REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

(CORAM: A.K. NDUNG'U)

CRIMINAL APPEAL NO. 20 OF 2020

WESLEY KIPYEGON CHEPKWONY ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal from the sentence and conviction delivered on 3rd April 2019 by Hon. R.M. Oanda (PM) in Kilgoris S.O. No.15 of 2017)

JUDGEMENT

1. The appellant, **WESLEY KIPYEGON CHEPKWONY**, was convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The particulars of the offence were that between the night of 16th April and 17th April 2018 in Transmara East Sub- County within Narok County, he intentionally caused his penis to penetrate the vagina of MC a child aged 14 years.

2. On a first appeal, the court has a duty to re-evaluate the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses testify.

3. The minor, MC (PW1) testified that on 16th April 2018 she and her sister went to sleep at 7 p.m. Their parents were not around. She recalled waking up in a lot of pain on her private parts and her stomach. She lit the **lantern** and found the appellant. She could not tell how the appellant had entered the house. She testified that he had come in, tore her panty and defiled her. The appellant promised to pay her Kshs. 200/= for a new panty and asked her to forgive him.

4. PW1 testified that she went to his mother and showed her the torn biker and panty, which she identified before the trial court. The appellant's mother asked her to forgive him. She told her grandmother about the incident and she advised her to report the matter to her uncle as her father was deceased. PW1 testified that she was examined at the hospital and that she later recorded her statement at the police post.

5. JKK (PW2) testified on 17th April 2018, his daughter PW1 told him that she had found someone in her bedroom at night. The clinical officer at Kabweria dispensary where he took her for examination said that PW1 had been defiled. PW2 testified that PW1 had told him that it was the appellant who had assaulted her. He identified the appellant in the dock and stated that he had known him since his childhood. He also produced an immunization card to prove that the minor was 14 years old.

6. Richard Sambu (PW3) who was a village elder testified that he received a report about the matter on 17th April 2018. He informed the area chief and was asked to arrest the appellant.

7. IP Edward Wanyama (PW4) who was working at Emurua Dikirr police station at the time, collected the appellant from Chesoen AP Camp, where he had been held for the offence. He interrogated the elders and the complainant and took them to the police station. He also took the minor for examination and she was found to have been defiled.

8. SGT Water Cheruyoit (PW6), who had taken over the matter from PW4, produced the torn panty and biker as exhibits.

9. Joel Kipngetich Langat (PW5) testified that he was a clinical officer at Emurua Dikirr health centre. He stated that on examination, the minor was found to have soft tissue injury on the upper part on the abdomen. There was redness on her labia majora and minora and a laceration on the labia majora. The age of the injury was a day old. A whitish discharge was also detected but there was no blood stain. The clinical officer concluded that there was penetration.

10. In his defence, the appellant testified that he was surprised by his arrest. He denied the charges facing him. He also insisted that he wanted the clinical officer who had examined the minor at Kabweria.

11. Aggrieved by the trial court's decision to convict and sentence him to 20 years' imprisonment, the appellant filed this appeal which he canvassed by way of written submissions.

12. He submitted that the case against him had been fabricated and was not proved by the prosecution. He faulted the trial court for relying on the evidence of one witness. The appellant pointed out that the minor's sister who was sleeping with her in the same house never heard the act and was never called to testify nor was the minor's grandmother. The minor did not see him in the act and did not hear as she was being defiled. He contended that PW2 and PW3 merely took the word of the minor without inquiring further into the matter.

13. Mr. Otieno, learned counsel for the State, opposed the appeal in his oral arguments before the court. He submitted that PW1 identified the appellant as someone she knew and who had defiled her. She had talked to the appellant after the act and PW5 had confirmed through medical evidence that there was penetration. Counsel submitted that while sentencing the appellant, the magistrate was clear that a deterrent sentence was needed.

14. The appellant was convicted for the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act. In order to prove its case against the appellant, the prosecution was required to adduce evidence to establish the victim's age; that there was penetration of the genital organ and the identity of the appellant as the minor's assailant.

15. The age of the minor and the element of penetration are not contested. The production of PW1's immunization card by PW2 confirmed that the minor was 14 years old when she was assaulted. The clinical officer, PW5, examined the minor a day after the assault. He confirmed that the minor had been defiled based on the discharge and injuries he had seen on the minor.

16. The gravamen of the appeal is whether the appellant was properly identified as the perpetrator. He contested the reliance of the singular evidence of the minor to convict him. He argued that the minor's sister and her grandmother had not been called to testify thus the prosecution had failed to prove its case against him to the required standard.

17. The prosecution is indeed required to call all witnesses necessary to establish the truth including those whose evidence may be inconsistent but it is not required to call a superfluity of witnesses. The **Evidence Act** under **Section143** of the **Evidence Act** provides that, "*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

18. If the witnesses called by the prosecution are sufficient to prove the charge, the situation hardly calls for the drawing of an adverse inference with regard to the 'missing' witnesses. (See ***Keter vs. Republic [2007] 1EA135***, ***Bukenya & Others –vs- Uganda (1972) EA 549, at page 550*** *and* ***Sahali Omar vs. Republic [2017] eKLR)***

19. As the only witness to put the appellant at the *locus in quo* was PW1, this court will examine her testimony to determine whether her evidence was adequate to prove the identity of the appellant and whether it was necessary to call the minor's mother and grandmother to shore up her evidence as contended by the appellant.

20. The courts have emphasised the need to test with the greatest care the identification by a single witness to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction.(See ***Nathan Kamau Mugwe versus Republic [2009] eKLR*** and ***Charles Maitanyi versus Republic (1986) 2KAR 76***)

21. PW1 testified that she was asleep during the act and woke up when she felt pain in her genitals and her stomach. The hand written proceedings say that she lit a lantern and saw the appellant in the house. Evidently, the indication in the typed proceedings that she lit a "latrine" was a typographical error.

22. The evidence shows that the appellant was someone well known to PW1. The minor approached his mother after the incident and informed her of what the appellant had done. She had sufficient time to look at the appellant by the light of the lantern when the appellant spoke to her and asked for her forgiveness and promised to pay her the panty he had torn. I am satisfied as the trial court was, that the conditions were conducive for a positive identification of the appellant.

23. The proviso to **Section 124** of the **Evidence Act**, dispenses with corroboration of the victim's evidence if the trial Magistrate has reason to believe the victim and records those reasons. In this case, there was sufficient evidence to corroborate PW1's evidence. Her torn biker and panty were produced as exhibits before the trial court. The medical evidence given by PW5 also confirmed the minor's testimony that she had been defiled.

24. The value of any evidence that might have been given by the minor's sister or her grandmother would most likely have been negligible as there was no indication that they had seen the appellant on the night in question. The evidence given by the prosecution's witnesses established the minor's age as 14, confirmed the element of penetration and identified the appellant as the assailant. These lead me to the finding that the appellant's conviction was sound.

25. The second limb of the appeal is on sentence. Ordinarily, an appellate court will not disturb the trial court's sentencing discretion unless certain conditions are met. These factors were laid out by the Court of Appeal in the case of ***Bernard Kimani Gacheru vs Republic [2002] eKLR*** 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."

26. In several decisions post **"Francis Muruatetu"** the Court of Appeal has held that the sentences imposed under Section 8 of the Sexual Offences Act left no room for the exercise of discretion by a sentencing court and were therefore unconstitutional. For instance, in **Evans Wanjala Wanyonyi vs Republic [2019] eKLR**, the Court of Appeal held as follows:

"*This Court in Christopher Ochieng-Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.*

….

In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."

27. The trial court, in meting out the sentence of 20 years' imprisonment, took into account the appellant's mitigation, the fact that he was a first offender but imposed the sentence as a deterrent due to the rise of defilement cases. Defilement is without doubt a heinous act that should be denounced in the strongest terms.

28. Sentencing does not however only aim to punish the offender. According to the Judiciary Sentencing Policy Guidelines sentencing must aim to rehabilitate the offender and ensure that he reforms from his criminal disposition and become a law abiding person.

29. The trial court did not consider that the appellant was remorseful of his actions. It also failed to consider that the appellant had been in custody throughout the course of the trial. **Section 333 (2)** of the **Criminal Procedure Code** requires a sentencing court to take into account the period spent in custody prior to the sentence.

30. The charge sheet indicates that the appellant was 23 years at the time he committed the offence. He was a first offender and has asked for forgiveness for his misdeeds. I find that this is a case befitting an interference with the trial court's discretion. Taking cue from the case of **Evans Wanjala Wanyonyi** above, I hereby set aside the sentence of 20 years' imprisonment and substitute it with a term of imprisonment of ten (10) years to run from 19th April 2018 when the appellant was arraigned in court.

Dated, signed and **delivered** at **Kisii** this **25th** day of **February, 2021.**

A. K. NDUNG'U

JUDGE