IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, MUSINGA & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 32 OF 2015

BETWEEN

VINCENT MUKOMBWA MAKOTSI..APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya

at Kakamega (A. C. Mrima, J.) on 12th February 2014

in

H.C.CR.A. No. 242 of 2011.)

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JUDGMENT OF THE COURT

1. This is a second appeal by ***Vincent Mukhombwa Makotsi***, (the appellant), who was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to the provisions of ***Section 8 (1)*** as read with **Section 8(3)** of the **Sexual Offences Act** before the Chief Magistrates' Court at Kakamega.

2. As far as concerns this appeal, ***Section 361 (1) (a)*** of the **Criminal Procedure Code** limits our jurisdiction to matters of law only. In **Karani vs. R [2010] 1 KLR 73** this Court stated as follows:

> "***This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law***."

3. Briefly, the facts that gave rise to this appeal were that on 16th April 2009 at about 3.30 p.m., **PW1** (the complainant), a girl aged 13 years was heading home when she saw the appellant, a relative, sitting outside his house. He called her, held her hand and led her into his house and closed the door.

4. The appellant removed his clothes as well as the complainant's and forcefully inserted his penis into her vagina and she started bleeding. The complainant wanted to cry but the appellant drew a *panga* and threatened to cut her if she dared scream. After the ordeal, the appellant warned her not tell anybody and threatened her that if she did he would kill her. She opted not to tell anyone due to fear.

5. After about a week she started bleeding from her vagina and that is when she narrated the ordeal to her brother, **PW3,** who then proceeded to report the matter to the Assistant Chief and later to Mikoyani Police Post.

6. ***PW4,*** *a clinical officer who examined the complainant,* testified that on examination he found that the complainant had stomach pains and was bleeding from her vagina.

7. PW4 completed the P3 Form and classified the injury as harm. He further testified that there was evidence of defilement...The medical report indicated that the complainant's hymen was ruptured and the vagina swollen. During the trial the complainant testified that she knew the appellant well and recognized him as the one who had defiled her.

8. After considering the evidence by the prosecution witnesses, the appellant was found to have a case to answer and on being put on defence, he gave an unsworn statement and called two witnesses. The appellant basically denied having committed the offence as charged.

9. The learned magistrate reached the conclusion that the charge of defilement was proved beyond reasonable doubt and proceeded to convict and sentence the appellant to 20 years' **imprisonment**. His appeal before the High Court was unsuccessful.

10. The appellant's second appeal before this Court is predicated on grounds that: the prosecution did not prove its case beyond reasonable doubt; there was no medical examination connecting him with the offence; and that neither the investigating officer nor the arresting officer was called to testify.

11. During the hearing, the appellant, who appeared in person, urged the appeal through his written submissions. Having read the submissions, we note that the only matter of law raised is that no medical examination was conducted on him to establish whether he was the perpetrator.

12. Further, the appellant's appeal is also against sentence, based on the mitigating factors that he advanced before the trial court. He urges that the sentence be reduced or he be granted a probationary sentence. He had told the trial court that he was the sole bread winner in his family and his siblings and aged parents depended on him. He stated that the trial magistrate failed to consider his mitigation.

13. Opposing the appeal, Prosecution Counsel, **Mr. Muia**, also relied on his written submissions. He submitted that the complainant narrated how she was defiled by the appellant and threatened using a *panga*; and that penetration was proved by the clinical officer. According to him, this was a case of direct evidence since the appellant was well known to the complainant.

14. On the issue of the age of the complainant, even though no birth certificate was produced, this was proved by production of the P3 Form where the complainant's age was assessed by the clinical officer.

15. As regards the sentence, **Mr. Muia** contended that the punishment was in accordance with the law. He urged that the appeal be dismissed.

16. Having considered the record, the parties' respective submissions and the law, the core issues that are discernible for our determination are; whether the prosecution proved its case to the required standard that it was the appellant who defiled the complainant; and whether the sentence imposed on the appellant warrants a reduction.

17. This is a second appeal where there are concurrent findings by the two courts below. In ***Adan Muraguri Mungara vs. Republic*…[2007] …eKLR** 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. We shall begin with the issue of whether the case was proved to the required standard. The testimony of the complainant is clear that she was able to tell her brother and the investigating officer that the person who defiled her was the appellant, who was well known to her as they were relatives and neighbours. The investigating officer testified how he re-arrested the appellant, who had disappeared from the area for a while after the incident. He investigated the matter and confirmed that it was the appellant who committed the offence.

19. We are thus convinced that that the appellant, being a relative and a close neighbour, was properly recognized by the complainant. It is trite that identification by recognition is more reliable because it is based on the witness' familiarity with the assailant as was held in ***Wanjohi & 2 Others v. Republic* [1989] KLR 415**.

20. The incident occurred in broad daylight and there was no possibility of mistaken identity.

21. The question of whether the prosecution proved the offence beyond reasonable doubt was fully considered by the two courts below. On the issue of penetration, the complainant testified and gave a detailed account of how she was defiled by the appellant, a neighbour who was well known to her. **PW4,** a clinical officer, examined the complainant's private parts and confirmed that they were swollen, her hymen rupture and she had an infection, she was oozing blood, evidencing an act of penetration. These were captured in the medical report by way of a P3 Form and the Post Rape Report and all the evidence was consistent that the complainant was a victim of defilement.

22. Furthermore, ***Section 124*** of the **Evidence Act** is clear that the trial court can convict on the basis of the complainant's evidence, if satisfied that the complainant is a truthful witness. Hence the appellant's argument that there was no clan elder, Assistant chief, or even a neighbour who was called to testify simply does not hold.

23. Turning to the ground of appeal that no medical examination was conducted to prove that the spermatozoa found in the complainant's vagina belonged to the appellant, whereas such evidence would have been important (relevant?), nevertheless, its absence did not compromise the conviction, considering the totality of the evidence that was tendered by the prosecution on penetration, the most crucial

element of the offence.

24. In ***Aml vs. Republic*** ***[2012] eKLR*** 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."***

25. **Having considered and rejected the appeal against conviction,** the final issue is on sentence. This Court in ***Christopher*** ***Ochieng -v- R*** ***[2018] eKLR*** and in ***Jared Koita Injiri -v- R, Kisumu Criminal Appeal No. 93 of 2014*** considered the legality of minimum mandatory sentences under the **Sexual Offences Act** and 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 of life imprisonment imposed and substitute it therefor with a sentence of 30 years' imprisonment from the date of sentence by the trial court."***

26. Taking into account the holding in the ***Muruatetu case***, a court is required to consider mitigating factors before imposing a sentence, even where the law prescribes a statutory minimum sentence. Our perusal of the record reveals that the trial court did consider the mitigation offered by the appellant and proceeded to hold that:-

> ***"Having considered the mitigation of the offender, I do note that those kind of offenses are quite rampant in our society today and the same calls for a deterrence sentence.*** *(sic)* ***I therefore do sentence the offender to serve twenty (20) years imprisonment."***

27. There is no doubt that an offence of defilement is grave and that is why the minimum sentence of 20 years for defilement of a girl between the age of twelve and fifteen years was prescribed. In the circumstances of this case where the mitigation of the appellant was factored in when he was sentenced, we are not inclined to interfere with the sentence imposed by the trial court and affirmed by the first appellate court. In conclusion, we find this appeal lacking in merit and dismiss it in its entirety

Dated and delivered at Kisumu this 24th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR