REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 20 OF 2020

(From original conviction and sentence in Butere PMCCRC No. 8 of 2019,

Hon. F. Makoyo, Senior Resident Magistrate, of 10th June 2020)

KENNEDY AKHURUNGA ANENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein had been charged before the primary court of the offence of rape contrary to section 7 of the Sexual Offences Act No. 3 of 2006, having, allegedly, unlawfully penetrated the vagina of one RNO, without her consent, on 3rd February 2019. He faced an alternative charge of committing an indecent act with an adult, contrary to section 11 of the same Act. A trial was conducted, where seven witnesses testified, the appellant was put on his defence, and was eventually convicted on the main charge, and was sentenced to ten years' imprisonment.

2. He was aggrieved by the verdict, hence the instant appeal, which he lodged on 22nd June 2020. The petition of appeal is on only one ground – the severity or harshness of the sentence. He would like the sentence reduced, after taking into account the period that he had spent in custody.

3. Directions were given on 1st July 2021, for the appeal to be canvassed by way of written submissions. The appellant had lodged his written submissions herein on 11th December 2020. He submits that he was not given a chance to mitigate, and that an essential witness was not called, and that PW1 and PW2 were not truthful witnesses.

4. The appellant was sentenced to ten years' imprisonment of the offence of rape. The offence is defined in section 3 of the Sexual Offences Act, where section 3(3), prescribes the penalty as imprisonment for a term not less than ten years and a maximum of life imprisonment. The offence, therefore, has ten years as a lower ceiling. The appellant was given the minimum sentence. I feel that he should have gotten a stiffer sentence. He took advantage of a woman who was suffering disability, and who was defenceless. That factor should have been taken into account, which should have been a basis for awarding a much stiffer penalty.

5. On mitigation, where he says he was not given a chance to mitigate, the record of 10th June 2020 reflects that mitigation was "*nil*." It is not clear what that means exactly, but I suppose that it was intended to mean that the appellant did not offer any mitigation. The trial court could have done better, recording the exact words used by the appellant to express the fact that he had nothing to say in mitigation. I fault the trial court for not doing so, but I am not persuaded that the court did not offer him a chance to mitigate.

6. The issue on the reliability of witnesses is not in the grounds of appeal in the petition of appeal filed in court on 22nd June 2020. It is raised in the written submissions, but I shall nevertheless consider it. There are several elements to it, and I shall consider each of them in turn.

7. The first is that PW1 and PW2 were not reliable witnesses. According to the appellant, they gave different versions of what transpired, yet they were supposed to have been at the same place at the same time. He refers to the time when the alleged offence occurred. PW1 talked of the incident occurring at about 12.00 noon, while PW2 talked of 4.00 PM. Both witnesses testified as to how they both left to fetch firewood, leaving the complainant in the house, and they gave indications of the time they left and the time they came, when they found the appellant allegedly committing the offence. According to PW1, they left at 11.00 AM and returned at 12.00 noon; while PW2 said they left at 3.00 PM, and returned at 4.00 PM. I note that the rest of their narratives were similar. PW1 and PW2 were minors. PW1 was said to be twelve years old at the time, the age of the other child was not indicated. The inconsistency on the timing was glaring, but that alone is not sufficient to displace the rest of the testimonies and to render them unreliable. Such inconsistencies do arise often, but the fact of witnesses referring to

different timings while narrating the same event does not necessarily go to the heart or core of the case, unless the court makes a finding that one of the witnesses was deliberately not telling the truth. The event, in the instant case, happened in broad daylight. Both witnesses refer to day time. The inconsistency did not go into credibility.

8. The law on how to handle contradictions and inconsistencies in the testimonies of witnesses in criminal matters was stated in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, as follows:

> *'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of* the *prosecution's case."*

9. See also *Philip Nzaka Watu vs. Republic* [2016] eKLR (**Makhandia, Ouko & M'Inoti JJA**).

10. The other issue is about one of the persons who apprehended the appellant not being availed as a witness. The principle is that the prosecution is not bound to call every person who was in one way or other involved in the whole drama. The duty is to call such number of witnesses as would be sufficient to establish the case. The witness who was not called to testify apprehended the appellant, he did not witness the commission of the offence, and the failure to call him was not fatal.

11. The other issue is that PW1 and PW2 were minors who should have been subjected to *voire dire* examination before their testimonies were taken, to assess whether or not they were intelligent enough to testify on oath. PW1 was said to be twelve years old. He was definitely a minor, but not of tender years. A child of tender years is, according to section 2 of the Children Act, No. 8 of 2001, a child of under the age of ten years. The court, therefore, was not obliged to conduct a *voire dire* examination on PW1. The age of PW2 was not recorded. He gave sworn evidence. As recorded, the same appears to have been given in a straightforward and flowing manner, suggesting that PW2 was of sufficient intelligence. Of course, the trial court ought to have recorded his age, being a minor, to obviate the sort of challenges that were likely to be raised later, with respect to his testimony, such as the one being raised in this instance by the appellant. The court came face to face with PW2. He must have assessed him mentally and was satisfied that he should give sworn testimony. But, I reiterate, though, that where a trial court is taking evidence from a minor of whatever age, the fact of his age ought to be recorded. I am not, however, persuaded that anything really turns on the submissions by the appellant on this point.

12. On the descriptions of what PW1 and PW2 saw the appellant doing to the complainant, suggesting some inconsistency, I do not find anything untoward. Eyewitnesses to an incident need not describe the incident in exact or similar terms. The witnesses are different individuals, with different personalities, perspectives, impressions and abilities. The difference in personalities are often reflected in the fact that the persons may express themselves on the same matter differently. The bottom-line should be that the witnesses saw the appellant do something to their infirm mother, which was not right, and they described it, each in their own words.

13. On whether PW1 and PW2 were coached, I see no basis for this submission. The mere fact that they spoke of different timings with respect to when the incident occurred is not sufficient proof of coaching.

14. Overall, I find no merit in the appeal, and I hereby dismiss it, affirm the conviction and confirm the sentence. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF February , 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Kennedy Akharunga Anene, appellant, in person.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the respondent.