IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 85 OF 2018

BETWEEN

ELIJAH KIMAYAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment and sentence of the High Court of Kenya at Eldoret

(Kimondo J) delivered on 24th September 2015 in HC Cr. Appeal No. 228 of 2013)

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JUDGMENT OF THE COURT

1. Elijah Kimayai was arraigned and charged with defilement contrary to **Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.** The particulars of the offence were that on 24th June 2013 in Marigat District within Baringo County he intentionally and unlawfully caused his penis to penetrate the vagina of JK a girl aged five years. He faced an alternative count of indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act.**

2. The complainant, JK, a minor was so troubled that she was unable to give evidence. The trial court observed the minor could not talk and was crying when asked about the incident.

3. The prosecution case was grounded on the testimony of several witnesses. PW1 EK testified as follows:

> *The complainant is my daughter. She goes to nursery school. She is five years old…. I know the accused. He stays at Laboi Centre. On 24th June 2013 I was at Laboi trading centre at 8.00 pm when my daughter came and informed me that she had gone to the house and found the door open. She had entered the house and found the net missing. She had found my two children sleeping. The complainant was naked and she did not have any pant. She had realized the child had been defiled. She came to the centre where I was and we went together….. As I was looking for a bed sheet to cover the child, I found a cap and a t-shirt on the bed where the children were….. The child's private parts were injured badly. I asked my child as to who had entered into her and she stated that one man had entered and had pushed them aside before defiling the complainant…. I then informed the neighbours and we started looking for the owner of the clothes. The neighbours said the clothes belonged to a bouncer, the accused herein. We looked for him and we had him arrested. The accused agreed that the clothes belonged to him…. The child was examined and a P3 Form issued.*

4. PW2 ZI, a minor aged 10 years old, after voire dire examination testified that he was in class two. That he was home on 24th June 2013. He was asleep with the complainant, his sister. That he knew the appellant who lived at Laboi centre. That on 24th June 2013 at around 8.00 pm, the appellant entered their house. That he was able to see the appellant whom he knew as bouncer because he (PW2) had a torch. That the appellant sat on the bed. He had a red cap and a t-shirt. That the appellant pushed him aside and slept between him and his sister. That the appellant then removed his sister's pant and lay on her. That he (PW2) screamed and the appellant told him to look the other aside or he would kill him as he had a knife. That the complainant screamed. That their aunt later came and he informed her what had happened. The aunt went and came back with his mother. That her aunt called out a neighbour Ms Chebitwot who also came to the scene.

5. PW3 JK testified that she was 19 years old. That she knew the appellant. That on 24th June 2013, she had gone to Laboi centre to pick milk. On returning, she did not find the door closed as she had left it. She looked into the house and found the bed sheet covering the bed removed and the blankets were on the floor. That the complainant was naked and was crying. That she called neighbours to look after the

children as she went to call her mother. That upon return with her mother, they recovered a t-shirt and a cap on the bed where the children were. That they took the recovered clothes outside to the people who said the clothes belonged to bouncer, the appellant.

6. PW5 Kigen Bowen, a clinical officer attached to Marigat District Hospital produced in evidence a P3 Form that he had filled upon medical examination of the complaint. He testified the complainant was five years old. That the complainant had tears to her private parts and her hymen had been broken. There were tears on the vulva and laceration on the vagina. That the laceration and broken hymen proved that the complainant had been defiled.

7. In his defence, the appellant gave an unsworn statement. He stated that on the date of the incident, he was at his house sleeping when he heard people knocking at his door. He opened the door and found a lady with a knife and four people and the lady's daughter. That the lady claimed he had defiled her daughter. He was then arrested. He denied committing the alleged offence.

8. Upon hearing and evaluating the evidence, the trial magistrate convicted the appellant and sentenced him to life imprisonment. In convicting the appellant, the magistrate expressed:

> *The accused was well known to the complainant's family and there was no evidence that they had any differences before the date of the incident…. The clinical officer confirmed in court that indeed the complainant minor had suffered tears to the vulva and lacerations with perennial tears and broken hymen. That was a confirmation that indeed the minor had been defiled by actual penetration to her private parts…. PW2 had stated that the accused had left in a hurry when he heard a neighbour calling outside which made him forget his cap and t-shirt in the complainant's house. The said clothes were identified by PW1, PW2 and PW3 as the ones the accused used to wear while carrying out normal activities within Laboi township and the accused did not raise any objection to the said cap and t-shirt. The accused was properly identified and connected to the offence as PW2 had screamed for help when he heard his sister, the complainant, herein screaming in pain as the accused defiled her in his presence…...*
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> ***…****The accused was connected to the commission of the offence beyond any reasonable doubt. I find it safe to find the accused guilty and convict him for the offence of defilement…..…*

9. Upon conviction and sentence by the trial magistrate, the appellant lodged a first appeal to the High Court. His appeal was dismissed prompting the instant appeal to this Court. The grounds urged in support of the appeal are that:

> *(i) The learned judge erred when he convicted the appellant on a defective charge sheet.*
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> *(ii) The judge erred in failing to find that the prosecution had not proved its case beyond reasonable doubt.*
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> *(iii) The judge erred in failing to find that the age of the complainant was not proved beyond (sic) and no birth certificate was produced in evidence.*
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> *(iv) The judge erred in failing to find the prosecution did not call vital witnesses.*
>
> *(v) The judge erred in failing to find that all prosecution witnesses were from one family.*
>
> *(vi) The judge erred in showing bias and affirming an extremely harsh sentence.*

10. At the hearing of this appeal, the appellant appeared in person while the State was represented by learned counsel Mr. Mulamula. Both parties had filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

11. In his written submissions, the appellant contends that the medical evidence tendered in court was not sufficient to convict him. That PW5, Mr. Kigen Bowen, the clinical officer was inconsistent in his testimony; that PW5 testified the complainant had a raptured hymen yet the evidence did not indicate the age of the rapture or the age of the injury sustained by the complainant. The appellant cited the case of **Michael Odhiambo – v – Republic, Nairobi Criminal Appeal No. 471 of 2001** where it was stated that rapture of hymen per se is not conclusive proof of defilement and that rapture of hymen in small girls could be caused by other factors. In further support, the appellant cited the decisions in **David Mwingirwa Cr. Appeal No. 23 of 2015** and **The Queen – v- Mannuel Vincent [1999] AB QB 769.** It was further submitted that the P3 Form that was filled was inconsistent with the facts. That all witnesses testified that the date of the alleged offence was 24th June 2013 yet the P3 Form shows the defilement report was made on the night of 22nd and 23rd June 2013.

12. The appellant also contends there was no conclusive proof of the age of the complainant. That age is a critical factor in a defilement case and the absence of conclusive proof of age in this matter renders the appellant's conviction unsafe. That PW5 the clinical officer never stated that he had conducted an assessment on the complainant. In addition, it was submitted that the learned judge erred in failing to find that the appellant was not taken for medical examination. It was further contended the judge erred in failing to find that a crucial witness, Ms Chebiwot, was not called to testify. That PW2 stated that his aunt called out a neighbour by the name Ms Chebiwot when she visited the house, that this crucial witness ought to have been called to testify. That failure to call the witness renders the prosecution case weak and not proved to the requisite standard.

RESPONDENT'S SUBMISSIONS

13. The State in opposing the appeal submitted that the appellant was charged with the offence of defilement of a girl aged five years. That

all the ingredients of the offence were proved beyond reasonable doubt. That the age of the complainant was proved through the testimony of her mother PW1 who testified she was five years old. That the act of penetration was proved by the testimony of PW5, the clinical officer, who examined the complainant and confirmed she had lacerations and her hymen was broken.

14. Responding to the ground that the charge sheet against the appellant was defective, it was submitted the defect in the charge sheet was that the appellant was charged with defilement contrary to **Section 8 (2)** instead of **Section 8 (3) of the Sexual Offences Act.** It was submitted that the defect in the charge sheet did not occasion any prejudice to the appellant. Further, that the defect was curable under **Section 382 of the Criminal Procedure Code.**

15. On the issue of sentence, it was submitted that the two courts below did not err in imposing the mandatory minimum life sentence meted on the appellant as prescribed by law.

ANALYSIS and DETERMINATION

16. We have considered the grounds of appeal as well as the submissions made by both parties and the authorities cited. We are cognizant that our role as *a second appellate Court is confined to* matters of law. In **Karani –v- Republic [2010] 1 KLR 73** it was aptly stated:

> *"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." See also* ***Karingo -vs- R (1982) KLR 213***

17. One of the grounds urged in this appeal is that the age of the complainant was not proved beyond reasonable doubt. Nevertheless, we have examined the record and we are satisfied that the evidence of PW1, the mother to the complainant, established the age of the victim as a girl 5 years of age.

18. The other issue contended in this appeal is that a crucial witness, a one Ms Chebiwot, was not called to testify. It is trite law that the prosecution is not bound to call a multitude of witnesses to prove its case. Only relevant witnesses need be called. **Section 143 of the Evidence Act** provides that no **number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.** In **Keter – v- Republic [2007] 1 EA 135** it was held *inter alia:*

> *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

19. PW2 in his testimony before the trial court stated "Our aunt had come and called out Chebiwot and the accused had left…. When Chebiwot came, he had informed her and she had asked people for help and she had gone to the centre to call my mother."

20. On our part, we have examined the record and we are satisfied that the prosecution case was proved beyond reasonable doubt notwithstanding the fact that Ms. Chebitwot was not called to testify. The appellant has not demonstrated to our satisfaction that a miscarriage of justice took place by the failure to call Ms Chebiwot. In any event, the appellant was at liberty to request the said Ms Chebiwot to be summoned to give evidence.

21. Another ground urged is that the appellant did not commit the alleged offence. In this context, we note that an essential ingredient for proof in any criminal charge is the identity of the perpetrator of the offence. In this matter, apart from the testimony of PW2 who testified that the appellant is the one who entered the house and defiled the complainant, there is sufficient corroborative evidence that links the appellant to the offence as charged. The recovery of the appellant's red cap and t-shirt at the scene of crime conclusively placed the appellant at the scene. The recovery of these items of clothing corroborates the testimony of PW2 that the appellant was the person who entered the house and defiled the complainant. We are thus satisfied that the two courts below did not err in finding that all the ingredients for the offence of defilement as charged had been proved to the requisite standard.

22. On the issue of defective charge sheet, we have considered the submissions made by both parties. This Court observed in ***Samuel Kilonzo Musau - v - Republic, Cr. App No. 153 of 2013,*** that **Section 382 of the Criminal Procedure Code** insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also ***George Njuguna Wamae – v - Republic, Cr. App. No. 417 of 2009****).*

> *23.* ***Section 382 of the Criminal Procedure Code*** *provides as follows:*
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> ***382: "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
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> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

24. In the instant matter, we are satisfied no prejudice was occasioned to the appellant as a result of an erroneous citation of the penalty section in the charge sheet. We are fortified in our finding as record of appeal shows that the appellant was well aware of the charge he was facing and the particulars thereof.

In penultimate, we now consider the legality of the sentence meted on the appellant. The appellant was sentenced to life imprisonment. We recognize that the sentence was meted pursuant to **Section 8 (2) of the Sexual Offences Act** which imposes the minimum life sentence if the victim is below the age of 11 years. The Section stipulates that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. Both the trial magistrate and the learned judge adhered to the said provision in sentencing the appellant.

25. In **Wanjema -v- Republic (1971) EA 493** this Court stated as follows regarding interference with sentencing:

> *"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."*

26. In this matter, the two courts below imposed the mandatory sentence for the offence as charged. The issue of the constitutionality of mandatory sentences was canvassed at the Supreme Court in **Francis Karioko Muruatetu & another – v - Republic [2017] eKLR** where it was held that the mandatory nature of sentences deprives the Courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person.

27. The Supreme Court further held that the trial process does not stop at convicting the accused. That sentencing is a crucial component of a trial as it is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.

28. We are further persuaded by similar findings held by 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** on the constitutionality of mandatory sentences.

29. In the instant matter, we are satisfied that the sentence meted on the appellant by the trial court and affirmed by the High Court was the mandatory minimum life sentence as provided in Section 8 (2) of the Sexual Offences Act. The discretion of both the trial magistrate and the High Court was curtailed. Noting that on record there is mitigation by the appellant, we apply the Supreme Court dicta in **Francis Karioko Muruatetu & another –v- Republic [2017] eKLR** and find it appropriate to interfere with the sentence meted upon the appellant.

30. The upshot is that we uphold the conviction of the appellant. On sentence, we are obliged to interfere. We hereby set aside the life sentence and substitute the same with imprisonment for a term of twenty (20) years with effect from 28th November 2013 when the trial court passed the sentence.

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