



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 54 OF 2018

BETWEEN

FO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret (C. W Githua J.) dated 27th July, 2017

in

HCCRA No. 181 of 2012)

JUDGMENT OF THE COURT

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read together with **section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that between the month of November 2011 and March 2012 in Lugari District within Western Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FN, a girl aged 6 years. The appellant also faced an alternative count of an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**. The particulars being that within the same period and place, the appellant unlawfully and intentionally committed an indecent act by allowing his genital organ namely penis to come in contact with genital organ namely, vagina of FN, a child aged 6 years. The appellant denied both counts.

During the trial, the prosecution called a total of five witnesses to establish the appellant's guilt. The facts of the case briefly stated were that **MN, PW1**, and the mother to FN, a nurse by training noticed some discharge on 27th March, 2012 on the minor's pant while washing her. As it looked like feces and pus to her she assumed that FN had defecated on herself. She asked her about it but got no response. She noticed a similar discharge the following day on FN's pant and still did not elicit any response from her upon enquiry. Since she had to go work and did not have a nanny, she had her niece **LO** come over to take care of FN and her other daughter. Upon her return on 30th March, 2013, **LO** pointed out that she had noticed a similar discharge from FN. This prompted **PW1** to sit FN down and question her, the origin of the discharge. It was then that she opened up and explained that the discharge was not faeces but that it came from her vagina. She stated that the appellant, who was their shamba boy at the time was defiling her. Her exact words in Court were **"He put his thing in me"**. She further stated that the appellant had defiled her more than once though she could not remember the exact dates. The reason why she could not tell her before was that the appellant had threatened to kill her if ever she mentioned what went on between them to anybody.

PW1 then proceeded to report the matter to Lumakanda Police Station where she was directed to take FN to hospital for treatment. **PW2, Dennis Ekisa**, a clinical officer attached to Lumakanda District Hospital examined FN. The examination revealed that FN's hymen was torn and there was a yellowish discharge from the vagina. A laboratory test conducted showed presence of epithelial cells and a urine analysis disclosed the presence of pus cells and that the minor was infected with sexually transmitted disease (STD). Based on physical examination and laboratory results, **PW2** concluded that there was evidence suggestive of vaginal penetration and extra loss of vaginity. **PW2** also examined the appellant and found that he suffered from similar STD to the one FN had.

On her part, FN testified that she knew the appellant and that his name was Fred. He used to stay in their home as a shamba boy. That the appellant did something to her by putting his thing into hers. This happened in the house whenever there was nobody around. That the appellant would remove her pant and then his and then defile her. She feared telling **PW1** as the appellant had threatened to kill her if she dared to do so.

The appellant was arrested on 1st April, 2012 by PW4, Police Constable Kerina Ngina. She also had the opportunity to interrogate FN who relayed to her information similar to what she had told PW1. In her investigations, she established that the defilement occurred over a long period of time between November 2011 and March 2012. That the defilement used to take place whenever PW1 was at work. Convinced that the appellant had committed the offences, she preferred the charges.

Put on his defence, the appellant in his sworn statement denied committing the offence and stated that the charges were fabricated against him due to a debt owed to him by PW1. That he had threatened to report her to the chief over non-payment of Kshs. 3,000/=, being his monthly salary. When he attempted to report the matter to the local chief, PW1 threatened that she would report him first. True to her words he was arrested the same night on the fictitious charges of defilement.

Upon conclusion of the trial and the learned magistrates having evaluated the evidence tendered by the prosecution and the defence put forth by the appellant, he was persuaded that the appellant had committed the main offence preferred. Accordingly he convicted the appellant on the main count and sentenced him to life imprisonment.

The appellant was aggrieved by the decision of the trial court and appealed to the High Court. The learned Judge of the High Court (**C. W Githua, J**) upheld both the conviction and the sentence. Essentially, the appeal was dismissed.

Dissatisfied by the judgment of the High Court, the appellant filed the present appeal on the grounds that the first appellate court erred by: - failing to note that the trial court had violated his constitutional rights; allowing a conviction on a defective charge sheet; convicting the appellant when the prosecution had not proved its case against him and rejecting the appellant's defence of alibi.

When the appeal came up for hearing, the appellant appeared in person whereas **Ms. Oduor**, Principal Prosecution Counsel appeared for the State. Both parties had filed written submissions. The appellant solely relied on his written submissions. Ms. Oduor however highlighted her written submissions.

The appellant submitted that his conviction was unsafe as he was a child at the time of the trial and during the sentencing. That he informed the court that he was 16 years of age but the court failed to ascertain his age. Similarly, the prosecution also failed to take the appellant for an age assessment. He submitted that he was born in 1995 and was therefore 17 years during the trial.

The appellant also submitted that his rights as provided for under **Article 25 (a)** of the Constitution were violated. It was his submission that he was physiologically tortured because of the indefinite life sentence imposed on him which was not in conformity with the Constitution. He reiterated that the sentence was manifestly harsh and excessive as he was a minor at the time of the sentencing.

The appellant argued further that penetration was not proved. In support of his argument he cited the case of **Michael Odhiambo v Republic Criminal Appeal 280 of 2005, Nakuru** and **David Mwingirwa v Republic [2017] eKLR**, where it was held that rapture of the hymen per se was not conclusive proof of defilement. That rapture of hymen in small girls could be caused by other factors. On the issue that both the appellant and FN were found to suffer from the same STD, he contended that this was not true since there were no forensic tests conducted to conclusively link him to the offence. He submitted further that the courts below disregarded his alibi defence and did not give reasons and that both courts below also failed to appreciate the inconsistencies and anomalies in the prosecution's evidence and weigh it against his defence. Finally, he submitted that the prosecution did not adduce evidence sound enough to warrant his conviction.

In opposing the appeal, Ms. Oduor submitted that penetration and identification of the appellant were proved. That the appellant's defence was a sham and did not displace the prosecution's case which was corroborated by medical evidence. On the issue of the defective charge sheet, counsel submitted that the charge sheet was properly framed and was in line with the requirements of **section 137** of the **Criminal Procedure Code**. That the two courts below did not err in relying on the testimony and evidence adduced by PW2 concerning the age of the appellant. She appreciated the dicta in the case of **Francis Karioko Muruatetu & another v Republic (2016) eKLR** regarding mandatory sentences but noted that FN was 6 years old and that the appellant had defiled her whilst in the employment of FN's mother. In the premises, counsel submitted that the sentence imposed was proper and merited.

This being a second appeal, we are bound only to consider matters of law raised. This is pursuant to **section 361 (1) (a)** of the Criminal Procedure Code. Further in the case of **David Njoroge Macharia v Republic [2011] eKLR**, this Court rendered itself thus:-

“This is a second appeal. That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v. R [1984] KLR 611.”

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 appellant's constitutional rights were violated; the charge sheet was defective; the case against the appellant was proved as required and whether the two courts below erred by rejecting the appellant's defence.

The appellant submitted that his rights under **Article 53 (1) (f)** and **2** of the Constitution were violated hence his conviction was unsafe as he was a child of 16 years at the time of the trial and seventeen years during the sentencing. He claimed to have brought up the issue of his age during the trial but neither the court nor the prosecution took the opportunity to ascertain his age.

Ms. Oduor opposed this ground and contended that the lower courts did not err in relying on the evidence of PW2, the medical officer concerning the age of the appellant. Dealing with the issue the learned judge stated the following in her judgment;

“On sentence, the appellant has maintained that he was a minor aged 17 years at the time he presented his defence. Given

this claim, it would have been desirable for the learned trial magistrate to call for an age assessment report to conclusively prove the age of the appellant before sentencing him. She did not do so but considering that the appellant's age was stated in the P3 form was found to be 18 years upon his examination by PW2 before the trial started, I find that he was an adult and not a minor either during the trial or the time sentence was pronounced."

We are aware of the importance of ascertaining the age and in particular in sexual offences as it enables the Courts to determine how to handle the case and in particular when it comes to sentencing. The Constitution protects the rights of children and the Courts as the custodians of the law cannot be seen to violate the same. However for us to fault the two courts below over the issue, we must be satisfied that the appellant was a minor at the time of the trial and during sentencing.

From the record, we note that the appellant first brought up the issue of his age during his defence hearing. He did not see it fit to bring it up early during the cross-examination of PW2, the clinical officer who had indicated his age as 18 years. The appellant also did not adduce any evidence in court in support of his assertion that he was born in 1995. He would easily have tendered in evidence his birth certificate and any other documentary evidence to prove that fact. According to the trial magistrate, in his judgment, the appellant had claimed to have been forced by the investigating officer to state that he was 18 years old when he was actually 17 years old. We do not see any reason why the investigating officer would force the appellant to state that he was 18 years old when he was not. Further in his submissions before us, he claimed to have told PW2 that he was 16 years but PW2 indicated that he was 17 years old. From the foregoing, it is easy to see the inconsistency of the appellant's evidence on the issue of his age. We note further that the appellant was in the employment of the PW1. We doubt whether PW1, a nurse at that, would employ a minor as a shamba boy. This coupled by the fact that the appellant raised the issue of age only during the defence hearing and did not cross-examine PW2 on the same leads to the irrefutable conclusion that it was an afterthought. The two courts below were therefore right in rejecting the assertion.

The appellant has also argued that the charge sheet was defective. In response, Ms. Oduor submitted that the charge sheet was properly framed and was in conformity with **section 137** of the **Criminal Procedure Code**.

We would dismiss this ground at once since it was not raised before the trial court nor before the first appellate court. It is being raised for the first time before us. We thus have no benefit of the two courts below on their rendition of the same. Further, he did not even submit on it before us, or point out the alleged irregularity. But even if we were to consider the same, we do not discern anything irregular or defective with the charge sheet. It is in full compliance with the requirements of section 137 of the Criminal Procedure Code.

Did the prosecution prove its case against the appellant beyond reasonable doubt? We think so. And this is why! FN in her evidence identified the appellant as the person who sexually assaulted her at the material time. FN and the appellant were not strangers. It was common ground that the appellant had worked for them for about five years. It was therefore a case of recognition which is always more reliable than a case of mere identification of a stranger. FN's recognition of the appellant as her assailant was therefore free from the possibility of error. This recognition was further buttressed by the medical evidence tendered by PW2. Further, when both PW3 and the appellant were examined, a similar sexually transmitted infection was found in both of them. It could not have been mere coincidence that both of them were suffering from a particular genre of a sexually transmitted infection at the same time.

In convicting the appellant, the learned trial magistrate believed the evidence of PW3. She found her evidence to be consistent and that she withstood intense cross examination by the appellant. The first appellate court was of the same view. We have no reason to depart from those concurrent findings.

Under Section 124 of the Evidence Act, the learned trial magistrate was entitled to convict the appellant on the evidence of PW3 alone if she believed that she was a truthful witness and indicated her reasons for that finding on record. This is exactly what the learned trial magistrate did in this case. We are unable to fault her findings on the credibility of PW3. The appellant's defence that the case was a frame up rings hollow. The appellant never brought it up in his cross examination of PW1. The defence appears to have been an afterthought and was therefore properly rejected.

We now turn to the question of sentence. We have considered the legality of the mandatory life sentence meted out on the appellant. We are cognizant of and bound by the dicta by the Supreme Court in the case of **Francis Karioko Muruatetu & another – v- Republic [2017] eKLR**; where it rendered itself thus:-

"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

This Court has also pronounced itself on the same in various cases including **Christopher Ochieng – v- R [2018] eKLR** and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 (Ur)** in which we held that mandatory minimum sentences takes away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

In this matter, we find that the life sentence imposed on the appellant was too harsh and excessive, and calls for our intervention.

Consequently, the appeal fails to the extent that the appellant's guilt on the charge of defilement was proved beyond a reasonable doubt. On sentence, we find appropriate to interfere with the same. Accordingly, we substitute the sentence of life imprisonment with that of 20-years imprisonment effective from 29th October, 2012 when the trial court imposed the initial 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