence tendered by the prosecution and defence, the trial magistrate convicted the appellant and sentenced him to life imprisonment. His appeal to the High Court against conviction and sentence was dismissed. In sentencing the appellant, the trial magistrate stated:

I have considered the sentiments of the prosecution and the mitigation of the accused person. However, this court has no discretion on the meting out of sentence. I therefore sentence the accused as required by law to life imprisonment. (Emphasis supplied)

6. In dismissing his appeal to the High Court, on sentence, the learned judge expressed himself as follows:

14. As regards the sentence, under Section 8 (2) of the Sexual Offences Act, a person who defiles a person who is 11 years old or less shall be sentenced to life imprisonment. As the child was 8 years old, the sentence imposed was the mandatory sentence. I therefore affirm the sentence. (Emphasis supplied)

7. Aggrieved by the dismissal of his appeal, the appellant lodged the instant second appeal only against sentence. At the hearing of the appeal, the appellant appeared in person while the State was represented by Mr. Kakoi, Principal Prosecution Counsel.

8. In his brief oral submission to this Court, the appellant stated he was 38 years old and he appeals against sentence. He urged this Court to reduce the life sentence and look into the constitutionality of the mandatory minimum life sentence meted upon him.

9. The State in responding to the appeal against sentence recalled that the appellant was not appealing against conviction. On sentence, it was submitted that following the decision of the Supreme Court in the **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015**, this Court has the jurisdiction to determine the appropriate sentence in the matter. Counsel submitted that taking into account that the victim was eight years old, the age of the victim is an aggravating factor and a sentence of thirty (30) years imprisonment would be appropriate. Counsel equated the offence of defilement of a child of eight years to the offence of murder with malice aforethought.

10. This Court in **Jared Koita Injiri - v- Republic [2019] eKLR, Kisumu Criminal Appeal No. 93 of 2014** expressed as follows:

*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.*

11. We have considered the oral submissions by the appellant and the respondent on the issue of sentence. The record of appeal shows that the appellant offered mitigation and the prosecutor requested that he be treated as a first offender. It is significant that the trial magistrate sentenced the appellant to life imprisonment on 30th September 2010. The High Court affirmed the sentence on 9th March 2015. The decisions of the two courts below were delivered before the judgment of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015**. In its 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.

12. In this matter, we note that both the trial magistrate and the High Court stated that the life sentence meted on the appellant was mandatory. This position is no longer the law in light of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra)**. There is mitigation by the appellant on record and we see no reason to remit this matter to the trial court for rehearing on sentencing. We thus find it appropriate to interfere with the life sentence imposed by the trial court and affirmed by the first appellate court. Accordingly, we set aside the life sentence meted upon the appellant and substitute thereto a sentence of twenty (20) years' imprisonment with effect from 30th September 2010 when the trial court passed 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