REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 48 OF 2015

ONESMUS MUSEE KAVUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Kitui Chief Magistrate's Court Criminal Case (S.O.) No. 36 of 2017** by **Hon. B. M. Kimemia (PM)** on **03/10/14)***

J U D G M E N T

1. **Onesmus Musee Kavua,** the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (3)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **14th** day of **October, 2012** at about **8.00 a.m.** in **Kitui County,** intentionally and unlawfully did an act which caused penetration to **HKM** a child aged **13 years** by inserting his penis to her genital organ namely vagina.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on **14th** day of **October, 2012** at about **8.00 a.m.** at **Mithine Sub-Location** in **Kitui County,** intentionally and unlawfully committed an act of indecency with **HKM** a child aged **13 years** by touching her private parts namely vagina with his hands.

3. He was tried, convicted for defilement and sentenced to **twenty-one (21) years imprisonment.**

4. Aggrieved, he appeals on grounds that can be condensed thus: The charge was not proved to the required standard; the fact that the Appellant was known to the Complainant was not proof that he was the perpetrator of the act of defilement; evidence adduced was hearsay as it was not supported by forensic evidence; and the strong defence put up was disregarded without any reason.

5. Evidence adduced by the Prosecution was that on the **14th** day of **October, 2018,** PW1 **HJM** left home at about **8.00 a.m.** going to the shop to purchase cooking fat. She purchased the oil from the Appellant's uncle's shop. The Appellant who was at the shop called her, he closed the door to the shop and threatened to kill her if she screamed. He pushed her on to a mattress that was in room behind the shop and violated her sexually. After the act he told her to dress up, go home and not tell anyone. Upon arrival at home she told PW2, **SM,** her mother, who reported the matter to the police and took her to hospital. She was examined by PW4, **Kenneth Kioko,** a Clinical Officer who found her hymen freshly broken.

6. Upon being put on his defence the Appellant stated that ordinarily he closes his shop at **8.00 p.m.** That on the **14th October, 2012** he was at home at **10.30 p.m.** when two (2) Administration Police Officers from **Kyatine AP Post** went and alleged that he had defiled a child at **8.00 a.m.** He denied the allegations and told them that he was grazing animals. However, they escorted him to **Kabati Police Station.** He concluded his testimony with an allegation that he disagreed with the mother of the Complainant who wanted maize from his shop on credit but he declined, an action that made her vow to ensure that his shop would close down.

7. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that the fact that he was well known to the Complainant does not mean that he defiled her. That it was a case of mistaken identity and he had disagreed with the Complainant's mother. He faulted the Court for believing the Complainant and disregarding the defence put up, yet, no semen was found in the Complainant's genitalia. He also questioned the trial Court for not sentencing him to the minimum prescribed sentence for the offence.

8. The Respondent opposed the Appeal. It was urged that the Prosecution proved all the ingredients of the offence, namely, the age, the fact of penetration and the identity of the perpetrator. That the hymen of the Complainant was freshly broken.

9. This being a first Appellate Court, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor **(See Kiilu & Another vs. Republic (2005) 1 KLR 174).**

10. To prove the case of defilement, the Prosecution was required to prove:

(i) Age.

(ii) The act of penetration.

(iii) Positive identification of the perpetrator **(See Fappyton Mutuku Ngui vs. Republic (2014) eKLR).**

11. In the case of **Mwalango Chichoro Mwajembe vs. Republic (2016) eKLR** the Court of Appeal stated that:

"… the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ..."

12. PW1 told the Court that she was 14 years, but at the time of the act she was 13 years old having been born in **1999.** PW2 her mother stated that she was 13 years old. The Prosecution adduced in evidence a Birth Certificate. Her date of birth was indicated as **24th September, 1999.** This was proof of the fact of age. At the time of the incident she was a child aged thirteen (13) years old.

13. Penetration is defined by the **Sexual Offences Act** as:

""penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

14. In her testimony the Complainant described what happened to her. She stated that the assailant threw her onto a mattress, removed her panty and lay on her abdomen where he inserted his penis into her vagina and had coitus with her. On completion of the act, he told her to wear the pant and made her leave through the rear part of the shop. She went home crying, told her mother what had befallen her and when she was taken to hospital, upon examination seven hours thereafter, she had a freshly broken hymen. Penetration in the circumstances was proved beyond reasonable doubt.

15. The Complainant identified the Appellant as the perpetrator of the act. **Section 124** of the **Evidence Act** provides thus:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an

offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

16. The learned trial Magistrate had the opportunity of observing the Complainant. She remarked that she was truthful. She considered the defence put up by the Appellant and reached a finding that the Appellant did not give an account of where he was at the time, on the material date.

17. I have considered evidence on record and indeed, reach the same conclusion as the trial Court. The Prosecution proved the case against the Appellant beyond reasonable doubt. The Allegation that there was a grudge between the Appellant and PW2 was not established.

18. On sentence, in the case of **Republic vs. Scott (2005) NSW CCA 152** it was stated that:

"… sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed … one of the purposes of sentence is to ensure that an offender is adequately punished … a further purpose of punishment is to denounce the conduct of the offender."

19. Principles of interference with the sentence of a Court by an Appellate Court were stated in the case of **Bernard Kimani Gacheru vs. Republic (2002) eKLR** where it was stated thus:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

Section 8(3) of the **Sexual Offences Act** provides thus:

"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."

The sentence given of twenty-one (21) years considering circumstances that transpired was not excessive.

20. Therefore, I find the Appeal lacking merit which I dismiss in its entirety.

21. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **4th** day of **December, 2019.**

L. N. MUTENDE

JUDGE