IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, MUSINGA, & ODEK, JJ.A)

CRIMINAL APPEAL NO. 96 OF 2016

BETWEEN

PWO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (A.C. Mrima, J.) delivered on 30th April 2015 in H.C. Cr. Appeal No. 222 of 2012)

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JUDGMENT OF THE COURT

1. PWO was arraigned before the Magistrates' Court on the offence of defilement contrary to ***Section 8 (1)*** and ***(2)*** of the **Sexual Offences Act.** The particulars were that on the 17th day of April, 2012 at about 5.00 pm at [particulars withheld] sub-location in Matungu District within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of AS, a girl aged six (6) years old.

2. The prosecution case was grounded, *inter alia*, on the testimony of the complainant, AS (**PW2),** who after the *voire dire* examination testified as follows:

> **"I am A.S. I am in nursery school. I live with Shosho (PW1). My dad is called s (points at the accused). My mum is PN She is at home.**
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> **On 17th April 2012 at 5.00 pm, I was at my father's place from Shosho's place. Daddy told me to go to his place. I had gone to pick firewood and he said I pick pen and paper from his place. I reached home. Daddy had gone to drink alcohol. He came back later and he was drunk. I was waiting for Daddy outside and when he came he told me to take book and pen.**
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> **He told me to go to the kitchen and he closed the door. I saw his trouser falling down. He tore my panty and threw it away. He put me down on the floor and came on top of me and started rubbing against me. He did manners which are bad to me. He put it (shows/points in between accused legs) in my private part (points between her legs). I felt pain here (show in between her legs). I tried screaming but he held my mouth. Blood came out of my private part. He ran away and I went back and told Shosho what he had done.**
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> **Shosho saw blood coming out of my private part and I told her what Daddy had done. Shosho took me to the sub-chief and he told me to go to hospital. We went to Namulungu dispensary. I also went to Matungu Dispensary. I was taken to Mumias Police Station together with the sub-chief and my Shosho. I gave out my report to a police woman who was there. I did not know that my Dad was arrested. He did bad manners to me.**
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> **No one told me to tell lies. Shosho did not tell me to say that you defiled me. ….. It is you who did bad manners to me. I was not told by anyone to say it was you. I was treated in hospital the same day."**

3. RK (PW1), testified that she is the grandmother to PW2 the complainant. She testified as follows:

> **"I know AS, she is my granddaughter. …My daughter is married to the accused who is in court. They are no longer staying together.**

…..On 17th April 2012, my granddaughter AS told me that the father (accused) had called her to give her pen and book. I agreed and allowed her to go. It was the first time I allowed her to go. She was in black dress and had a panty on. She left at 5.00 pm and when she was back it was dark. She came alone and I saw blood coming out of her vagina. I examined her and I saw blood coming out of her vagina.

I asked her about it and she told me that the father had told her to go to the kitchen, closed the door and then he got on top of her, on the floor and inserted his penis into her vagina. She told me that the father (accused) held her mouth, she could not scream. It was in the kitchen. The panty remained in that house.

I carried her and took her to Namulungu dispensary that very day. I have a treatment chit from Namulungu dispensary. The next day I took her to Matungu sub-district hospital. She was treated and discharged the same day. After hospital, we were with the sub-chief of Namulungu, who is also a witness. We went to Mumias Police Station to report the incident. At Mumias Police Station we wrote statements.

4. George Mukhisa Walita (**PW4**), a clinical officer at Matungu sub-district hospital testified that on 20th April, 2012 he examined the complainant. An age assessment was done and she was found to be below the age of 10 years; and that her real age could be six years; A P3 Form was filled confirming that there was a perineal tear of the vagina, the hymen was raptured and there was blood from the vagina. He produced the P3 Form as an exhibit in court.

5. The appellant in his defence gave sworn testimony. He stated that on 17th April, 2012 at 5.00 pm, he was at work planting maize at Bukananachi. That when he came from work nothing happened. That on 20th April, 2012 when he was at work he was arrested and taken to Namulungu Police Station. He testified that he never defiled his daughter, and that he has never defiled anyone. He thinks the complainant and **PW2** were against him since he separated from his wife.

6. Upon evaluating the prosecution and defence evidence, the trial magistrate convicted the appellant and sentenced him to life imprisonment. In convicting the appellant, the magistrate stated:

"The medical assessment of the complainant was produced in court and it shows the complainant was under the age of 10 years to be precise and that complainant was six years old. I therefore have no doubt that the complainant is under 10 years old.

Now to the issue of penetration, the same is demonstrated vide the evidence of PW2 which is corroborated by PW4 the clinical officer from Matungu sub-district hospital….. Going by PW4's evidence after examining PW2, a perineal tear of the vagina and a raptured hymen was visible. There was blood from the vagina of the complainant and his conclusion is that the minor had been defiled. ….

It is therefore clear in my mind that the minor was indeed defiled.

The pending issue is whether it was actually the accused who defiled PW2. It is on record that the incident occurred at 5.00 pm. PW2 candidly narrated how the accused took her to the kitchen and defiled her. She knew and recognized the accused as her father. She soon thereafter named the accused to the grandmother and equally to the clinical officer and the investigating officer. No time had lapsed. I do find that there was no chance of mistaken identity as she recognized the father."

7. Aggrieved by the conviction and sentence meted by the trial court, the appellant lodged a first appeal to the High Court. His appeal against conviction and sentence was dismissed. In dismissing the appeal, the learned Judge (Mrima, J) expressed himself as follows:

"…. I have examined the evidence of the complainant… I do not find any reason to depart from the finding of the learned magistrate. Without shifting the burden of proof, the appellant in the course of trial did not challenge the evidence or even raise any issue on the possibility of mistaken identity but instead stated that he did not commit the offence. Equally, the appellant did not effectively bring out the aspect of grudge with the grandmother of the complainant…...

In this appeal, however, the record is quite clear that the evidence of PW2 (the complainant) was duly corroborated by that of PW1 (the complainant's grandmother) and PW4 (the clinical officer) hence the issue of corroboration is settled.

On severity of sentence, the appellant having been charged and found guilty under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act and accordingly convicted, the only sentence is life imprisonment and that is what the learned magistrate handed down. There is no error thereof. That appellant has therefore not satisfied this Court that the appeal has any merit. The same is therefore dismissed."

8. Aggrieved by the dismissal of his appeal, the appellant has lodged the instant second appeal to this Court. The grounds in support of the appeal are that:

"(i) That the two courts below erred in failing to consider that there were no other independent witnesses to support the complainant's testimony.

ii. That the two courts below erred in failing to consider the need for DNA test following the vendetta between the appellant and PW1 (grandmother to the complainant).

iii. That the courts below failed to scrutinize the medical report on the issue of penetration.

iv. That the trial magistrate's decision was made without jurisdiction and by not considering other material facts like prior existing relationship between the appellant and PW1.

v. That the appellant's alibi defence was not properly considered.

vi. That the swab done by the medical expert in inserting a finger into the private parts of the complainant was unconstitutional and could be one organ that was used to penetrate and break the hymen."

9. At the hearing of this appeal, the appellant appeared in person. The State was represented by, the Prosecution Counsel I, ***Mr. Peter Muia***. Both parties filed written submissions and relied upon the same.

APPELLANT'S SUBMISSIONS

10. In his written submissions, the appellant urged that the learned judge did not consider that there was malice on the part of PW1 (complainant's grandmother); that the appellant married PW1's daughter and the marriage did not last as the appellant was not a rich person; that due to separation with her daughter, PW1 had a motive to fabricate the allegations against the appellant and that the ill motive of PW1 is evident when one considers that the mother of the complainant did not testify.

11. It was further submitted that the judge erred in convicting him based on personal opinion and anticipation; that the evidence on record did not prove that the clinical officer who used a bad procedure of swab with a finger could have caused the complainant's hymen to be broken and that it beats logic why there were no bruises on the private parts of the complainant if at all there was penetration. The appellant further submitted that he was not subjected to a medical test (DNA) to determine if he was responsible for the defilement. That his home is not far from the complainant's home and PW1 could have informed the appellant's parents whom he stays with before reporting the matter to the chief.

RESPONDENT'S SUBMISSIONS

12. The respondent in opposing the appeal urged that this was a second appeal against conviction and sentence; that the ingredients of the offence of defilement were proved beyond reasonable doubt; that it was proved that the complainant was below the age of ten years and that there was penetration and the appellant was identified through recognition as the person who defiled the complainant.

13. It was further submitted that although there were no independent eye witnesses to the offence, the two courts below did not err in relying on the evidence of **PW2** who was the victim of the offence. Counsel cited the provisions of ***Section 124*** of the **Evidence Act** to support the proposition that in sexual offences, the evidence of a victim is sufficient to convict an accused person.

14. On the sentence, it was submitted that the life sentence meted upon the appellant was the mandatory sentence under the provisions of ***Section 8 (1)*** as read with ***Section 8 (2)*** of the **Sexual Offences Act.** The prosecution urged us to uphold the conviction and not to interfere with the sentence meted on the appellant.

ANALYSIS and DETERMINATION

15. We have considered the record of appeal as well as submissions made by the appellant and the respondent. This is a second appeal which is confined to matters of law only. In ***M'Riungu vs. Republic [1983] KLR 455***, this Court stated thus:-

"Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".

16. The appellant was charged with the offence of defilement. In **John Mutua Munyoki vs. Republic [2017] eKLR**, this Court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

i. The victim must be a minor, and

ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

17. In the instant appeal, the evidence of **PW2** explicitly placed the appellant at the scene of crime. **PW2**, the complainant, is the daughter of the appellant. For this reason, we have no doubt in our mind that the appellant was recognized by the complainant. We thus agree with the findings of the two courts below that there was no mistaken identification of the appellant as the perpetrator of the alleged offence.

18. On the issue of penetration, **PW2** recounted how the appellant lured her into the kitchen and defiled her on the floor of the kitchen. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence, (See ***Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported).*** **The slightest penetration is enough to prove defilement.**

19. In the instant matter, the evidence tendered in proof of penetration is the testimony of **PW2** who testified that the appellant took his

genital organ and inserted it in her genital organ. In the words of **PW2** she stated "He put me down on the floor and came on top of me and started rubbing against me. He did manners which are bad to me. He put it (shows/points in between accused legs) in my private part (points between her legs). I felt pain here (show in between her legs). I tried screaming but he held my mouth. Blood came out of my private part. He ran away....."

20. The testimony of **PW2** is a victim's direct evidence and a narration of how the defilement took place. It requires no corroboration if it is believed. See ***Section 124*** of **Evidence Act**. Even if corroboration was necessary, the testimony of **PW2** on penetration is corroborated by the testimony of PW1 who saw blood coming out of the private parts of the complainant. Penetration is further corroborated by the evidence of **PW4**, the clinical officer, who testified that the hymen of the complainant was broken. In this appeal, we are convinced by the complainant's testimony as corroborated by **PW1** and **PW2** and we are satisfied that the two courts below did not err in finding that penetration was proved beyond reasonable doubt.

21. In an attempt to disprove that he was responsible for the penetration, the appellant urged that the vaginal swab by a finger performed on the complainant by the clinical officer (**PW4**) could as well have caused her hymen to break. We have considered this submission and find it has no merit. The evidence of **PW2** is direct testimony by the victim. The evidence of **PW1** that she saw blood coming out of the private parts of the complainant is an event that took place before the vaginal swab by the clinical officer. The swab was a *post facto* event. Bearing this in mind, we are satisfied that the evidence of **PW2** taken together with the evidence of **PW1** discounts the hypothesis that the post-defilement vaginal swab by finger could have caused the complainant's hymen to be broken.

22. The appellant further submitted that his *alib*i defence was not considered. This ground has no merit. In considering the *alibi* defence, the learned Judge correctly expressed himself as follows:

> **"…It is imperative to note that a party raising the defence of alibi is not under any legal obligation to establish that the alibi is reasonably true. All one has to do is to create doubt as to the strength of the case for the prosecution. The alibi defence can only be disproved by very strong prosecution evidence which cannot be shaken and where no doubt can reasonably be created. (See Haro Guffil Jiilo – v- Republic [2014] eKLR…...)**
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> **….. the complainant explained how the ordeal by his father went on. The possibility of mistaken identity could not reasonably arise given the relationship between the two. On returning home, it was the complainant who informed PW2 what had transpired…. PW2 confirmed the status of the complainant's private parts.**
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> **The above analysis truly militates against the appellant's defence in that the prosecution evidence remains so strong and unshaken and no doubt can be created. This court therefore finds that the appellant was properly placed as the perpetrator and wholly concurs with the finding of the learned magistrate on this aspect."**

23. On our part, we have considered the appellant's contestation that his alibi defence was not considered. We are satisfied from the testimony of **PW2** as corroborated by **PW1** that the appellant was positively placed at the scene of crime and his alleged *alibi* is an afterthought that neither casts doubt nor shakes the prosecution case. Coupled with the evidence on recognition, the prosecution proved its case against the appellant beyond reasonable doubt.

24. On the alleged vendetta between the appellant and PW1, we find the same has no merit. There is sufficient evidence that the complainant was defiled by the appellant and that the victim was below the age of ten years. There is evidence of penetration which is corroborated by medical evidence. Even if there was proof that a vendetta existed (of which there is no evidence on record), all the ingredients of the offence of defilement as charged were proved beyond reasonable doubt. In any event the issue of vendetta is really a matter of fact.

25. In this appeal, it has been urged that since no DNA was conducted, there is no evidence linking the appellant to the offence of defilement as charged. A ground analogous to the one urged in this matter was considered by this Court in **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** where it was stated:

> **"[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to Section 36 of the Sexual Offences Act which evidence could have exonerated him. In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:**
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> > **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**
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> **[20] This was further affirmed in Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported) where this Court stated that:**
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> > **"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**
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> **[21] Moreover, section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". *Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case."***

26. Persuaded by the merits of the above cited decisions of this Court, we find that failure to conduct a DNA test on the appellant did not dent the prosecution case. There is direct evidence of PW2 as corroborated by the evidence of the clinical officer (**PW4**) that links the appellant to the offence as charged. With or without DNA analysis, the evidence on record conclusively points to the appellant as the person

who defiled the complainant.

27. In penultimate, we have been called upon to interfere with the sentence meted out on the appellant by the trial court and as affirmed by the High Court. The ground urged is that the sentence meted out is harsh and excessive and the discretion of the two courts below was curtailed by the mandatory nature of the sentence under ***Section 8 (2)*** of the **Sexual Offences Act**.

28. In **Adan Muraguri Mungara vs. Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court in the following terms:

> **"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." See Aggrey Mbai Injaga v Republic [2014] eKLR."**

29. On record there was evidence to show that the complainant was below the age of 10 years at the time the offence took place. The trial magistrate meted out a life sentence on the appellant. The sentence was affirmed by the learned judge on 30th April 2015. We note that the High Court's judgment which affirmed the sentence was delivered before the decision of the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic SC Petition Nos. 15 & 16 of 2015** which held that the mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case.

30. It is important to note that as per the provision of ***Article 163 (7)*** of the Constitution, all courts, (other than the Supreme Court) are bound by the decisions of the Supreme Court. Therefore, this Court is bound by the doctrine of *stare decisis* to apply the principles laid down in the case of **Francis Karioko Muruatetu & another vs. Republic (Supra)**. We are further persuaded by the various decisions of this Court in **Christopher Ochieng vs. R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri vs. R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory minimum sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

31. Accordingly, we find that the two courts below lacked discretion in determining the appropriate sentence in the circumstances of the case. We are cognizant that the appellant defiled his six-year-old daughter. This is a factor that has weighed upon our decision in determining an appropriate sentence. The learned judge in upholding the life sentence meted upon the appellant stated that the only sentence in law is life imprisonment. This perforce meant that the judge considered he had no discretion in the sentence to be meted out. This goes contrary to the decision in **Francis Karioko Muruatetu & another vs. Republic (Supra)**. Accordingly, we hereby interfere with the life sentence meted upon the appellant.

32. The final orders are that we affirm and uphold conviction of the appellant for the offence of defilement as charged. We set aside the life sentence and substitute it with a sentence of twenty-five (25) years' imprisonment with effect from 13th September 2012 when the trial court passed sentence.

Dated and delivered at Kisumu this 7th day of October, 2019

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR