IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, MURGOR & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 136 of 2015

BETWEEN

EVANS OPIYO ESAU .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (G. Dulu J.) delivered on 27th July 2015

in

H C Cr. Appeal No. 48 of 2010)

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JUDGMENT OF THE COURT

1. Evans Opiyo Esau was charged with the offence of defilement of a girl aged nine (9) years old contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. The particulars are that on 14th October, 2008 in Kakamega South District within Western Province he unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of GM a girl aged nine years. The appellant was charged with an alternative count of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**, whose particulars were that on the 14th day of October, 2008 in Kakamega South district within Western Province unlawfully and intentionally contacted his genital organ namely penis into genital organ namely vagina of GM a girl aged 9 years.

2. He denied both counts. During trial, PW1 Francis Etiali, a clinical officer attached to Kakamega Provincial Hospital testified that he examined the complainant, GM a girl child ten (10) years old at the time of examination. That upon examination, he filled a P3 Form. The complainant had a bruise on her right thigh. Her injury was four days old. That there were bruises on the majora and her hymen was broken. That there were no spermatozoa seen. HIV test was negative.

3. PW2, minor named GN; the complainant; testified as follows after *voire dire* examination:

> *On 14th October 2008, I was at home seated in our kitchen at around 1.00 pm. I was with my brother M. The accused came and opened the door. He held me on my hands and put me on the ground and removed all my underpants. He lifted my full dress, unzipped his trouser and removed his thing. It is something he has. He slept on me. Then put his thing into mine. It is where I urinate from. He hurt me when he put his thing into mine. When P my aunt came in, she found him doing. He was putting his thing and pushing his finger into my thing where I urinate. I was crying all along loudly. M saw it all. M is my follower and he walks, he talks well. He was also crying a lot but could not do anything. Accused was holding my throat all the time. When P came, she also started crying when she saw what was happening. She went to call our grandmother. The accused took the opportunity to escape…. My grandmother took me to Musundi the assistant chief and reported. The accused was arrested and beaten up.*

4. PW2 continued in her testimony while pointing at the appellant and stated *"I know you as Evans. I have known you for many years. You are the only person who walked into our kitchen."*

5. PW3, RM another minor, testified after *voire dire* examination that on 14th October 2008, she had come home for lunch from school. She found the appellant had removed the pants of complainant and had squeezed her on the wall. That she saw the appellant doing bad manners to the complainant. He was raping her. The appellant threatened to beat her up as he ran away. That in the kitchen there was a young child

M. The complainant was crying.

6. PW4 Jonathan Musundi testified that he was the assistant chief of Mukulusu sub-location. That on 14th October 2008, he received a report from the grandmother of the complainant (Mrs MB) who informed him that the complainant had been raped by the appellant. That he went to the appellant's home and arrested him. Thereafter, he called the Police who re-arrested and took the appellant to Kakamega Police Station.

7. In his defence, the appellant gave an unsworn statement. He denied committing the offence. He stated that the allegations were false; that he knew nothing about the charge and the alleged offence.

8. Upon evaluating the evidence on record, the trial magistrate convicted the appellant for defilement and sentenced him to life imprisonment. In convicting the appellant, the magistrate stated:

> *I have considered the evidence by the prosecution which was generally not contested by the accused. The complainant PW2 gave very detailed evidence on what transpired that afternoon when the accused walked into the complainant's kitchen and defiled her. Although she did not have a better term to describe the accused sexual organ which she referred to as "thing", the description of his actions left no doubt in my mind as to what happened that day. The accused is well known to the complainant… PW3 walked into the room and when she saw what was happening to her sister, threatened to report the incident and the accused threatened her instead… I had the privilege of observing PW2 who struck me as a very forthright witness. Her demeanour is that of a very confident child and when PW3 confirmed her story, I am of the view that both were honest witnesses and I have no doubt that they were both telling the truth despite their age…. I am of the respective view that the prosecution had proved its case beyond all reasonable doubt and since the accused did not tender any meaningful defence the evidence remains unchallenged (sic). I therefore found the accused guilty of the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006….*
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> **….** *I note that the mandatory sentence provided is life. I therefore sentence the accused to imprisonment for life.*

9. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. His appeal was dismissed. In his memorandum of appeal to this Court, the appellant lists three grounds of appeal namely: that the age of the victim was not proved beyond reasonable doubt; that he was not positively identified as the perpetrator of the offence: that the life sentence meted upon him is harsh and does not meet the parameters of criminal responsibility, retribution and rehabilitation.

10. At the hearing of the instant appeal, while the appellant appeared in person the State was represented by the Prosecution Counsel Mr. Peter Muia. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

11. The appellant accentuated that age is an integral component in establishment of defilement as a sexual offence. That in the instant case, the age of the complainant was not established by way of production of any documentary evidence such as a birth certificate or baptismal card. That the victim's parents did not testify as to the age of the complainant and no age assessment report was produced in court. To this extent, the appellant submitted it was unsafe to convict him when the prosecution had failed to establish the age of the victim.

12. The appellant further submitted that the life sentence meted upon him was harsh. That the Supreme Court in the case of **Francis Karioko Muruatetu & another – v- Republic, SC Petition No. 16 of 2015** held that mandatory sentences are unconstitutional. To this extent, it was submitted that the two courts below erred in meting upon the appellant the mandatory life sentence provided for under **Section 8 (2)** of the **Sexual Offences Act**.

13. The appellant concluded his written submissions by urging us to find that there is mitigation on record and added that he is remorseful; he is a first offender; that he is a young man who should be given a second chance in life; that he has been rehabilitated during the period that he has been in prison.

RESPONDENT'S SUBMISSION

14. The State in opposing the appeal recapped that this was a second appeal that must be confined to matters of law. That all the ingredients of the offence of defilement as charged were proved to the requisite standard. That the age of the complainant was proved through the testimony of PW1 and PW2. That PW1, Francis Etiali, the clinical officer who examined the complainant testified to the effect that the complainant was 10 years old at the time of examination. That the post rape care form indicated that the victim was born in September 1999 thus putting her age at the time of defilement at 9 years old. It was further submitted that the victim testified she was in class one. The respondent urged this Court to take judicial notice that children in class one are usually below the age of ten (10) years.

15. Submitting on the sentence, the respondent urged that the life sentence meted upon the appellant was lawful as it was provided for in law under **Section 8 (2)** of the **Sexual Offences Act**.

ANALYSIS and DETERMINATION

16. We have considered the appellant's grounds of appeal, the submissions by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal Procedure Code****, a second appeal is confined to* matters of law. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219;

> "*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 Karari C/O Karanja -vs- R (1956) 17 EACA 146**)"*

17. In this appeal, the two courts below arrived at concurrent findings of fact that the appellant committed the offence of defilement as charged. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court namely:

> *"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. A pivotal ground urged by the appellant in this appeal is that the age of the complainant was not proved beyond reasonable doubt. That there was neither a birth certificate, baptismal card nor an age assessment report verifying and proving the complainants age. In **Paul Otieno Okello - v- Republic, [2019] eKLR**, the learned judge of the High Court correctly and persuasively stated thus:

> *I hereby reiterate 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.*

19. In the instant matter, PW1 testified that he medically examined the complainant who was aged 10 years. The post rape form indicated that the complainant was born in September 1999. Guided by these two items of evidence, we are satisfied that it was proved the complainant was a child as per the definition in the **Sexual Offences Act** and **Children Act**. For purposes of sentencing under the **Sexual Offences Act**, we are satisfied that the prosecution proved the complainant was not a child of twelve years and above.

20. The evidence on record also shows that all the ingredients for the offence of defilement were proved. In the first instance, the complainant identified the appellant by way of recognition as the perpetrator of the offence. The offence took place at 1.00 pm during broad day light. PW 3 also testified that he found the appellant in the act of defiling the complainant. Just as the two courts below, we are satisfied that the testimony of PW2 and PW3 not only identified the appellant through recognition but also corroborate the fact that the appellant defiled the complainant. The testimony of PW3 is an eye witness account of the act of defilement. We are thus satisfied that the two courts below properly convicted the appellant for the offence of defilement as charged. Consequently, we affirm and uphold the conviction of the appellant for the offence as charged. We note that the trial court considered the credibility of PW2 and PW3 and was duly satisfied that despite being of tender years, the two witnesses were credible, honest and spoke the truth. We have no hesitation in affirming the credibility of the two witness as the trial court was better placed to examine and assess the demeanour of the witnesses.

21. On sentence, the appellant contends that the mandatory life sentence meted upon him is harsh. 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** considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court observed that the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic** (supra) held that a mandatory sentence fails to conform to the tenets of fair trial that accrue to an accused person under the provisions of **Article 25 of the Constitution.** Guided by the aforestated Supreme Court decision, this Court in **Christopher Ochieng – v- R** (supra**)** 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 for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.*

22. In this appeal, guided by the merits of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic** (supra) and persuaded by the decisions of this Court in **Christopher Ochieng – v- R** (supra) and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014** in relation to sentencing, we are convinced and satisfied that the life imprisonment meted upon the appellant by the trial magistrate and as upheld by learned judge cannot stand. We are inclined to intervene on sentence as we hereby do and set aside the life imprisonment meted upon the appellant. However, we uphold the conviction of the appellant for the offence of defilement.

23. As regards an appropriate sentence, we have considered the mitigation made by the appellant as per the record. In the instant matter, we note that there are aggravating factors that favour a longer sentence of imprisonment for the appellant. The record shows that a probation officer's report was called for regarding the appellant. The appellant initially gave the probation officers a misleading report on the direction to his home. The probation report shows the appellant had several criminal cases of stealing people's properties and disappearing from home to return when things have cooled down. In our considered view, the probation report contains factors militating against a short period of imprisonment. Nevertheless, guided by the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic** (supra), we hereby set aside the life sentence meted upon the appellant and substitute the same with imprisonment for a term of thirty (30) years with effect from the date of sentence by the trial court on 9th February 2010.

24. The upshot is that we affirm and uphold the conviction of the appellant for the offence of defilement as charged. We however set aside the life sentence meted upon the appellant and substitute the same with imprisonment for a term of thirty years with effect from 9th February 2010.

Dated at Kisumu this 7th day of October, 2019

ASIKE MAKHANDIA

……..

JUDGE OF APPEAL

AGNES K. MURGOR

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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