IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 42 OF 2018

BETWEEN

ROPHAS FURAHA NGOMBO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.) dated and delivered on 3rd July, 2018

in

H.C.Cr.App. No. 23 of 2017)

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JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to Section 8(4) of the Sexual Offences Act, the particulars being that between 7th and 8th August 2014, at **[particulars withheld]** village in Konjora sub-location in Kilifi township location within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of SM, a child aged 16 years. He was tried before the Senior Principal Magistrate's' Court at Kilifi and convicted. Thereafter he was sentenced to serve 15 years imprisonment. His first appeal to the High Court on grounds that the charge sheet was defective; that the complainant's age was not established; that he was himself a minor; and that his defence was not considered was rejected.

2. In this second appeal, which under Section 361 of the Criminal Procedure Code, must be confined to matters of law, the appellant contends that the High Court failed to consider that the provision in the Sexual Offences Act providing mandatory minimum sentence under Section 8(4) violates Section 216 and 329 of the Criminal Procedure Code; it deprives the trial court jurisdiction to pass an appropriate sentence; that the age of the complainant was not proved as no birth certificate or age assessment was produced; that the clinic card that was produced in proof of age was not certified; that contrary to Section 77 of the Evidence Act, medical treatment notes were produced before the trial court by a police officer; that the complainant told the court that she was 18 years and the appellant reasonably believed that she had the capacity to grant consent; that the court did not consider that the appellant was a minor; and that his defence was not considered.

3. Urging the appeal before us, the appellant who appeared in person, relied entirely on his written submissions in which he urged that the mandatory minimum sentence prescribed under Section 8 of the Sexual Offences Act rendered his mitigation superfluous; that the provision is discriminatory, unconstitutional and void as it denies the trial court ability to exercise discretion under Sections 216 and 329 of the Criminal Procedure Code. In support, the decision of the Supreme Court in ***Francis Karioko Muruatetu & another vs. Republic, SC Pet. No. 16 of 2015*** was cited.

4. The appellant further submitted that the age of the complainant was not proved as no birth certificate or age assessment report were produced in evidence and that the clinic card that was produced could not reliably prove her age. Reference was made to a decision of this Court in ***Eliud Waweru Wambui vs. Republic, Criminal Appeal No. 102 of 2016*** for the proposition that the age of a victim of sexual offence must be proved by cogent evidence. Furthermore, the appellant submitted, the clinic card should have been produced in evidence by a doctor, as opposed to by a police officer, as required under Section 77(1)(3) of the Evidence Act.

5. The appellant further submitted that the complainant presented herself as a mature girl and spent three days with him and that he reasonably believed that she was an adult; that even though the complainant was in school, that did not rule out the appellant's reasonable belief that she was of age. Reference was again made to the decision of this Court in ***Eliud Waweru Wambui vs. Republic*** (above).

6. The appellant went on to say that he was a minor and that he was not subjected to an age assessment and his conviction was unconstitutional; that the given the age of the injuries on the complainant, a linkage with the appellant was not established; and that he was not supplied with the documentary evidence prior to the plea and Article 50(2)(a)(b) of the Constitution was violated.

7. Opposing the appeal, ***Mr. Igonga***, Assistant Deputy Public Prosecutor, submitted that the age of the victim was duly established; that the child's clinic health card that showed her age as 17 years was produced and age assessment was therefore not necessary; that the health clinic card is admissible evidence of the age of the complainant and its production into evidence by PW4 was procedural and need not have been produced by the medical doctor, PW3, who had already produced the P3 form.

8. As regards the appellant's age, counsel submitted that the same was duly addressed and it was established he was an adult and was therefore rightfully convicted and sentenced.

9. On the sentence, counsel submitted that the 15 years sentence that was imposed is lawful, although, based on the Supreme Court decision in ***Francis Karioko Muruatetu & another vs. Republic***, the court has a discretion to impose an appropriate sentence.

10. We have considered the appeal and the submissions. As indicated, by reason of Section 361(1)(a) of the Criminal Procedure Code, our mandate on a second appeal such as this and is limited to matters of law. As the Court stated in ***Kaingo versus Republic [1982] KLR 213*** :

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]."***

See also the decision of the Court in ***David Njoroge Macharia vs. Republic [2011] eKLR*** .

11. Guided by those principles and based on the amended grounds of appeal and the appellant's submissions, there are two main issues for consideration. The first is whether the respective ages of the complainant and of the appellant were established. The second issue is whether the sentence imposed is lawful.

12. But first, a brief statement of the facts as established before the trial court will provide context. Based on the testimony of the complainant's mother, SM, who testified as PW2, on 7th August 2014 the complainant (PW1) left home in the morning to go to school, **[particulars withheld]** Primary School, where she was in class five. It was the closing day. PW1 did not return home that day. PW2 reported the matter to the Chief and to the Police. A couple of days later, PW1 was brought home by her brother and on enquiry it was established that PW 1 had been with the appellant since 7th August 2014. PW2 confronted the appellant in the company of his parents, who according to PW2, stated that he had agreed with PW1 that once "*she completes school they would get married*." According to PW2, the complainant was aged 18 years as at the time PW2 was testifying on 22nd June 2015.

13. On her part, the complainant testified that on 7th August 2014 at 1.00 p.m. she was in school when the appellant called her to his place. She complied and went to the appellant's place where she found him with another person, John. After John left, the appellant asked her to remove her clothes and she complied. She remained in the appellant's place and did not go home until the 3rd day.

14. In the complainant's own words, "*on the 3 days I slept in his house we had sex*." "*I had sex with Rophus (sic) for the days I slept there*." When she eventually got home, she informed her mother, PW2, that she was at her girlfriend's place before eventually revealing that she was at the appellant's place. Thereafter they went to the appellant's place where

PW2 confronted the appellant after which they went to the police. PW1 subsequently went to hospital and on examination was given a P3 form and a post rape care form.

15. Dr. Mohamed Yones, a doctor at Kilifi District Hospital where PW1 was treated, testified as PW3, and confirmed that the complainant was examined at that hospital by a Dr. Hashim; and that the examination revealed that that PW1's hymen was broken. He produced a P3 form and a post rape care (PRC) form. PW3 further stated that the complainant's date of birth was in 1998.

16. Corporal Clara Bingo, from Kilifi Police Station (PW4) was attached to the gender and children's desk at the police station and produced the Child Health Card in respect of the complainant based on which she stated that the complainant was born in 1997. The Child Health Card was produced as an exhibit.

17. Put to his defence, the appellant gave sworn testimony in which he said nothing of the charges that he faced. All he said was that he stayed in Kibarani, was a carpenter, was the first born to his mother and that "*my father passed away*" before adding, "*I have my father who is old and relies on me*."

18. After considering the evidence, the trial court, in answering the question whether the prosecution had proved its case to the required standard had this to say:

> ***"I note that the complainant in her evidence stated that the accused called her to his home. Within that time she stayed with him for three days and they had sexual intercourse. This evidence was not seriously challenged by the accused during cross examination. This evidence was further corroborated by the doctor's evidence and other prosecution witnesses. The doctor confirmed that the complainant had been defiled as her hymen was broken. I therefore had no reason to doubt this evidence."***

19. The trial magistrate went on to conclude that the ingredients of the offence had been established in that penetration was proved, and that

the age of the complainant was proved as 17 years at the time the offence was committed.

20. On its part, the High Court was satisfied that the age of the victim was proved through the production of the Child Health Card as well as by the fact that the complainant's mother testified that the complainant was 17 years old in 2014. In that regard the court took judicial notice that a child health card is issued after the birth of a child for purposes of immunization and the data reflected thereon as to the date of birth is admissible evidence and that PW4, being the investigating officer was competent to produce the health card.

21. We cannot interfere with the concurrent findings of the courts below unless it be demonstrated that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters that court was plainly, wrong, in which case our considering such matters amounts to considering matters of law as in such cases, it would be accepted that the first appellate court failed to revisit the evidence that was before it afresh, analyze it and evaluate it as is required of it in law.

22. No doubt the age of the victim in defilement cases under the Sexual Offences Act, is a critical factor. See decision of this Court in ***Evans Wamalwa Simiyu vs. Republic [2016] eKLR***. The manner in which age may be proved is not confined to production of a birth certificate or by undertaking age assessment. In ***Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000*** for instance it was held that that apart from medical evidence, the age of the complainant may be proved by victim's parents or guardians and by observation and common sense.

23. In our view, the concurrent findings by the two courts regarding the age of the complainant is well founded.

Apart from her mother who, when she testified on 22nd June 2015 said that the complainant was 17 years when the offence was committed, the Child Health Card that was produced as exhibit 4 gave the date of birth as 7th November 1997. In effect, the complainant was 16 years and 3 months when the offence was committed on 7th August 2014. In our view, the age of the complainant was established to the required standard.

24. As for the appellant's age, the record shows that on 14th August 2014, the trial court ordered his age assessment test to be undertaken which was done and on 15th August 2014, the age assessment report was produced on the basis of which the court noted, "*I have seen the age assessment report dated 15/8/14. The accused is assessed to be 18 years old. He shall therefore be remanded at Kilifi G.K. Prison*." The appellant's complaints regarding age have no merit. We reject those complaints.

25. That leaves the question of sentence. In sentencing the appellant to 15 years imprisonment, the trial court expressed that, *"the hands of this court are tied by the law as the offence herein provides for a mandatory sentence. The accused is hereby sentenced to serve 15 years imprisonment."*

The appellant has in this appeal taken issue with that in light of the Supreme Court of Kenya decision in ***Francis Karioko Muruatetu & another vs. Republic*** where, though dealing with the question of the constitutionality of the mandatory nature of sentence under Section 204 of the Penal Code, expressed that the same deprives the court of the use of judicial discretion.

26. The legal principle underpinning the Supreme Court decision has subsequently been applied by this Court to provisions of the Sexual Offences Act. In ***Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014***, for instance, this Court had this to say:

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."***

27. We are of the same persuasion. Although the complainant was on the verge of attaining 18 years, she was a minor and incapable, legally, of consenting to sexual intercourse and it doesn't matter that there was mention by the appellant of intention to marry her upon completing school. Nonetheless, the appellant stated in mitigation that he was 23 years old, was remorseful and sought leniency, he was a first offender on whom his family relied. In those circumstances, we consider a custodial sentence of 8 years would have been reasonable punishment.

28. In conclusion therefore, the appeal on conviction fails. The appeal on sentence succeeds to the extent that we set aside the sentence of 15 years and substitute therefor a sentence of 8 years from the date of conviction on 31st May 2017.

Orders accordingly.

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

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR