REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 62 OF 2020

DAVID NDEGWA WANJIRU...APPELLANT

Versus

REPUBLIC..RESPONDENT

(Appeal against conviction and sentence in the Principal Magistrate's court

at Kikuyu dated 28th May 2015)

JUDGMENT

1. ***DAVID NDEGWA WANJIRU*** was convicted before Kikuyu Principal Magistrate's Court for the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act**. He was sentenced to serve 20 years imprisonment. He has filed this appeal against his conviction and sentence.

2. This is first appellate court. In considering this appeal, I will be guided by the case ***OKENO V. REPUBLIC (1972) eKLR:-***

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA VS. REPUBLIC (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (SHANTILAL M. RUWALA VS. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS VS. SUNDAY POST [1958] E.A 424."***

3. The prosecution's case was that **AW**, a girl aged 14 years was on her way to her grandmother's house. This was at 3.00 pm. She met the appellant who pulled her into his house. Someone who AW did not know saw AW being pulled by the appellant into his home. The appellant closed the door behind him and he began to undress AW. The appellant proceeded to defile AW. AW's father was informed by a boy that AW had being pulled by the appellant into his house. AW's father went to the appellant's house. The appellant worked as a farm hand of Baba Kamau and lived on the farm. AW's father called out AW. According to AW when the appellant heard her father calling her, the appellant jumped out of the window and ran away. In the meanwhile AW's father went to report at the police station. It was then that Baba Kamau called AW's father and informed him that AW was in the appellant's house. AW's father went to that house in the company of police officers. They found AW there. AW was taken to Nairobi Women hospital.

4. The Clinician who attended to AW at Nairobi Women hospital testified and confirmed AW was defiled.

5. The appellant on being found to have a case to answer gave a sworn testimony. He stated on the day in question he was in church and thereafter he went to the farm. On 25th May, 2015 he was on his way to take the farm's milk to Thogoto trading Centre when he was arrested. He blamed the charges before him to a grudge between him and AW's father which began when he, the appellant, declined to work for AW's father. He said AW's father threatened to "do something" he would never forget. He denied he knew AW and stated he first saw her in court when she testified.

6. By his submissions the appellant raised the following issues for consideration:-

(a) Whether his rights were violated when the new trial magistrate refused to start the trial *de novo*.

(b) Whether the charge was defective for not having the words "unlawful".

(c) Whether the trial court conducted *voir dire* as required.

7. On the first issue identified above, I will begin by considering the provisions of **Section 200(3)** of the Criminal Procedure Code.

> ***"200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may:-***
>
> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
> >
> > ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right"***

8. Although the reading of that Section provides that an accused can demand the trial to start *de novo* the jurisprudence of that section shows that there are other considerations to be taken into account. The Court of Appeal in the case of ***<u>ABDI ADAN MOHAMED V. REPUBLIC (2017)</u> eKLR*** stated this in that respect:-

> ***"In other words Section 200, as was emphasised in <u>Ndegwa</u> (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached."***

9. The starting of a trial *de novo* will always be resorted to sparingly. In this case the prosecution explained that AW was a school going girl and recalling her would interfere with her education. Moreover courts should avoid to recall witnesses where such recalling may cause witness fatigue.

10. I do therefore refute submissions of the appellant that his rights were violated by not starting the trial *de novo* before the new trial magistrate.

11. The second issue to consider is whether the charge the appellant faced was defective for omitting the word "unlawful".

12. The appellant erred to rely on cases that were decided on a charge of rape contrary to Section 141 of the Penal Code. Contrary to the submissions of the appellant Section 8 (1) of the Sexual Offences Act does not have in its particulars the words "unlawful". Section 8(1) of the Sexual Offences Act defines defilement. That section states:-

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

13. I would therefore dispose the submission of the appellant by stating that the charge was not defective.

*14. AW, as stated before, was 14 years old when the offence took place. AW had just sat her KCPE examination. The trial court conducted a voir dire examination and confirmed AW knew the meaning of an oath. AW gave her evidence under oath. The Court of Appeal in the case of **<u>JAPHETH MWAMBIRE MBITHA VS. REPUBLIC (2019)</u> eKLR** set out the purpose of conducting voir dire examination as follows:-*

> ***"Again, it bears repeating that the purpose of*** *voir dire* ***is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven."***

15. The trial court having satisfied itself that AW knew or appreciated the nature of oath that *voir dire* exam by the trial court cannot be faulted.

16. This latter ground of appeal is also rejected.

17. The prosecution proved its case on the required standards, that is beyond reasonable doubt, and that evidence was not displaced by the appellant.

18. It follows therefor that the appellant's appeal against conviction is dismissed.

19. On sentence being aware of the Supreme Court decision discussed in the case of ***<u>FRANCIS OWINO OTIENO VS. REPUBLIC (2020)</u> eKLR***, I will interfere with the trial court's sentence. In the case of ***<u>FRANCIS OWINO OTIENO VS. REPUBLIC</u>*** the court sated:-

"22. The reasoning in the above** FRANCIS MURUATETU **case has been extended to mandatory minimum sentences imposed under the Sexual Offences Act and by extension, to all other statutes prescribing minimum sentences by the Court of appeal in DISMAS WAFULA KILWAKE V R [2018] eKLR, and in JARED KOITA INJIRI V REPUBLIC [2019] eKLR where the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:-

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in*** *FRANCIS KARIOKO MURUATETU & ANOTHER V. REPUBLIC*, *SC PET. NO. 16 OF 2015]**, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

DISPOSITION

20. In the end the judgment of the court is as follows:-

(a) The appeal against conviction for the reasons set out above is dismissed.

(b) The trial court's sentence is set aside and the appellant is hereby sentenced to serve ten (10) years imprisonment which shall be calculated starting from 28th May, 2015.

Orders accordingly.

JUDGMENT DATED and DELIVERED at KIAMBU this 22nd day of April, 2021.

MARY KASANGO

JUDGE

Coram:

C/A:

Appellant: ....

Respondent: ....

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE