REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: R. E. OUGO)

HIGH COURT CRIMINAL APPEAL NO.4 OF 2015

SHADRACK KIPKURUI.....APPELLANT

VERSUS

STATE.....RESPONDENT

(Being an appeal from the sentence and conviction delivered on 18th October 2019

by Hon. R.M. Oanda (PM) in Kilgoris S.O. No.7 of 2017)

JUDGMENT

1. The appellant, **SHADRACK KIPKURUI CHEPKWONY**, was convicted and sentenced to 15 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 on the night of 17th day of January, 2017 at [Particulars Withheld] village in Transmara East sub-county within Narok County intentionally caused his penis to penetrate the vagina of JC a minor aged 15 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, JC (PW1) testified (PW 1) told the court that on 17th day of January, 2017, her teacher sent her to Appellant's home to fetch water. She went there with a friend, PW 2. They found accused person there alone whom they requested to give them drinking water. The Appellant told them that the drinking water was at his mother's bedroom. They proceed inside and accused followed them there and asked who among them was ready to have an affair with him. He then picked on her. He pushed her into the room and closed the door. He laid her into his mother's bed, stepped on her and forcefully removed her clothing and defiled her. He later let her go. She thereafter went and reported to her school head-teacher (PW 3) and was taken to hospital and a p3 form was filed (MFI PI).

4. MC PW2 testified that that she accompanied PW 1 to the home of the Appellant. While in the house, accused got hold of PW 1, pushed her into the bedroom and closed the door. They later went back to the school and reported matter to the school head-teacher (PW3).

5. Michael Kipngetich Ngeno (PW 3), the head-teacher [Particulars Withheld] primary school got the report from PW I on the material date at 4pm. The child reported to him that the Appellant had defiled her inside his mother's bedroom. Appellant was called to the school and asked to be forgiven.

6. Later accused was arrested. The victim/child was taken to hospital. PW 4, the clinical officer, Olchobose medical centre, filled the p3 form which he produced as EXP P1. PW 4 testified that in his findings, the child had a history of having been defiled by a known person and on examination on the Labia minora, there were mild laceration and some minimal clotted blood. Hymen was broken and a penile shaft was used. He concluded that she had been defiled. He also produced the PRC form (EXB P2) and treatment notes (EXB P3).

7. PC LILIAN MUTHONI (PW 5) of Abosi police post investigated the matter and later charged accused of the present charges. She said that receiving the report she sent the girl to hospital after issuing her with a p3 form. She also recorded statement before charging accused person. She finally stated that the complainant herein is aged 15 years old.

8. In his defence, said that the Appellant come from OL-chobosei and a bodaboda rider. He met one Michael in the course of his work. The said Michael asked to be taken to Dikirr police station. On arrival, he was arrested and asked for some money, which he refused to was later part with. He was charged. He denied committing the offence and attributed his predicament on bad blood between him and the school head

teacher the school -head (PW 3) who testified.

9. Aggrieved by the trial court's decision to convict and sentence him to 15 years' imprisonment, the appellant filed this appeal which he canvassed by way of oral and written submissions. The grounds of Appeal quoted verbatim were that;

i. He pleaded not guilty at trial.

ii. The trial magistrate erred in law and fact the prosecution since it did not summon the essential witness before court their facts.

iii. Most of the witness gave hearsay evidence that could not render conviction so harsh

iv. The Investigating officers did not even go to the scene of crime.

v. He was violated in police custody for five days without being produced in court and without any good reasons as to why he was detained in cells without any good reasons.

10. In his written submissions filed on 6th July, 2020, the appellant submitted on two major issues being, the failure to summon key witnesses and contradictions and inconsistencies. On the issue of failure to summon key witnesses, he submitted that the investigation officer, the parents of the complainant and pw4 who was a teacher of the complainant were not Summoned to clear their evidences yet they were mentioned essential witness. He contended that the mentioned people were very crucial witnesses with vital corroborative evidence but they were not summoned.

11. He referred the court to the case of **CIDRAF THUO AND ANOTHER V/S REPUBLIC C.R.A N0 12 AND 13 OF 2002 CA AT NYERI**, where it was held that the two courts below failed to observe and find summoned as witnesses and the assistant chief and the village elder and thus the benefit of doubt ought to have been resolved in favour of the appellant. The court contended that nothing prevented investigating officer to summon aforementioned people to appear in court including himself and hence they were able to give their verdict guided by the holdings of **JOHN JENGA V/S R.C.R.A NO 1126 AND 1121 OF 1984 C.A NAIROBI**, where the appellant was acquitted for the fact that some of the witnesses were not summoned, to clear doubts of the arrest especially those who arrested him.

On the issue of contradiction and inconsistencies, the appellant submitted that trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence. He referred the court to the case of **SEKITOLEKO VS UGANDA IN THE CASE OF RICKY GANDA VS THE STATE**

12. Mr. Otieno, for the State opposed the appeal. In his oral arguments he submitted that the evidence adduced in the lower court was adequate and the appellant was convicted of defiling a child of 15 years. That PW1 testified she knew the appellant who forced her in the house and defiled her. The 2nd witness who was with PW1 testified to have seen the appellant force the complainant into the house. PW3 stated that he was in the staff room when the appellant sought to be forgiven. The doctor confirmed the complainant had been defiled. He was sentenced to 15 years' imprisonment. He further submitted that while sentencing the appellant, the magistrate was clear that a deterrent sentence was needed. He sought that this appeal be dismissed and the appellant continues to serve his sentence.

13. Given an opportunity to rebut the oral submissions by the learned counsel for the state, the appellant who was acting in person simply stated the case against him was not true since the parents of the child and the chief didn't testify he the PW3 refused to take oath and therefore the evidence was false.

ANALYSIS AND DETERMINATION

14. Having carefully considered the grounds of appeal and submission in favour of and against the appeal, and having analysed and reassessed the evidence adduced on record the main issues of determination are;

i. Whether case against the appellant proved by the prosecution.

ii. Whether the sentence was repressive hence requiring a review by this court

WHETHER CASE AGAINST THE APPELLANT PROVED BY THE PROSECUTION

15. In determining this issue, the court needs to satisfy itself whether the key ingredients of the offence of defilement were proved in this case. The key elements are the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. This Court shall proceed to consider each of them singly.

(a) The age of the complainant:

16. The age of the complainant was settled by the P3 form produced in court confirming that the complainant is 15 years old. Her age was not contested during the trial and thus it is safe to conclude that the complainant was hence a minor within the meaning of the law.

(b) The issue of penetration:

17. Section 2 of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.…'

18. The Court of Appeal, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

19. In this instant case, PW 4, the clinical officer who examined the complainant testified that in his findings, the child had a history of having been defiled by a known person and on examination on the Labia minora, there were mild laceration and some minimal clotted blood. Hymen was broken and a penile shaft was used. He concluded that she had been defiled. He also produced the PRC form (EXB P2) and treatment notes (EXB P3). Considering his testimony and documents produced the element of penetration was proved

(c) Proof that the appellant was the perpetrator of the offence:

20. This element is the real issue in this appeal. The appellant argues that key witnesses like the investigation officer, the parents of the complainant, the chief and pw4 who was a teacher of the complainant were not Summoned to testify give their evidences yet they were mentioned essential witness. He contended that the mentioned people were very crucial witnesses with vital corroborative evidence but they were not summoned. It was also his argument that the witness who were summoned gave testimonies that had a lot of inconsistencies.

21. It is true that prosecution is indeed required to call all witnesses necessary to establish the truth including those whose evidence may be inconsistent. However, it is not required to call a superfluity of witnesses. The **Evidence Act** under **Section 143** 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."

22. If the witnesses called by the prosecution are sufficient to prove the elements of 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).***

23. In this case the only witnesses that put the appellant at the *locus in quo* are PW1 and PW2. This court will therefore examine their testimony to determine whether the evidence they gave was adequate to prove **the identity** of the appellant and whether it was necessary to call the minor's parents and area chief to shore up their evidence as contended by the appellant. Before doing so, it is essential for me point out that the appellant is dishonest when he claims that the investigating officer and PW4 never gave their testimony while both of them testified and he was given an opportunity to cross examine them. It is also essential to note that his arguments his Appeal, his written submission and his oral submission in court regarding

24. The evidence on record shows that the appellant was someone well known to PW1 and PW2. PWI told the trial court that on 17th day of January, 2017, her teacher sent her to appellant's home to fetch water at around 4 Pm. She went there with a friend, PW 2. They found accused person there alone whom they requested to give them drinking water. The appellant told them that the drinking water was at his mother's bedroom. They proceeded inside and accused followed them there and asked who among them was ready to have an affair with him. He then picked on her. He pushed her into the room and closed the door. He laid her into his mother's bed, stepped on her and forcefully removed her clothing and defiled her. He later let her go. She thereafter went and reported to her school head-teacher (PW 3) and was taken to hospital and a p3 form was filed. Her testimony was collaborated by the PW2. Therefore, it is clear the appellant was a person well known to PW1 and whom they identified accurately. This fact is also corroborated by the testimony of PW4 who following the report of the PW1, was able to trace the appellant, apprehended him and brought him to his office where he asked for forgiveness. Further my examination of the court record, I note that appellant choose not to cross examine the three witness extensively so point out to the trial court to any inconsistencies identifying him as the villain. I am satisfied as the trial court was, that the conditions were conducive for a positive identification of the appellant.

25. In this case, there was sufficient evidence given by PW1 and corroborated PW2. The medical evidence given by PW4 also confirmed the minor's testimony that she had been defiled. The value of any evidence that might have been given by the minor's parents and the area chief would most likely have been negligible as there was no indication that they had seen the appellant on the night in question.

26. From the forgoing it is clear that the evidence given by the prosecution's witnesses established the minor's age as 15, 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.

iii. Whether the sentence was repressive hence requiring a review by this court

27. The second limb of the appeal before 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."*

28. In several decisions post **"Francis Muruatetu case"** 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."*

29. It is clear that, the trial court in this case choose not to impose the maximum 20-year imprisonment given by the act and opted to hand the Appellant a 15 years' imprisonment instead. In exercising his discretion, he 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.

30. It is clear the record before me that the appellant was not remorseful of his actions as the only mitigation he gave was that he wanted to be released and go home to go and take care of his children. I find that this is a case where I do not need to interfere with the trial court's discretion hence the appeal on sentence is dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH, 2021.

R. E. OUGO

JUDGE

R.E. OUGO

JUDGE

In the presence of :

Appellant In person -present

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael Court Clerk