IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 201 OF 2014

BETWEEN

ANTONY MUSASHA LUBANGA.... APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma, (A.Mabeya, J.) dated 25th July 2014 in **HCCR. NO. 211 OF 2011***)*

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JUDGMENT OF THE COURT

Background

[1] **Antony Musasha Lubanga**, (the appellant) is before us in this second appeal in which he challenges the dismissal of his first appeal by the High Court (Mabeya, J.). The appellant was first tried in the Senior Resident Magistrate's Court at Webuye **(Hon. Arika)** for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The appellant was convicted and sentenced to life imprisonment for the main offence of defilement. Dissatisfied with that decision, the appellant moved the High Court at Bungoma in Criminal Appeal No. 93 of 2008 and the Court quashed his conviction and sentence and ordered a retrial of the case by a different Magistrate. The appellant was then retried in the same Court **(Hon. Ombewa)** and was convicted and sentenced to life imprisonment for the offence of defilement.

[2] The particulars of the offence were that on 20th January 2008 at [particulars withheld] Village, Ndalu Location in Bungoma North District within the then Western Province, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of **CI** (name withheld) a girl aged 7 years.

[3] During the re-trial, the prosecution called four (4) witnesses including **CN** (name withheld), the complainant), her mother **ZE** (Z), **CPL Fatuma Mbala** (**Cpl Fatuma**) the Investigating Officer, and **Linus Likare (Linus)**, the clinical officer based at Kitale District hospital.

[4] The evidence adduced by the complainant was that on the material day she was playing with her brother **DI** (name withheld) at around 7.00pm when the appellant passed by their house on his way to his house and asked the two minors to escort him to his house. Upon arrival at his house, he locked them up inside his house and threatened to cut them with a *panga* (machete) if they shouted. He then gave them food and asked them to sleep on the same bed with him, which they did. The complainant slept in the middle, **DI** on the side near the wall and the appellant on the other side. The complainant testified that the appellant was at home alone and that he cooked supper for them; that the appellant "did bad things" to her private parts, removed her pant and slept on top of her; that he put his private part severally inside hers and she felt pain. The complainant further testified that the appellant threatened to cut her with a *panga* if she raised alarm and that he woke them up early the next morning and asked them to go back to their home. It was the complainant's further testimony that she reported to her mother, **Z**, that the appellant had defiled her. The complainant was taken to Kitale Hospital where she was examined and treated and **Z** reported the matter at Kiminini Police station.

[5] It was **Z's** testimony that on the material day the complainant and her brother were playing near their gate when they disappeared; that she looked for them at her neighbour's houses and did not find them and went to sleep; that she did not go to the appellant's house since he was not usually in his house and his house was locked. It was her further testimony that at 6.00am the following day, she opened the door and found the complainant and her brother seated outside their house and that the complainant was weeping; that the complainant and **DI** informed her that they slept at the appellant's house on the material night; that the complainant informed her that the appellant had defiled her; that she examined the complainant's private parts and found that it was reddish and wide; that she took the complainant to AP Brigadier where she was told to take the complainant to the hospital; that she first went to Ndalu but was referred to Kitale District Hospital;

that the complainant was examined and treated. **Cpl. Fatuma**, the Investigating Officer further testified that the complainant had reported the matter to Kiminini Police station and that she took her to Ndalu health centre from where she was referred to Kitale District Hospital.

[6] The complainant was examined at Kitale Hospital and a treatment notes and P3 form filled by Linus, the Clinical Officer were issued. From his physical examination of the complainant's private parts, **Linus**, noted the complainant's hymen was torn and still fresh, that her urine showed pus cells and he concluded that the complainant was defiled. He also observed that the complainant had contracted a sexually transmitted disease (STI) but admitted that he did not know exactly which disease she had contracted.

[7] In his defence, the appellant gave a sworn statement and did not call any witnesses. He denied the offence and stated that he was married; that on the material day he was assisting another *fundi* (repair man) and went home at around 7.00pm; that he prepared food, ate and slept. The appellant confirmed that he knew Zerka, his neighbour and that she had children who he knew by name; that on the material night he did not see the complainant or DI; that **Z** and him lived 50 metres apart and there were no other homes between them; that on the material night he locked the door to his house from inside and nobody knocked; that on the following day he went to work at 7.30am; that he understood the charges he was facing; that he did not defile the complainant; that his family and **Z's** did not visit each other; that the day after the material day police officers arrested him and took him to Brigadier AP Camp and thereafter to Kiminini Police Station where he was later charged; and that he was not taken for a medical examination despite having requested to be examined. The appellant further stated that he had not differed with **Z**.

[8] In his judgment, the Resident Magistrate (Hon. B.Ombewa) found that the prosecution had provided its case with sufficient and reliable evidence to convict the appellant with the offence of defilement. The trial court warned himself of the danger of convicting the appellant on uncorroborated evidence of a child but found that from the evidence on record there was no reasonable doubt that it was the appellant who defiled the complainant. The trial court found the appellant's defence to be a mere denial and convicted him of the offence of defilement contrary to section 8(1) of the Sexual Offences Act and sentenced him to life imprisonment in compliance with section 8(2) of the Sexual Offences Act.

[9] Dissatisfied with the judgment of the trial Court, the appellant filed a first appeal to the High Court in Bungoma raising seven grounds of appeal: that the trial court relied on inconsistent evidence; that the evidence on record did not support the charge; that the appellant's defence was not considered; that the appellant was not accorded a fair trial; that the evidence relied on was uncorroborated; that the trial court considered extraneous matters; that the charge was fundamentally defective; and that no offence was disclosed. The State opposed the appeal.

[10] The learned judge (Mabeya, J) reconsidered and re-evaluated the evidence. On the ground that that the trial court relied on extraneous material in arriving at its decision, the learned Judge found that there was no evidence that the disease that the complainant contracted was HIV and Syphilis as concluded by the trial court; that the trial court therefore erred by making conclusions regarding the actual sexually transmitted disease that the complainant contracted which was not borne out by the evidence; that the finding by the trial court was not fatal in that there was a conclusion by **Linus** that the complainant had been infected with a sexually transmitted disease; that the conviction of the appellant was not based on the nature of the infection but that there had been a medical conclusion borne by evidence that defilement had taken place. Regarding the conclusion by the trial court that the complainant had some injury in her reproductive or urinary system, the learned Judge found that to be a factual conclusion by the trial court borne by medical evidence adduced by **Linus**, the Clinical Officer. The learned Judge found that the trial court did not rely on extraneous material in arriving at its decision; that there were no contradictions in the evidence relied on; that the appellant was accorded a fair trial; that the charge was proved to the required standards; that penetration was proved by the evidence of the complainant and the other witnesses including a medical report which proved that the complainant had been penetrated; that the complainant had known the appellant for a long period of time as they were neighbours and there was nothing to show that she was mistaken or that the appellant had been framed; that the court considered the appellant's defence; that the evidence tendered in court supported the charge and that the charge did disclose an offence which the appellant was convicted of. The learned Judge dismissed the appeal.

[12] Dissatisfied with that decision, the appellant filed this second appeal. Counsel for the appellant filed amended grounds of appeal that the learned Judge erred in law: in failing to find that the conviction of the appellant by the trial court had introduced and took into account matters that were never canvassed in evidence to the prejudice of the appellant; in failing to sufficiently appraise the evidence of the trial court as was bound to as a first appellate court; in upholding a conviction that was founded on evidence by the prosecution which evidence did not prove the prosecution's case beyond reasonable grounds; and in upholding a sentence which was excessive. The appellant urged this Court to allow the appeal, set aside the order of the High Court dismissing the appellant's appeal and quash the appellant's conviction and sentence passed against him by the trial court.

The appellant argued his appeal through written submissions. The state also filed their written submissions in opposing the appeal.

Submissions

[13] At the hearing of the appeal, learned Counsel for the appellant, **Mr. O. Kebira** relied on his written submissions to the effect that the learned Judge failed to find that the trial Court took into account matters that were never canvassed in evidence to the prejudice of the appellant; that the prosecution did not prove its case beyond reasonable doubt; that the learned Judge failed to sufficiently appraise the evidence of the subordinate court; and that the sentence meted out by the trial court and upheld by the first appellate court was harsh and excessive.

[14] Learned Prosecuting Counsel, **Mr. Kakoi** for the State relied on written submissions filed on behalf of the State. Counsel opposed the appeal and submitted that this Court must only consider matters of law and not entertain introduction of new matters; that the learned Judge had considered all the evidence of the trial court; and that the sentence imposed on the appellant was lawful and was therefore not excessive.

[15] **Mr. Kakoi** further submitted that the complainant was only 7 years at the time the offence was committed; that she recognized the appellant as they were neighbours; that identification of the appellant as the perpetrator was positive as the complainant was unwavering

that it was the appellant who defiled her and her evidence was consistent; and that penetration was proved by the medical findings of the Clinical Officer, Linus a day after the sexual assault as the complainant's hymen was torn and her urine showed pus cells. The prosecution urged us to find this appeal unmerited and dismiss it.

Determination

[16] We have considered the appeal, the 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. We are in this regard guided by **M'Riungu v Republic (1983)KLR 455.**

Section 361 of the Criminal Procedure Code also provides that:-

> **"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] The issues for determination are whether the conviction of the appellant was based on matters that were never canvassed in evidence to his prejudice; whether the evidence produced by the prosecution proved its case beyond reasonable doubt; whether the learned Judge failed to sufficiently appraise the evidence of the trial court; and whether the sentence imposed against the appellant was manifestly harsh and excessive.

[18] On the issue whether the conviction of the appellant was based on matters that were never canvassed in evidence to his prejudice, we find that this is a question of fact which this Court lacks jurisdiction to determine. As such, this ground must fail.

[19] The second issue is whether the evidence produced by the prosecution proved its case beyond reasonable doubt. We find that the complainant gave direct evidence of what transpired on the material day. Her mother, **Z** corroborated the complainant's evidence by giving an account of what the complainant had told her on the morning that she found the complainant and her brother outside their home. Linus also testified that the complainant's private parts had fresh wounds, which were sufficient proof of defilement; that the appellant was therefore not arrested and charged out of malice or because of any vendetta.

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] The prosecution had to establish the following ingredients to prove the charge of defilement under Section 8(1) of the Sexual Offences Act; that there was penetration, that the female person was under the age of 11 years; and the identity of the perpetrator. In the instant appeal there was sufficient evidence adduced by the complainant, her mother, **Z** and the Clinical Officer, Linus which proved that the complainant was defiled and that she suffered injuries on her private parts which confirmed that there was penetration.

[21] Regarding the age of the complainant, we find that the age of the complainant was proved to the required standard. The complainant testified that she was 8 years at the time she was defiled. Her mother, **Z** produced an age assessment report dated 15th March, 2010 which showed that the complainant was 10 years and she was therefore about 8 years at the time the offence was committed in 2008.

[22] 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 neighbour. It was **Z's** testimony that the complainant informed her that the appellant had locked her and her brother in his house on the material day and defiled her; and that the appellant was her neighbour and therefore well known to her. The identity of the defiler was therefore clearly established.

[23] 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.

[24] As regards sentence, the evidence adduced before the trial court 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 8 years old. The trial court noted the appellant's mitigation that he was the breadwinner of his family.

[25] 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."**

[26] 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 sentence of life imprisonment meted on the appellant was 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.

[27] This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

Dated and delivered at Kisumu this 30th day of December, 2019.

ASIKE - MAKHANDIA

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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