REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NUMBER 218 OF 2014

GEORGE OMANGE SIMBA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence of Hon. Nthuku J NTHUKU

in Chief Magistrate Court at Nakuru vide Criminal in CMCC No. 79 of 2013

delivered on 28th August 2013)

JUDGMENT

1. The Appellant George Omanga Simba seeks to quash the conviction and sentence in Nakuru CMCC No. 79 of 2013 delivered on the 28th August 2014 whereof he was convicted for the offence of defilement of a 17 years old girl contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006 handed a sentence of 25 years imprisonment.

The particulars of the offence were that on the 11th May 2013 at [particulars withheld] farm in Nakuru County he unlawfully and intentionally defiled JW by inserting his male organ (penis) into her female organ (vagina) causing penetration.

2. The appeal is premised on three grounds

> *(1) Violation of the appellant's constitutional rights to fair trial contrary to Article 50 of the Constitution.*
>
> *(2) Reliance on insufficient and incredible prosecution evidence.*
>
> *(3) Prosecution case not proved to the required standard, beyond reasonable doubt.*

3. The appellant relied on his filed petition of appeal and written submissions. I have considered them.

The duty of a first appellate court is to re-examine and scrutinize the evidence adduced before the trial court to satisfy itself that the evidence supports the trial court's findings by weighing the same and coming to own findings and conclusions – **Republic –vs- George Anyango Anyang & Denis Oduol Ongojo (2016) e KLR, Okeno –vs- Republic (1972) EA 32, Kiilu & Another –vs- Republic (2005) 1**

KLR.

4. The prosecution case was urged through four witnesses. I have re-evaluated the trial court's findings and judgment.

5. **Violation of Article 50 Constitution on Fair Trial**

The record shows that at the commencement of the trial, the court directed the prosecution to provide the appellant with all documentary evidence it would rely on. That was on the 23rd May 2013. On the 25th July 2013, the accused told the court that he had not been given the documents, and therefore not ready. The case was adjourned to the 14th October 2013. The appellant told the court that he was ready therefore the prosecution case started. He did not inform the court, that he had not been provided with the prosecution witness statements and other documents as earlier on directed. There is no record to that effect.

6. The appellant cross examined two of the three prosecution witnesses, and when placed on his defence, stated that he would not give any evidence in defence and would await court's verdict.

7. ***Article 50(2)(j) of the Constitution gives every person a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence and under Subsection 2(c) an accused person has right to have adequate time and facilities to prepare his defence.***

8. Failure to accord the above rights to an accused person no doubt prejudices and violates these rights that are unlimited under the Bill of Rights as stated in the case **Thomas Patrick Gilbert Cholmondeley – vs- Republic (2008) e KLR** where the court rendered that *"….we think it is now established and accepted that to satisfy the requirements of a fair trial under our constitution, the prosecution is under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the tail copies of documentary exhibits to be produced at the trial and such like items."*

9. The appellant requested for, and an order made by the trial court for provision of all the documents. As I have stated earlier, the accused on the second time, did not inform the court that he had not been given the said documents, but stated to have been ready for hearing of the case. I find that had he not been given the documents including witness statements just like the first time, he would have told the court so. By stating that he was ready, it was implied that he had the documents, and was ready with the case.

See **Julius Rotich –vs- Republic (2019) e KLR** and **Dominic Kariuki –vs- Republic (2018) e KLR** where the issues were ably discussed.

I find no merit in that ground of appeal.

10. **Inadequacy and insufficiency of evidence**

PW1 was the mother of the seventeen (17) years old girl. The age was satisfactorily proved by production of her health clinic card as well as age assessment report. Her evidence was not challenged at all. The appellant cross examined her but not on her evidence, but on matters not before the court.

11. The witness had testified to a mental retardation of the complainant due to prior defilement by some unnamed boys.

Her evidence that the appellant had defiled the complainant several times was not challenged.

12. **PW2** was the complainant. The trial court upon taking her through a *voire dire* examination observed her mental retardation, but nevertheless certified that she understood the importance of telling the truth, but not intelligent enough for a 17 years old girl to take an oath. She gave an unsworn statement. Her

evidence was very thorough on how the appellant, a neighbour took her to his house, placed her on his bed, undressed her and how he defiled her by *"aliingiza mfereji ya kukojoa"* – meaning his penis) and threatened her not to tell anybody as he would kill her.

13. It was her evidence that, was not the first time as he had done so several times when his wife had gone to work. She testified that earlier on, two boys had also defiled her and since then she did not go to school.

The appellant cross examined the complainant who replied that *"you took me and told me I should be having my home by now."*

14. **PW3** was the clinical officer. He examined the complainant on the 20th May 2013, seven days after the defilement.

He observed old torn hymen with vaginal bleeding. Vaginal swab showed red blood cells with few pus cells, and concluded that there was penetration. He filled the P3 form on 4th May 2013 – PExt 2.

The appellant said he had no questions for this witness.

15. **PW5 Cpl. Rosemary Kaikai** took the complainant for age assessment of the complainant. She produced the report stating her age as seventeen –PEx 3. It was her evidence that when he visited the scene, she found the girl shaken with heavy vagina bleeding and confirmed that the appellant was a neighbour of the complainant, living next door to the complainant's parents' house.

16. As I stated earlier, when placed on his defence, the appellant stated that he would not give any evidence in defence, and would await the court's verdict.

He now challenges that verdict of guilt.

17. The evidence by the prosecution was in my view, straightforward, cogent and plain, and not challenged at all. The appellant was known by all the prosecution witnesses having been their neighbour. He did not challenge the evidence that pointed to him as having defiled the complainant, not once, but several times, prior to the date in the charge sheet.

18. The burden of proof in a criminal case always lies with the prosecution to call evidence sufficient enough to prove the offence.

The complainant testified to have had several sexual encounters with the appellant. She was 17 years then. Legally, she did not have capacity to consent to sexual intercourse with the appellant or any other person. She testified to have been threatened if she told anybody about the sexual activities. Though no medical evidence was tendered to prove her mental retardation, the trial court alluded to having observed her and concluded that she had no intelligence of a 17 years old child – see **Dalmas Ochola –vs- Republic (2019) e KLR.**

19. Though the entire evidence was circumstantial, the same points to no other person as the assailant except the appellant. **Proviso to Section 124 of the Evidence Act** empowers the court to convict on uncorroborated evidence if it is satisfied that the complainant is truthful and credible. – **Chila –vs- Republic (1967) EA 722.**

20. The ingredients of defilement that must be proved are:

a) Age of the child

b) Proof of penetration

c) Positive identification of the assailant.

The medical evidence was satisfactory that indeed the girl had been defiled and that penetration was evident.

The appellant tendered no evidence in defence. He threw away his chances of controverting the complainant's evidence which was corroborated by the medical evidence. He only has himself to blame.

21. I am persuaded that the prosecution did prove the offence, with the available evidence, that the appellant committed the offence as charged.

I uphold the conviction.

22. On the matter of sentence upon conviction, **Section 8(4) of the Sexual Offences Act** prescribes the sentence as imprisonment for a term not less that fifteen years. The trial court upon its discretion meted a sentence of twenty five years upon the appellant.

However, the circumstances do not warrant the sentence over and above the minimum statutory sentence of 15 years imprisonment. unless there are exceptional circumstances. I have considered the trial court's judgment. No special or peculiar circumstances are stated, except the alleged retardation of the complainant, but which was not proved by any medical evidence.

23. Essentially, sentencing is at the court's discretion. When such discretion is taken away by the statutory prescribed minimum sentences, no justice can be done to the offenders. Circumstances of each case ought to be considered as stated in the **Judiciary Sentencing Policy,** and now reinforced by judicial decisions where judges have not shied away from reducing such sentences when circumstances allow, to meet the ends of justice. Sentence ought to be proportionate and consumerate to the crime committed.

24. Turning to the twenty five (25) years imprisonment, I find the same to be not only unfair, but also not consumerate with the offence, nor would it serve the objectives of sentencing, being deterrent and rehabilitation, among others.

I am guided by the following **Jared Koita Injiri –vs- republic (2019) e KLR, NOO –vs- Republic (2019) e KLR, RKS –vs- Republic (2018) e KLR, Gidraph Mwangi Mugo –vs- Republic (2019) e KLR** as well as **Samuel Njenga Wanyoike –vs- Republic (2019) e KLR**, where the courts, upon considering the circumstances of each case, and its peculiarity, have reduced the sentences below the minimum prescribed under the Act.

25. **For the above reasons, I shall set aside the twenty five year imprisonment meted to the appellant and substitute it with a sentence of ten years imprisonment from the date of the trial court's sentence, the 28th August 2014.**

Delivered, signed and Dated at Nakuru this 30TH Day of January 2020.

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J.N. MULWA

JUDGE