REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPLEAL NO 91 OF 2017

JOSEPHAT KIBET TANUI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being an Appeal from against both the conviction and the sentence of Resident Magistrate*

*Hon. Rita Amwayi delivered on 6th of November, 2017 in Molo Criminal Case No. 72 of 2017.****)***

JUDGMENT

1. The Appellant was arraigned before the Molo Chief Magistrate's Court charged with a single count of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars alleged that on the 13th day of August, 2017 at [particulars withheld] Location in Rongai sub-county within Nakuru County, the Appellant intentionally caused his penis to penetrate the vagina of MC aged 14 years old.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The specifics of the victim, time and place of the alternative charge are the same as those of the main count.

3. The Appellant pleaded not guilty and the case proceeded for full hearing. The Prosecution called six witnesses to prove its case.

4. The Complainant, MC, testified as PW4. She testified that on 13/08/2017, she and her friend, MC went to Ebenezer church. She testified that they came from church at 1:00pm and started walking home. On their way home, MC and her friend passed by a shop to buy mandazi. She said that while there they met the Appellant who wanted to buy them sodas. MC testified that they declined the soda and walked away; and that the Appellant followed them.

5. MC testified that after walking for a short while, the Appellant caught up with them and and told them that they had to live by his rules. He then brandished a knife and forced MC and her friend to walk to his house. MC said that on getting to the Appellant's house, the Appellant pushed her inside the house while he pushed MC outside. Left inside, MC said that the Appellant proceeded to forcefully undressed her and had sexual intercourse with her by penetrating her vagina with his penis. When done, MC told the Court that the Appellant dressed up and left; noting to lock the door from the outside. He remained inside until her mother in the company of the Chief and the Police went to rescue her.

6. MC testified as PW5. She is 14 years old. She corroborated MC's narrative of how the Appellant accosted them as they headed home from church and that the Appellant eventually locked MC in his house. M said that she then raced home and on meeting MC's uncle, informed him what had happened. The uncle then told MC's mother who then reported to the Chief and the Police. She then led the group to the house.

7. MC's mother, DC, was PW1. She confirmed that on 13/08/2017, a Sunday, MC and M left home to go to church but that MC did not come back. Instead, M came back and told DC's brother that MC had forcefully been taken by the Appellant to his house. DC, then, went with the brother to the Chief and the Police to the Appellant's house as pointed out by M. There, they found the Appellant who was arrested and forced to give up the key. On opening the door, the found MC inside the house. The following day, DC took MC to the hospital for examination and treatment.

8. The Chief who went with DC to the Police Station and to the Appellant's house was Stanley Nderitu. He testified as PW3. He confirmed receiving a call on the incident from a Mr. Tuwei before receiving DC and M. Together, they went to the AP Camp where they made a report. They were assigned some Police Officers with whom they proceeded to the house of the Appellant as pointed out by M.

9. It was Corporal Francis Kimutai Kosgei of Rigogo AP Post who accompanied the team to the Appellant's house. Corporal Kosgei testified as PW2. He corroborated the story of what happened when DC went to report at the AP Post about her daughter. He testified that M led them to the Appellant's house and that on getting there, the Appellant attempted to run away but he arrested him. Corporal Kosgei asked the Appellant for the key with which he opened the door only to find MC inside.

10. At Rongai Health Centre, MC was examined by Bildad Bargoge, a Clinical Officer. He testified that he examined MC on 14/08/2017. He found a vaginal infection, visible vaginal injuries and white vaginal discharge. Upon urinalysis, he found non-motile spermatozoa. He concluded that there was penetration most likely by a penis.

11. The final Prosecution witness was the Investigating Officer who narrated the mechanics of her investigations and her decision to charge the Appellant.

12. Put on his defence, the Appellant gave an unsworn statement. He stated that on 13/08/2017 he was at his place of work at a barber shop until 7:00pm when there was a black out. He stated that he went to buy airtime but on getting back he was arrested on the allegations that he had defiled a girl. He denied having done so stating that he does not know the victim.

13. Upon analysis, the Learned Trial Magistrate identified the three elements the Prosecution had to prove as:

a. The age of the victim;

b. The fact that there was penetration; and

c. The identification of the assailant as the person who caused the penetration.

14. The Learned Trial Magistrate was persuaded that all the three elements had been proved beyond reasonable doubt and proceeded to convict the Appellant. She then sentenced him to imprisonment for twenty (20) years.

15. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court. The Appeal raised the following grounds as contained in the Amended Grounds of Appeal:

1. That the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution did not prove its case beyond reasonable doubt.

2. That the learned trial magistrate erred in both law and fact by failing appreciate that the documentary evidence was produced in evidence as exhibit contrary to the provisions of law.

3. That the learned trial magistrate erred in both law and fact by failing appreciate that the medical evidence adduced was neither sufficient nor cogent enough to provide corroboration to the charge.

4. That the learned trial magistrate erred in both law and fact by failing to find that the Appellant was cogent and raised considerable doubts against the prosecution evidence.

5. That the learned trial magistrate erred in both law and fact thus failing to give due regard to the material contradiction, discrepancies and inconsistences in the prosecution case.

6. That the learned trial magistrate erred in both law and fact in allowing the prosecution evidence which was full of gaps, shallow in nature and not cogent enough to sustain the conviction and sentence meted on the Appellant.

16. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic*** **[1972] EA 32**).

17. On review of the evidence, there appears little controversy that the Complainant was approximately 14 years old at the time of. A birth Certificate was produced to prove the age of the Complainant. Both the Complainant and her mother also testified about her age and date of birth.

18. On appeal, Mr. Keboga, counsel for the Appellant, concentrated his submissions on whether there was sufficient evidence to sustain the charges. His submissions go to the question of whether there was penetration and if so whether it was caused by the Appellant. He submitted that the evidence tendered at the trial was full of inconsistencies, contradiction and gaps and should not have led to a conviction. He pointed out the following three as definitive:

a. First, Mr. Keboga complained that there was inconsistency as to who opened the door to the Appellant's house where the Complainant was reportedly found. He complained that DC said she opened the door while PW3 (Samuel Nderitu) claimed that the Appellant opened the door and then tried to run away. Still, Mr. Keboga submitted, PW2 (Corporal Kosgei) said he is the one who opened the door.

b. Second, Mr. Keboga submitted that the evidence of MC and her friend, M, was incredulous because it is not plausible for two girls who are fourteen years old to be abducted in broad daylight on a Sunday and they do not raise alarm.

c. Third, Mr. Keboga submitted that it was remarkable that no other person saw the alleged abduction yet it was a Sunday and it allegedly happened on a busy road.

d. Fourth, Mr. Keboga submitted that it seems illogical that the Appellant would lock MC in his house and keep her for seven (7) hours yet knowing fully well that her friend had escaped and would report the abduction.

19. I have considered the alleged inconsistencies, contradictions and gaps against the Trial record and the Prosecution case as a whole. The rule of law when it comes to inconsistencies and contradictions is that that minor discrepancies and inconsistencies in the Prosecution case can be ignored (see ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** *CRIMINAL APPEAL NO. 5 OF* **2013). In this case, the Court of Appeal stated:**

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.

20. In the present case, I found no major contradictions about who opened the door to the Appellant's house. PW1 (DC) stated: "We then found the suspect coming from a barber shop while he had locked MC inside his house. He then opened for us the house where MC was and they were both arrested and we went to Police at Salgaa." On the other hand, PW2 stated: "When we reached there, we found the suspect outside who attempted to run away but I arrested him. The house was locked with a padlock and the suspect had the key. I then took the key from the suspect and he pointed to us his house which I opened and found the Complainant inside the house seated on the bed." The discrepancy of whether it was the Appellant who actually opened the door or Corporal Kosgei is minor and does not go undermine the credibility of the witnesses.

21. What about the complaints that the Prosecution case is unworthy of belief because it is implausible that the Appellant would have abducted the two teenagers in broad daylight on a Sunday without other people noticing; and further that it was incredible that M did not divulge earlier about the abduction? It is important to recall that the charge the Appellant faced was defilement not abduction. The ingredients of the offence of defilement are: age; penetration and identity. The main question is whether these ingredients were proved not whether every single aspect of the stories narrated by the Prosecution witnesses were completely true. As the Court of Appeal stated in ***Phillip Nzaka Watu vs. R (2016) e KLR***:;

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

22. It may well be in this case that the Appellant persuaded the two young girls to accompany him to his house and then proceeded to have sex with MC while sending M away. In my view, it is perfectly possible that the two young girls chose to accentuate the story because of the stigma associated with being seduced even if one is a minor. However, the manner in which MC went to the Appellant's house is immaterial. What appears eminently true from the facts is that MC was found in the Appellant's house. Indeed, this fact is so eminently true that during the cross-examination of PW1, the Appellant himself remarked: "The girl was inside my house. I have not denied."

23. In my view, there was sufficient evidence to establish penetration beyond reasonable doubt. Apart from the evidence of opportunity described above, the testimony of the Complainant, the medical evidence by Bildad Rangoge put the issue beyond doubt. He found non-motile spermatozoa and Sexual Transmitted Infection (STI). The Clinical Officer concluded that there was penile penetration.

24. On the identity of the person who caused penetration, as analyzed above, the unequivocal and straightforward testimony of the Complainant and M remained largely unchallenged on cross examination. Second, the evidence is corroborated by the fact that MC was found inside the Appellant's house. Third, the Appellant attempted to run away upon seeing Corporal Kosgei and MC's mother; indeed he was arrested as he tried to escape. This is a tell-tale sign of a guilty mind.

25. Given this analysis, it is my finding that the Prosecution proved any reasonable doubt that the Appellant committed rape against the Complainant. The Trial Court was correct in dismissing the Appellant's defence as implausible given the weight of the Prosecution case and the credibility the Court assigned to the Prosecution witnesses.

26. Turning to the sentence imposed, I note that the Appellant was sentenced to twenty years in prison which is the statutory minimum. I note that our Courts have now held that in appropriate circumstances the Court can go below the statutory minimum. (See the Court of Appeal decision in in ***Dismas Wafula Kilwake v R [2018] eKLR***). The Appellant was given an opportunity to mitigate. He only told the Court that he prayed for leniency and that he was from a single parent whom he was supporting. I have also considered that the Appellant here did not use force and that it is likely he unfairly seduced the minor and persuaded her to have sex with him. Needless to say, the girl was way below the age of consent. I note, however, that the Appellant is a relatively young man. Twenty years imprisonment in the circumstances of this case would be disproportionate response to the crime committed. I am of the opinion that a sentence of ten years imprisonment would be sufficient in the circumstances of this case.

27. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of imprisonment for twenty years is set aside. In its place, a sentence of ten (10) years imprisonment is imposed. The sentence shall be computed to run from 15/08/2017.

28. Orders a22. ccordingly

Dated and delivered at Nakuru this 27th day of February, 2020

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JOEL NGUGI

JUDGE