IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 41 OF 2016

BETWEEN

JULIUS KIPSANG LANGAT.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisii

*(**R. N. Sitati, J.)** delivered on 29th October 2014*

in

HC Cr. Appeal No. 129 of 2011)

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JUDGMENT OF THE COURT

[**1**] The appellant herein was tried and convicted by the Resident Magistrates' Court at Kilgoris for the offence of defilement contrary to **Section 8(1),** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that he had defiled JC (name withheld), a child aged three and half (3½) years.

[**2**] The trial court having heard the evidence of seven (7) prosecution witnesses, found that there was sufficient evidence to prove the charge of defilement against the appellant. He was therefore convicted and sentenced to serve life imprisonment as stipulated under section 8(2) of the Sexual Offences Act.

[**3**] In his first appeal to the High Court, the appellant faulted the judgment of the trial court contending that the trial court failed to take into account that he was a minor at the time of sentencing; that his constitutional rights were violated during the trial as he was not arraigned in court within 24 hours; that the offence of defilement was not proved; and that the trial court relied on hearsay evidence.

[**4**] Upon hearing the appeal, the learned Judge of the High Court (**Sitati, J.**) dismissed the appellant's contentions that his constitutional rights were violated and found that the prosecution adduced sufficient evidence and proved the case against the appellant to the required standard. The learned judge also rejected the appellant's contentions that he was a minor at the time of the trial.

[**5**] The appellant who is dissatisfied with this judgment is now before us in this second appeal. In his memorandum of appeal, the appellant has raised five grounds, namely, that the learned Judge erred in law and in fact: in finding that the appellant was an adult while he was a minor; in not considering the time frame within which the appellant was charged after his arrest; in finding that the appellant's constitutional rights were not violated; in accepting the medical report; and in accepting the evidence of a minor that was not corroborated.

[**6**] At the hearing of the appeal, the appellant relied on written submissions that he had filed in support of his appeal. Therein, he submitted that the offence of defilement was not proved since the evidence did not expressly indicate that there was penetration; that the minor testified that she was only touched; and that the evidence adduced by the doctor was contradictory, as the report indicated that there were no injuries or bruises around the vagina despite the presence of a broken hymen.

[**7**] The appellant also argued that his rights to a fair trial under Article 50 of the Constitution were violated. First, because the evidence of the prosecution witnesses was not translated to him during trial, and secondly, the prosecution failed to serve him with their evidence in advance to enable him prepare for his defence.

[**8**] In addition, the appellant challenged the constitutionality of the life sentence that was imposed on him, contending that it was a mandatory sentence which was not constitutional. In support of this proposition, the appellant relied on **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.** He urged that the sentence was not commensurate with the circumstances of his case and asked the Court to review the sentence.

[**9**] We are cognizant of the fact that under Section 361 of the Criminal Procedure Code, a second appeal is confined to matters of law only. This was also reiterated by the Court in **Karingo v Republic [1982] KLR 213** at **p. 219** that;

"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 s/o Karanja -vs- Republic (1950) 17 EACA 146)"

[**10**] There are three issues of law that arise from this appeal. First, is the propriety of the appellant's trial in regard to his constitutional right to fair trial; secondly, whether the charge of defilement that was alleged against the appellant was proved to the required standard; and thirdly, whether the appellant's sentence was proper, and whether this Court should interfere with it..

[**11**] The main ingredients of the offence of defilement are penetration of the victim's genital organs, proof that the victim is a minor, and proof that the accused person was the one who caused the penetration of the minor's private parts. Under section 2 of the Sexual Offences Act, penetration means 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

[**12**] During the trial, JC the victim, who gave unworn evidence because of her young age, identified the appellant as the person who took her into a thicket and did something to her sexual organ. The evidence of LC, a minor who gave her age as 11 years, and

who gave sworn evidence corroborated the evidence of the victim. She heard the victim crying in the thicket and when she went into the thicket, she found the appellant lying on top of the victim who did not have her inner clothes. LC raised an alarm and Sarah Cherono who responded to the alarm saw the appellant running away from the thicket. Upon rescuing and examining the victim, Sarah noted that her underpant was missing and her sexual organ was wet. The victim's parents later took the minor to the Lolgorian hospital where she was examined by Dr. Robert Mutula, a senior medical officer. The doctor noted that she had a swollen *labia majora* and that her hymen was not intact. He concluded that there had been penetration of her vagina. The doctor estimated the victim's age as 3 years. He also produced the victim's health card from the hospital, which gave the victim's date of birth as 22nd December 2007. The appellant was subsequently arrested and charged. When put on his defence, the appellant elected to remain silent, but alleged that he was 16 years old.

[**13**] The learned Judge in upholding the appellant's conviction and sentence, stated inter alia as follows;

"50. I now turn to the more contentious issue in this appeal that is whether the prosecution proved its case before the trial court beyond all reasonable doubt.

51. The complainant in this case was a 3½ year old child who testified as PW1. The court noted early enough during the trial that the child was of a tender age and before even proceeding with her testimony, she was already noted as a vulnerable witness. She however recognized the appellant in court and told the court that the appellant touched her genitalia. She said this by pointing at her genitalia.

…

54. To my mind, the prosecution has already proved by medical evidence that indeed the complainant's genitalia was not intact. It is not normal for a girl of 3 years to have a punctured hymen. In any event, the act of defilement took place in broad day that is between the hours of 10-10.30 a.m. in the morning. The appellant was seen by PW3 who was not a stranger to him since they were neighbours; lying on top of the complainant and then moments later after (sic) she heard PW1 crying while the accused was seen running away from the scene of defilement…Why did the appellant run away unless he wanted to cover his tracks"

55. This piece of evidence to my mind proves not only the fact that the appellant was seen in the vicinity of the defilement but that he was in fact caught red handed defiling the minor after which he took to his heels. PW3's evidence stood unshaken as the appellant chose not to cross-examine her."

[**14**] Both courts below arrived at concurrent findings of fact that the victim was defiled, and that the appellant was the perpetrator of the offence. In **Adan Muraguri Mungara v Republic [2010] eKLR**, this Court stated as follows:

"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."

[**15**] In this case, the concurrent findings of fact that were made by the two lower courts are unassailable. The victim identified the appellant as the person who led her into a thicket and did something to her vagina. Although a young child, she demonstrated to the court what the appellant did to her. Her evidence was corroborated by LC, another minor who was attracted to the scene of the incident by the victim's cries as the defilement was in progress. LC also identified the appellant, a person who was well known to her as her neighbour, as the perpetrator of the heinous act. The mother and father of the victim, both testified and also identified the appellant as a person known to them. The evidence of the victim and LC was consistent with that of Sarah, who arrived at the scene

of the incident when LC raised the alarm, and saw the appellant trying to flee from the scene.

[**16**] The trial magistrate believed and accepted the evidence of the victim and LC as truthful. This was consistent with **Section 124** of the **Evidence Act** which though requiring corroboration of the evidence of minor victims of a criminal offence, has a proviso in regard to victims under the Sexual Offences Act, as follows:

"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."

[**17**] The evidence by the doctor corroborated the fact that there was penetration of the genital organs of the minor victim, hence the broken hymen and swollen labia majora that was noted on examination of the victim. This evidence was consistent with the evidence of the victim and LC. The victim's age was also confirmed by the doctor who estimated her age as 3 years and the victim's health card which gave her date of birth as 22nd December 2007.

[**18**] It is clear that there was overwhelming evidence against the appellant and that even if the evidence of the minor victim was to be excluded, there was still sufficient evidence from the other witnesses which established that the minor was defiled and identified the appellant as the culprit. Thus the learned Judge cannot be faulted in finding that there was sufficient evidence to sustain the appellant's conviction. Accordingly, we find no substance in the appeal against conviction.

[**19**] Despite the victim's age, it is clear from the charge sheet that the penal section under which the appellant was charged, was **Section 8(3)** of the **Sexual Offences Act**. This section states as follows:

"(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."

[**20**] In sentencing the appellant, the trial magistrate referred to **Section 8(2)** of the Sexual Offences Act which provides that a person who commits an offence of defilement with a child aged 11 years or less, shall upon conviction be sentenced to imprisonment for life. The trial magistrate then proceeded to sentence the appellant to life imprisonment as stipulated under Section 8(2) of the Sexual Offences Act.

[**21**] In her judgment the learned Judge properly noted that the appellant was charged under section 8(1) as read with Section 8(3) of the Sexual Offences Act. However, in considering the issue of sentence the learned Judge misdirected herself, noting that the sentence passed on the appellant was not harsh as there was no other sentence for a person found guilty of defiling a child of tender years, other than life imprisonment. The appellant having been charged under section 8(3) of the Sexual Offences Act, he could only be sentenced under that section, and that section provided for a minimum sentence of 20 years, and not life imprisonment. Both the trial magistrate and the learned Judge therefore misdirected themselves on the issue of sentence.

[**22**] What is of more concern to us is the issue of the appellant's age. It is clear that this was raised before both the trial magistrate and also before the learned Judge. The learned Judge ordered for the appellant's age to be assessed but the record does not indicate whether this was done and if so, what the result was. In her judgment, the learned Judge stated as follows on the issue:

"47. Thirdly, counsel for the appellant contends that his client was 16 years old at the time of his trial. Having made the allegation, the onus of proving this allegation was upon the appellant. Since it was the appellant's contention that he was under age to stand trial, he should have presented in evidence his birth certificate or requested for an age assessment test to be done on him. The fact that he raised the issue of his age without arming himself with proper documentation did not convince the trial court that he was indeed under age. I am also not convinced that the appellant was under age."

[**23**] Section 185 of the Children Act states as follows

"(1) Subject to any rules or directions made or issued by the Chief Justice, where it appears to a court, other than a Children's Court, at any stage of the proceedings that a child is charged before it with an offence other than murder and is not charged together with a person or persons of or above the age of eighteen years, the court may, and where within the area of a subordinate court's jurisdiction there is established a Children's Court having jurisdiction, the subordinate court shall remit the case to a Children's Court:

Provided that nothing in this subsection shall be construed as preventing a court, if it considers in the circumstances (including the stage reached in the proceedings) that it is proper so to do, from proceeding with the hearing and determination of the charge.

(2) Where in accordance with the provisions of subsection (1) of this section, a case is remitted to a Children's Court after a finding that the child charged is guilty of the offence, the Children's Court to which the case has been remitted may deal with the offender in any way in which it might have dealt with him if he had been tried and found guilty by that court.

(3) No appeal shall lie against an order of remission made under this section, but nothing in this section shall affect any right of appeal against the verdict or finding on which such an order is founded, and if a child has been found guilty by the High Court and his case remitted to a Children's Court for an order under section 191 of this Act, he may appeal against such findings to the Court of Appeal.

(4) A court by which an order remitting a case to a Children's Court is made under this section may give such directions as appear to be necessary with respect to the custody of the offender or for his release on bail or bond until he can be brought before the Children's Court, and shall cause to be transmitted to the clerk of the Children's Court a certificate setting out the nature of the offence and stating the stage reached in the case, and that the case has been remitted for the purposes of being dealt with under this section.

(5) Where, pursuant to the provisions of section 184, a court other than a children's court hears a charge against a child, the court shall apply all the provisions of this Act as relate to the safeguards to be accorded a child offender.

[**24**] The above provisions place an obligation on a court hearing a matter, to satisfy itself that the person appearing before it is not a child, because a child would be subject to the provisions of the Children Act. Section 185(1) of the Children Act gives latitude to the trial court to rely on its own impression on the apparent age of the offender, so that where it 'appears' to the trial court that the accused is a child, it may invoke the provisions of section 185 and either proceed with the trial or refer the case to the Children's court. The proviso to section 185(1) and section 185(5) also affirm that the trial of a child may continue in a court other than the Children's court subject to the rights and safeguards accorded to the child under the Children Act being enforced by that trial court.

[**25**] In addition, section 143 of the Children Act on presumption and determination of age states as follows:

"143 (1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

(2) A certificate purporting to be signed by a medical practitioner as to the age of a person under eighteen years of age shall be evidence thereof and shall be receivable by a court without proof of signature unless the court otherwise directs." *(emphasis added)*

[**26**] The appellant having raised the issue of his age at the time of his defence, and alleged that his age was 16 years, it was incumbent upon the trial magistrate to apply section 143 of the Children Act. A child is defined under the Children Act as any human being under the age of 18 years. By claiming that his age was 16 years, the appellant was claiming that he was a child. The trial magistrate did not record what he thought was the apparent age of the appellant. Although the issue of the appellant's age came at the tail end of the trial, the issue was important in determining whether the appellant was entitled to the safeguards of the Children Act in regard to sentencing, and whether the appellant would be entitled to benefit from section 8(7) of the Sexual Offences Act that provides that an Accused who is below the age of 18 years, may upon conviction be sentenced in accordance with the Borstal Institutions Act, and the Children Act.

[**27**] As the appellant was in custody, he was not in a position to adduce any evidence in proof of his age. It was for the court to make an inquiry on the age of the appellant as provided under section 143 of the Children Act, and call for medical evidence to ascertain the age, so that if indeed the appellant was a child as alleged, section 185(4) of the Children Act would be applied or the appellant sentenced in accordance with Section 191 of the Children Act. Without the trial court ascertaining the appellant's age, there was a doubt as to whether the sentence imposed upon the appellant was proper. The learned Judge having requested for the appellant's age to be assessed, this should have been followed up so that the actual position is established. It was unfair and unrealistic for the learned Judge to expect the appellant to have proper documentation of his age when he was in prison.

[**28**] In the circumstances, we are constrained to interfere with the sentence that was imposed upon the appellant. The appellant having been sentenced on 24th July 2010, he has already served 9 years' imprisonment. We find it appropriate that we commute his sentence to the time already served. Accordingly, we would allow the appeal against sentence.

[**29**] The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of life imprisonment that was imposed upon the appellant, and substituting it with the period already served. The appellant shall therefore be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of August, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR