IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ASIKE-MAKHANDIA & SICHALE, JJ.A.) KISUMU CRIMINAL APPEAL NO. 177 OF 2017

BETWEEN

ATHANUS LIJODI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Majanja, J.) dated 29th August, 2017 ***in H.C.CR.A. No. 69 of 2014)***

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JUDGMENT OF THE COURT

1. **Athanas Lijodi**, the appellant, has preferred this second appeal challenging his conviction and sentence for the offence of defilement. The role of the second appellate court was succinctly set out in **Karani vs. R [2010] 1 KLR 73** wherein this Court expressed:-

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

2. The facts giving rise to the instant appeal are that on 30th July, 2012 at around 3.00 pm **SK, (PW1)** a child aged 10 years was sent by her mother to collect firewood. The appellant whom the child knew well before came towards her and requested her to assist him carry grass which was in the nearby bushes. She accepted but when she followed him there was no grass.

3. According to SK, the appellant carried her deep into the maize plantation where he proceeded to defile her. Meanwhile, PW3 emerged and found the appellant in the act. PW3 confronted the appellant but since the appellant had a panga, PW3 feared for his life and they parted ways. During the brief confrontation, PW1 ran away and went home where she found her mother, PW2.

4. PW2 informed the Court that the child came home looking distressed with her dress stained. She examined her private parts and observed that the child was bleeding. The child then narrated to PW2 what had happened to her. She was taken to Shibuye sub District hospital for examination and treatment and

the matter was also reported to the police station the same day

5. PW 5, the Clinical Officer examined the child and noted that she had bruises on her private parts. She also noted that her pants were wet, torn and had blood stains. She concluded that there was penetration and that the minor had been defiled. Consequently, the appellant was arraigned and charged at the Chief Magistrate's Court at Kakamega with the offence of defilement contrary to ***Section 8(1)*** *and* ***(2)*** of the ***Sexual Offences Act***.

6. The appellant pleaded guilty at first but later changed his plea to not guilty and gave unsworn testimony. He denied the charges leading to a trial in which the prosecution called five witnesses, at the end of whose testimony the trial magistrate found the appellant had a case to answer and placed him on his defence. He made an unsworn statement and promised to avail two witnesses but eventually he did not.

7. In his unsworn testimony, the appellant narrated his family background while recalling how he was arrested by members of the public who accused him of what he said he knew nothing about. He alleged that he only learnt of the charges against him when he was arraigned in court. He fervently denied defiling the minor whom he considered as his grandchild. He stated that he was a married man and questioned why he was not taken for examination himself. He said that by virtue of his occupation as a night guard he had become impotent and thus did not engage in sex even with his wife.

8. The learned trial magistrate upon assessing and analyzing the evidence tendered before him found the appellant guilty of the offence of defilement, convicted him and sentenced him to life imprisonment.

9. Aggrieved with both the conviction and sentence, the appellant appealed to the High Court. The High Court (Majanja, J.) in a judgment dated 29th August, 2017 found the first appeal to be devoid of merit and dismissed it, provoking the present appeal.

10. In his self-crafted memorandum of appeal filed on 7th October, 2020, the appellant raised the following grounds of appeal on the basis of which he asked this Court to allow his appeal in its entirety;

> ***"1. That the trial court failed to consider that penetration as an ingredient of defilement was not established as required by law;***
>
> ***2. That the court be pleased to find that the entire medical examination by the doctor and the Investigating Officer was shoddy hence not conclusive enough to support a conviction:***
>
> ***3. That the mandatory nature of the sentence as provided is unconstitutional*** and relied on the case of
>
> ***Francis Karioko Muratetu & Another vs The Republic (2017).***

13. In opposing the appeal, Mr. Edward Kakoi, Principal Prosecution Counsel, submitted that penetration was indeed proved and more particularly that;

> ***a. PW 1 testified on how she was forcefully taken into a maize field and defiled (page 6 of the Record)***
>
> ***b. PW 3 found the Appellant in the act and clearly observed that he had penetrated the complainant;***
>
> ***c. PW 5 examined the victim and noted that she had oedema of the labia majora and bruises on the minora.***
>
> ***d. that the sentence, is not illegal but in view of the appellant's age and term served, the Court can interfere with the sentence and reduce it to a term not less than 15 years.***

14. As already stated this is a second appeal and the Court is therefore restricted to addressing itself to matters of law only. The Court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. 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)."***

15. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, we discern the issues falling for our determination as;

> ***i. Whether the ingredients of the offence were established;***
>
> ***ii. Whether the appellant's sentencing was justified as imposed by the trial Court and upheld by the High Court.***

16. On the first issue, the Appellant avers that penetration as an ingredient of the offence of defilement was not established as required by law.

17. The charge and penalty applicable in the circumstances of this case are as provided for under the Sexual Offences Act. The pertinent provisions are as follows:

"8. Defilement

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(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.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

18. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:

> ***"PW 1's testimony was clear and graphic and left no doubt that it is the Appellant who had sexual relations with her. He was not a stranger and was well known to her…In this case the trial magistrate was satisfied that PW 1's testimony was clear and unshaken."***
>
> ***Notwithstanding the provisions of section 124 of the Evidence Act, there is ample corroboration of PW 1's testimony… Leaves no doubt that there was penetration…***

19. The age of the minor was not in contest as it was established to be 10 years by her mother who produced the complainant's birth certificate in court.

20. The second ground of appeal is that the entire medical examination by the doctor and investigation officer was shoddy and not enough to warrant a conviction. The two courts below made concurrent findings of fact to the effect that the medical evidence adduced by PW5 was overwhelming and proved

the charge of defilement. We have no reason to interfere with these concurrent findings of fact. Indeed, we note that the evidence of the child's mother pertaining to the injuries she saw on her child was fully corroborated by the medical evidence.

21. In our view penetration was proved beyond reasonable doubt; the appellant's identity was not in dispute and the child's age was also proved. This boils down to the inevitable conclusion that the appellant's conviction was safe and the appeal against conviction is totally devoid of merit and is hereby dismissed.

22. **ii. Whether the mandatory nature of the sentence was unconstitutional**

The Appellant in his memorandum of appeal says the mandatory nature of the sentence provided under Section 8(2) of the sexual offences act is unconstitutional and throws his weight behind the Supreme Court case of **Francis Karioko Muruatetu & Another V Republic (2017) eKLR.**

23. On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases **Muruatetu's case** *(supra)* notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance **Evans Wanjala Wanyonyi v Republic [2019] eKLR).** Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the Sexual Offences Act if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. This Court expressed the proposition as follows in **David Wafula Kilwake & Another v. Republic [2018] eKLR.**

> **"[W]e hold that the provisions of section 8 of the sexual Of-fences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the Society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it."**

That said, after taking into consideration the appellant's mitigation, the sentiments expressed by the learned State counsel, and the impact of the heinous act committed on the young child by the appellant, we set aside the life sentence imposed on the appellant and substitute therefor a sentence of 20 years imprisonment from the date of conviction.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. KARANJA

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR