IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & ODEK, JJ.A)

CRIMINAL APPEAL NO. 57 OF 2018

BETWEEN

DAVID KIPROP ROTICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret (Kanyi Kimondo J.) dated 16th September, 2014

in

HCCRA No. 64 of 2011)

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JUDGMENT OF THE COURT

The appellant was charged with the offence of defilement of a child aged 9 years contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 10th day of July in Uasin Gishu District of the Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of RC a girl aged 9 years. The appellant also faced an alternative count of indecent act contrary to **section 11(1)** of the Sexual Offences Act. The particulars were that on the same day and place he intentionally and unlawfully touched the private parts of RC namely the vagina. The appellant denied the charge but after a full trial, he was found guilty, convicted and sentenced to life imprisonment.

The facts that informed the prosecution's case briefly stated were that on 10th of July 2010, PW1, RC was sent by her in-law PW4, **PM** to borrow a basin from the home of the appellant as she needed to wash some clothes. RC went to the appellant's home and found him alone cleaning his motorbike. The appellant suddenly grabbed her and pulled her into a store and told her not to scream. He then ordered her to lie down, unzipped his trouser and defiled her. It was her evidence that she felt a lot of pain and when she tried to scream, the appellant threatened to kill her. As soon as he was done RC left the vicinity and on the way met PW2, **CC,** her 7 year old friend and immediately informed her of her ordeal under the hands of the appellant. PW2 accompanied her to report the matter to her mother, PW3, **EM**, RC explained to PW3 what had happened to her and fingered the appellant as the culprit by his nick name *"baba boy"*. PW3, proceeded to check the RC's pants and saw that it had some semen on it. She then took her to Mobet Dispensary where she was referred to Moi Teaching and Referral Hospital. R.C was treated the following day and the P3 form filled by **PW6, Dr. Cynthia Chebet**. She noted a tear on her perineum and her hymen was also torn. She also had a whitish discharge from her vagina. PW3 stated that the appellant ran away upon hearing that members of the public wanted to lynch him for the offence. He was eventually arrested on 24th August 2010 hiding in a maize store.

PW5, **Hilary Koech**, the Chief of Soiniming location was responsible for the arrest of the appellant. On 23rd August 2010 while on duty, he received a phone call from Daudi the village elder informing him that the appellant was hiding in the area and that he had committed an offence of defilement. He proceeded together with the Assistant Chief in search of the appellant, they finally found him sleeping inside a maize store in Kabiyet and promptly arrested him. He was then arraigned before the Chief Magistrate's Court in Eldoret and charged with the offences which he denied.

Put on his defence, the appellant gave a sworn statement in which he not only denied the charge but also knowing RC. He claimed that on 9th July, 2010 he was in Nandi District in the house of one Samson Sambu. On the 24th August 2010 he was arrested on the allegations of defilement by the Area Chief and subsequently transferred to Eldoret police station. He denied committing the offence.

As already stated, the trial court found the appellant guilty of the offence, and sentenced him to life imprisonment. Being aggrieved by the

conviction and sentence, the appellant preferred his first appeal to the High Court. The same was heard by the High Court, **(Kanyi Kimondo, J)** who dismissed it on the grounds that the age of the minor was proved at the trial by both documentary and oral evidence; the appellant was positively identified by RC and placed at the scene of the crime; medical evidence established penetration and that all the ingredients of the offence of defilement were proved beyond reasonable doubt. In the premises he was unable to disturb the conviction and sentence meted out by the trial Magistrate.

Aggrieved by the judgment of the High Court, the appellant has filed this 2nd and perhaps last appeal on grounds that the first appellate court erred in law by; failing to carry out the duty of a first appellate court which is to reconsider, re-evaluate the evidence tendered before the trial court and reach its own conclusions; finding that the prosecution had proved the age of RC, not drawing adverse inference for the failure by the prosecution to call as a witness the investigating officer; holding that the act of the appellant of disappearing from the scene was not consistent with his innocence; rejecting the appellant's alibi defence and failing to find that the appellant had a right to give an unsworn statement of defence.

When the appeal came up for hearing, **Mr. Mogambi,** learned counsel held brief for **Mr. Kigamwa** for the appellant while **Ms. Oduor,** Principal Prosecution Counsel appeared for the respondent. Counsel had filed written submissions which they briefly highlighted.

Mr. Mogambi submitted that the age of the complainant was not proved as the birth certificate was merely marked and never tendered in evidence. That although the appellant gave an alibi defence the same was disregarded by the court, and no witnesses were called to corroborate the testimony of RC placing the appellant at the scene of the crime. Counsel further submitted that the medical evidence tendered did not prove penetration hence the appellant was not properly convicted. On the issue of sentencing, Counsel submitted that the sentence meted out on the appellant was manifestly harsh and excessive in the circumstances of the case.

Ms. Oduor in opposing the appeal submitted that all the ingredients of the offence were proved beyond reasonable doubt. She countered the appellant's Counsel's argument on the birth certificate by asserting that the court was not barred from looking at the document even though it was marked but not produced as evidence. Additionally, the court conducted *viore dire* and confirmed that RC was a child; that the P3 form and the charge sheet all indicated the age of RC. Most importantly, PW3, the mother of RC testified and confirmed that she was aged nine years old. Counsel contended that penetration was proved by the evidence of the tear on the genitalia of RC and the identity of the appellant was also proved hence there was no need for the investigation officer to testify.

On the issue of the alibi defence, counsel submitted that it was properly disregarded as the same was a sham and clearly an afterthought. The defence never shook the watertight prosecution case which placed the appellant at the scene of crime. In any event, the alibi defence was raised during the defence hearing which did not give the prosecution the chance to investigate it, counsel submitted. On the sentence, the counsel reverted to the case of **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR** but nonetheless submitted that the sentence of life imprisonment was deserved considering the age of the minor and the impact and consequence of the crime will have on her.

This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** binds us to consider only questions of law. In **Karani v Republic [2010] 1 KLR 73** this Court observed thus:

> "***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."***

We have carefully considered the record of appeal, submissions by counsel and the law. The issues of law that fall for our determination are whether; the first appellate court performed its statutory duty to re-evaluate the evidence and reach its own conclusion; the age of the complainant was proved; the prosecution proved its case beyond a reasonable doubt; failure to call the investigating officer was fatal, the alibi defence was considered and whether this Court should reduce the sentence imposed on the appellant in view of the Supreme Court's decision in the **Muruatetu case** (supra).

With regard to the re-evaluation and re-appraisal of the evidence by the first appellate court so as to reach its independent conclusions, there is no doubt at all that the first appellate court carried out this mandate splendidly. In paragraph 7 of the judgment, the learned Judge reminded himself of this responsibility. Indeed, he even cited eight authorities in this regard including the oft cited case of **Okeno v Republic [1972] EA 32**. He thereafter summarized the prosecution case as well as that of the defence. He thereafter applied the evidence to the facts as well as the law. He extensively dealt with the age of RC, identification of the appellant, the appellant's alibi defence, evidence of penetration, the language of the trial court, alleged defects in the charge sheet and failure to call the investigating officer. Given the foregoing, we are satisfied that the first appellate court adhered strictly to its mandate of subjecting the evidence tendered in the trial court to a fresh and exhaustive re-appraisal so as to reach its own independent conclusions.

The appellant was convicted based on the evidence of R.C and that of 5 other witnesses. The evidence was consistent with regard to the appellant's guilt. There was solid medical evidence confirming the defilement. The appellant argued that the age of RC was not proved as the birth certificate was not tendered in evidence hence the court had no basis for sentencing him under **Section 8(2)** of the **Sexual Offences Act**. We appreciate that establishing the age of a complainant with cogent evidence in such proceedings is paramount as it determines the kind of sentence to be meted on the accused if found guilty of the offence. In the case of **Paul Otieno Okello v Republic, [2019] eKLR**; the Court reiterated:-

> ***"… that proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled, then a Court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances***

where none of the said documents may be available and in such a case a court may revert to its observation of the victim or the oral admissible evidence on record."

From the record, it is clear that the birth certificate of RC was part of the court record. However, though marked, the same was not produced in evidence. Also, we note that the charge sheet and the P3 form all contained the age of RC. Even if the foregoing is not enough, the fact that the trial Magistrate conducted *voire dire* on the complainant was a clear proof that the court was satisfied that R.C was a child of tender years. Similarly, PW2, the mother of RC testified and clearly stated that RC was aged nine years. We do not think that the oral evidence of a mother regarding the age of her child can be doubted. In the case of **Boniface Mutua Ngolanya v Republic [2016] eKLR**, this Court observed:-

"We therefore find that the courts below ought to have taken the complainant's age as seventeen years; that was the apparent age of the complainant and more importantly that is the age that her mother said she was."

We are therefore satisfied just like the two courts below that the age of the complainant was proved beyond a reasonable doubt.

The appellant has also cast aspersions on the weight of the evidence leveled against him by the prosecution claiming that it did not meet the threshold of beyond reasonable doubt. He claims that the complainant's evidence of placing him at the scene of the crime was uncorroborated and that penetration was not proved. We shall first deal with the issue of non-corroboration of evidence of the complainant. **Section 124** of the **Evidence Act** provides as follows on corroboration; in sexual offences:-

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.

It is not in dispute that the trial Magistrate conducted *voire dire* examination on R.C. The court thereafter observed that RC was an intelligent girl with good cognitive abilities and she also understood the value of telling the truth. With regard to her testimony, the trial court took the view that her testimony was clear and consistent, she did not buckle even under cross examination by the appellant. She was emphatic on the fact that it was the first time the appellant had defiled her. The trial court went on to believe her testimony for the above reasons. That being the case, her testimony did not require corroboration. As held in ***P M M v Republic [2014] eKLR***;

"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."

In this regard, the trial court was so satisfied.

Further, if there was need for corroboration, it would be found in the testimony of PW2, PW3 and PW6. Their evidence was the events which occurred immediately after the defilement. RC on her way from the appellant's home met her friend PW3 and immediately told her what had transpired. Together they proceeded home and on finding PW3 informed her of the ordeal. She even mentioned the name of the appellant to her as *"baba boy."* When PW3 checked RC's pant she noted semen on it. To round up on this aspect is the evidence of PW6. Her evidence showed that RC's vagina was reddish and had a tear that was consistent with the fact that she had been defiled and penetration achieved. This Court has pronounced itself on the issue of penetration in **Mark Oiruri Mose v Republic [2013] eKLR**;

"In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

We are satisfied that though corroboration was not necessary, nonetheless it was provided. Further, there was the evidence of penetration going by the medical evidence tendered by PW6. This was also the concurrent finding by the two courts below and we have no reason to depart from the finding. Indeed these pieces of evidence go to show that the prosecution's case against the appellant was proved beyond reasonable doubt.

The appellant also complained that his alibi evidence was disregarded by the court. The learned judge considered the alibi defence and held that the appellant had not given any notice that he would raise it, thus it was open to the trial court to weigh it against the evidence already tendered by the prosecution. In the end both courts found the defence as feeble when juxtaposed against the prosecution's evidence. We concur with the finding of the learned judge and it appears to us clearly that the same was an afterthought. Why for instance did he raise it early by way of cross-examination of prosecution? In the case of **Victor Mwendwa Mulinge v Republic [2014] eKLR**; it was observed:-

"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA v REPUBLIC [1983] KLR 501….. this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

In our view, the alibi defence, given the foregoing was properly rejected by the two courts below.

The appellant disappeared from the scene soon after the incident and went to hide in Soiniming Location where PW5, Hillary Koech is the area Chief. According to his testimony, he was called by a village elder who informed him that the appellant was hiding in his area. He went looking for him but on seeing him approach he escaped to Kabiyet. He was pursued to Kabiyet and arrested while sleeping inside a maize store. We doubt whether the conduct of the appellant was of an innocent person. This evidence coupled with the evidence placing him at the scene of crime as well as the medical evidence clearly points to the appellant as the perpetrator of the offence. He cannot therefore be heard to say that his case was not proved beyond reasonable doubt.

Finally, is the question of failure to call the investigating officer as a witness? We do not think that this failure was fatal to the prosecution case nor that the two courts below ought to have drawn inference that should he have been called, he would have given evidence adverse to prosecution case. See **Bukenya v Uganda [1972] E.A 549.** The evidence from the six prosecution witnesses proved all the primary ingredients of the offence and connected the appellant to the offence. In any event there is no requirement in criminal proceedings that all or certain number of witnesses must be proffered before an offence is deemed proved. See **section 143** of the **Evidence Act**. On that score this ground of appeal must fail.

Turning to sentence meted out on the appellant, we note that at the time the appellant was convicted and sentenced, the Supreme Court had not yet declared that the mandatory nature of the sentences as unconstitutional in the famous case of **Muruatetu (supra).** The said decision of the Supreme Court has an immediate and binding effect on all other courts below. This Court has pronounced itself on the same in the case of **Jared Koita Injiri v Republic [2019] eKLR**, thus:-

> ***"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.***
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> ***The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
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> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

We note that the sentence imposed was the mandatory sentence under the Act. We do not think it was deserved. Consequently, we affirm and uphold the conviction of the appellant for the offence of defilement. However and pursuant to the holding in **Muruatetu's case (supra)**, we set aside the life imprisonment sentence meted on the appellant and substitute it with a sentence of 20 years imprisonment. The sentence shall take effect from 5th April 2011 when he was first sentenced.

Orders accordingly.

Dated and delivered at Eldoret this 17th day of October, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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