IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED. JJ.A)

CRIMINAL APPEAL NO. 187 OF 2018

BETWEEN

SOLOMON LIMANGURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale, ***(Chemitei, J.)*** *dated 21st September 2017*

in **HCCR. NO. 103 OF 2016)**

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JUDGMENT OF THE COURT

Background

[1] Solomon Limangura, (the Appellant) is before us in this second appeal in which he challenges the dismissal of his first appeal by the High Court (Chemitei, J.). The Appellant was tried and convicted in the Chief Magistrate's Court at Kitale for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act (the Act).

[2] The particulars of the offence were that on 31st May, 2011 at [particulars withheld] Farm within Trans Nzoia County, the appellant intentionally and unlawfully did cause his penis to come into contact with the vagina of **AN** (name withheld) a girl aged 11 years in violation of the said Act.

[3] During the trial, the prosecution called four (4) witnesses. These were the minor complainant (the complainant), her grandmother, **RN** (R), **Dr. Odhiambo Edward (Dr. Odhiambo)** a medical officer at Endebess Hospital who testified on behalf of **Dr. Kagundi**, the complainant's uncle **JMJ** (J), and the Investigating Officer, **P.C. Stanley Chepkwony** (PC Chepkwony).

[4] It was the complainant's testimony that on the material day, her grandmother, **R** sent her to pick milk from the appellant's home at about 6.30pm. The complainant testified that the appellant was their neighbour and she collected milk from the appellant's wife; that on her way home she met the appellant, who was on his way to his home. It was complainant's further testimony that the appellant held her hands and carried her into a maize farm. She tried to scream but he strangled her and did what she termed as "bad manners." She testified that the appellant lay on her and penetrated her vagina and she bled and her underwear was blood stained. He then released her and she went home and told her grandmother what had transpired.

[5] It was **R's** testimony that the complainant was trembling when she went back home; that upon checking the complainant's private parts she found that they had a watery substance. She called a village elder and they went with the complainant who showed them the place in the maize plantation where the appellant had defiled her; that the appellant was also present. It was R's further testimony that she then reported the incident at Endebess Police Station and the complainant was taken to hospital. **R** further testified that she had good relationship with the appellant and that she had lived with the complainant since she was born as her mother got married in Kakamega while her father was deceased.

[5] The complainant was examined at Endebess Hospital and a P3 form filled by **Dr. Kagundi**. The P3 Form was produced in evidence by Dr Odhiambo who testified that he had worked with **Dr. Kagundi** for 3 years, and that he therefore knew his signature and handwriting. In the report Dr Odhiambo noted that the complainant's hymen was broken and still fresh looking and had some whitish discharge on her

private parts. In **Dr. Odhiambo's** opinion there was forced sexual contact. The appellant was later arrested and charged and **PC Chepkwony** was assigned to investigate the case.

[6] In his defence, the appellant gave an unsworn statement and did not call any witnesses despite having indicated that he would call 4 witnesses and being given an opportunity to call them. He denied the offence and stated that on 1st June, 2014 he was at home at 10 am when a neighbour accused him of defiling a child; that he denied knowing the victim or defiling her and that he was taken to Endebess police station where he denied the charges but was arraigned in court the following day. He maintained that he did not know why he was arraigned in court.

[7] In his judgment, the trial Magistrate found that the prosecution had proved the charge against the appellant beyond reasonable doubt. He rejected the appellant's defence, convicted him of the offence of defilement contrary to **section 8(1)** and sentenced him to life imprisonment in compliance with **section 8(2)** of the Sexual Offences Act.

[8] Dissatisfied with the judgment of the trial court, the appellant filed a first appeal to the High Court. raising six (6) grounds of appeal which were; that the trial court based its findings on inadequate evidence; that the charge was not proved beyond reasonable doubt; that the complainant had not positively identified him as the person who had defiled her; that all elements of the offence of defilement were not proved; that there were material contradictions in the evidence of the prosecution witnesses; and that he was convicted on the uncorroborated evidence of a minor.

[9] The State opposed the appeal on the grounds that the prosecution produced sufficient evidence and proved the charge beyond any reasonable doubt; that the appellant was positively identified; that penetration was proved; that there was clear evidence linking the appellant to the offence; and that the sentence meted out was lawful.

[10] The learned Judge found that penetration was proved by the evidence of the complainant and other witnesses including the medical report which confirmed penetration and that the complainant had known the appellant for long and could not have mistaken him. The learned judge also noted that the defilement occurred at around 6.30 pm and 7 pm, a time when there was some light and not total darkness as alleged by the appellant and the complainant could therefore identify the appellant as her assailant as he was the complainant's immediate neighbour.

[11] Regarding the age of the complainant, the learned judge found that although the charge sheet indicated the complainant's age as 7 years, **R** produced the complainant's birth certificate which proved that the complainant's age was 11 years; that whether the complainant was 7 years or 11 years did not water down the offence; nor was it prejudicial to the appellant as it would not affect the sentence imposed on the appellant. The learned judge dismissed the appeal.

[12] Undeterred, the appellant filed this second appeal on the grounds that:

(i) The prosecution evidence was contradictory;

(ii) The prosecution case was not proved to the required standard;

(iii) Crucial witnesses did not testify;

(iv) Identification of the appellant as the perpetrator was not proved;

(v) The elements of the offence of defilement were not proved; and

(vi) The sentence meted against the appellant was manifestly harsh and excessive.

Submissions

[13] At the hearing of the appeal, learned counsel for appellant, **Mr. R.E. Nyamu** relied on his written submissions the sum total of which was that the doctor's evidence was based on hearsay; that the prosecution had failed to identify the scene of the crime or place the appellant at the scene of crime; that the prosecution case was not proved; and that the sentence imposed on the appellant was harsh and excessive.

[14] Learned Prosecuting Counsel. **Ms. R. N. Karanja**, appeared for the State and relied on her written submissions. She opposed the appeal and argued that all the ingredients of the offence were proved beyond reasonable doubt; that the medical report, that is the P3 form, indicated that upon examination of the complainant, her hymen was broken and it was still fresh looking, and that **Dr. Odhiambo** who prepared the report observed that there was forced sexual contact as evidenced by the torn hymen, and that this proved penetration. On the issue of age, **Ms. Karanja** submitted that the birth certificate produced in court proved that the complainant was eleven (11) years; that the fact that the charge sheet stated that she was seven (7) years is a mere error which does not in any way prejudice the appellant; and that the minimum sentence of life imprisonment applies when the victim is eleven (11) years or below. On the issue of identification, **Ms. Karanja** submitted that the complainant was defiled at about 6.30pm when it was not dark; that the appellant was not a stranger to the complainant as he was an immediate neighbour; that the recognition of the appellant by the complainant was satisfactory and reliable; and that the prosecution called five (5) witnesses whose evidence was consistent.

Determination

[16] We have considered the appeal, the rival submissions, the authorities cited and the law. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only.

Section 361 of the Criminal Procedure Code states:

> **"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –**
>
> ***(a)* on a matter of fact, and severity of sentence is a matter of fact; or**
>
> ***(b)* against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

[17] As a second appellate Court it is now our obligation to reconsider and evaluate the evidence which was adduced in the lower court as reflected in the record of appeal, taking into account the relevant law, with a view to determining whether the prosecution evidence was built on hearsay; whether the charge against the appellant was proved to the required standard; whether the complainant positively identified the appellant as the person who defiled her; and whether all the elements of the offence were proved.

[18] In regard to the contention that the prosecution relied on hearsay evidence to build its case, we find that the complainant gave direct evidence on what transpired on the material day. **Dr. Odhiambo** produced the medical report on behalf of **Dr. Kagundi**. Although the record does not show why **Dr. Kagundi** did not testify, we find that the provisions of section 72 of the Evidence Act were complied with since attestation was proved and no objections were raised by the appellant during trial. In addition, the evidence of the complainant that she was defiled was corroborated by all the other material witnesses.

[19] The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The onus was on the prosecution to prove the particulars of the charge.

Sections 8(1) and **8(2)** of the Sexual Offences Act provide as follows:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(2). 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."**

[20] Thus the prosecution had to establish the following ingredients to prove the charge; that there was penetration of the complainant's genital organs committed by the appellant and that the victim was a minor. In the instant appeal there was sufficient evidence adduced by the complainant, her grandmother **R** and **Dr. Odhiambo** which indicated that the complainant was defiled and that she suffered injuries to her private parts which confirmed that there was penetration.

The evidence relating to the age of the complainant was of concern to us. This is because although a birth certificate was produced which showed that she was born on 2nd August 2003 and therefore just slightly under 11 years at the time of commission of the offence, the Doctor who examined the complainant and filled the P3 form estimated her age as 7 years, and this explains why the charge sheet indicated her age as 7 years. Noting that the complainant's birth was actually registered after the defilement incident, there is a possibility that the information in the birth certificate may not have been accurate. Be that as it may, the inconsistency has not caused any prejudice as section 8(2) of the Sexual Offences Act covers a child who is 11 years or less.

[**21**] Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her, that she knew the appellant since he was their immediate neighbour and she used to be sent to buy milk from his house. The complainant identified the appellant by name to her grandmother. Both the two lower courts believed the complainant's evidence and accepted it as truthful. The evidence of **R** that the complainant informed her that the appellant had defiled her; and that the appellant was her neighbour and therefore well known to her was consistent with the evidence of the complainant. The identity of the defiler was therefore clearly established and consequently this ground must fail.

[22] We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. As regards sentence, the evidence adduced before the trial established that the complainant was under the age of 11 years, and the sentence prescribed by the Sexual Offences Act is life imprisonment. We take note of the Supreme Court of Kenya's decision in ***Francis Karioko Muruatetu & Another v Republic SC Petition No. 15*** as consolidated with Petition No. 16 of 2015 (the Muruatetu decision) in which the Supreme Court held that the mandatory death penalty as provided under Section 204 of the Penal Code is unconstitutional as it deprives the courts discretion to impose an appropriate sentence depending on the particular circumstances of each case. This Court in ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014*** extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. In the instant case, the minor complainant was 11 years old. The trial court noted the appellant's mitigation that he was the breadwinner of seven (7) children.

[23] This Court in ***Christopher Ochieng v R [2018] eKLR*** stated as follows: -

> **"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 should 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."

[24] Guided by the Supreme Court in the ***Muruatetu*** decision and persuaded by the case of ***Christopher Ochieng v R*** (Supra) and by ***Dismas Wafula Kilwake*** decision in relation to sentencing, we are satisfied that the life imprisonment meted upon the appellant cannot stand. We are inclined to intervene and hereby set aside the life sentence imposed on the appellant. We have considered the circumstances of this case and find that the life imprisonment meted on the appellant is harsh and excessive.

We substitute the term of life imprisonment with an imprisonment for a term of twenty (20) years with effect from the date of sentence by the trial court.

Accordingly, we uphold the conviction of the appellant for the offence charged, but reduce the sentence to 20 years imprisonment with effect from the date of the sentence.

Dated and delivered at Eldoret this 28th day of November, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.