REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 22 OF 2019

KEVIN MOENGA NYANGAU.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. C. W. Waswa – RM Nyamira dated and delivered on the 21st day of June 2019 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 18 of 2018}

JUDGEMENT

The appellant whose names in the lower court appear as KELVIN OMWENGA NYANGA'U was sentenced to twelve (12) years imprisonment for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act.

The particulars of the offence were that on 10th November 2017 at, within Nyamira County, in association with Clif Subano Matoke, the accused intentionally and unlawfully caused his penis to penetrate the vagina of P. N. a child aged seventeen (17) years old.

This appeal is premised on six grounds which are framed as follows: -

> **"1. That I was sentenced to 12 years imprisonment.**
>
> **2. That the sentence imposed to me is manifestly harsh and in excessive, I do pray for probation to intervene or alternatively sentence reduction.**
>
> **3. That I am a sole breadwinner in my family and my siblings and my parents depend on me full to cater to their needs hence I pray for probation or reduction of the sentence review, so that I can access the opportunity to assist my dependents who are adversely suffering in my absence.**
>
> **4. That the trial magistrate erred in law and facts by not considering my mitigation before he passed the sentence of 12 years imprisonment.**
>
> **5. That the appeal is under mitigation and probation basis.**
>
> **6. That I urge this honourable court to make its own conclusion and gave me a reduction of sentence."**

At the hearing of the appeal the appellant who acted in person preferred to proceed by way of written submissions in which he states that the sentence imposed by the trial court is manifestly harsh and excessive; that it was not proved that he participated in the crime and that the offence was not proved as DNA was not conducted. Secondly, he submits that the bad blood between his family and the family of the complainant could have resulted in his being framed because firstly he was not in the forest where it is alleged the complainant was defiled and secondly because the complainant told her mother she did not know who among the boys defiled her. He submits therefore that his involvement was doubtful. The appellant further submits that he ought to be set at liberty or given a non-custodial sentence as he is a victim of circumstances which he does not understand. He submits that he is from a poor family and was at the material time undertaking a mechanics course in Nakuru and his future may be curtailed yet being the firstborn his family looks up to him. He also expresses remorse for defiling the complainant and states he truly feels sorry for the complainant and states that as he had not been involved in any criminal activities this court should consider his mitigation and grant him the orders sought.

Mr. Majale, Senior Prosecution Counsel however opposed the appeal. He noted that the appellant's plea is for reduction of the sentence and urged this court to uphold the conviction. He contended that the prosecution had in any event proved its case beyond reasonable doubt. In regard to the sentence, Mr. Majale submitted that the same was reasonable in the circumstances of the case and it ought to be upheld.

In the grounds, the appellant has not challenged the conviction but it is clear from his submissions that apart from the sentence he was aggrieved by the conviction. I am alive to the provisions of **Section 350 (2)** that prohibit an appellant who has not obtained leave, from relying on a ground of appeal other than those set out in the petition of appeal without leave but the appellant having been convicted of a serious offence and being unrepresented I have overlooked that and considered the appeal against conviction as well. I have done so by re-considering and evaluating the evidence in the lower court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses who gave evidence **(see Okeno v Republic [1973] EA 32).**

The complainant testified as Pw4 and vividly narrated that on the material day she left her aunt's house in Kisii at 8pm to go home. She alighted the vehicle at a place called Yaya Centre and using the conductor's phone she called her father to pick her. She testified that there were two boys at the stage who demanded a phone and money and when she said she did not have they got hold of her and took her to a forest where they forcibly undressed her and then defiled her one after the other and fearing she would report them they took her to a house where they found the appellant who also defiled her. She stated that after that the appellant took her to his sister's house where she stayed until 6am when she went home and reported the matter to her mother. She was then escorted to Ekerenyo Sub-County Hospital where an examination confirmed she had been defiled. According to Kerubo Nancy (Pw1), a clinical officer at the facility, who produced the results of the examination on behalf of her colleague Josphat Nyamache who was on study leave, there were blood stains and spermatozoa in the complainant's genitalia at the time of examination. After the examination the complainant and her mother (Pw2) reported the matter to Ekerenyo Police Station. On 28th April 2018 the appellant was arrested by members of "Nyumba kumi" and taken to Ekerenyo Police Station. What followed was an identification parade in which the complainant identified the appellant. She also identified one other of the young men who had defiled her in another parade and the appellant and that other man were charged with gang defilement.

I am satisfied that the charge against the appellant was proved beyond reasonable doubt. The complainant positively identified him with the light of a lantern lamp that was being used to light the house. She was positive that she saw him clearly and I believed her as she had sufficient opportunity to do so given that it must have taken considerable time for each of the offenders to commit the act and for the appellant to escort her to his sister's house. I have perused the testimony of Pw2 (the complainant's mother) and it does not support the appellant's submission that the complainant did not know who defiled her. To the contrary, Pw2's evidence corroborated that of the complainant in every material particular although corroboration is not a requirement in sexual offences. Pw2 confirmed that the complainant had that night called her father to pick her from the bus stage and when he went there he did not find her. Pw2 also confirmed that the complainant arrived home at 6am in the morning and that she arrived in tears and confided she had been defiled. The complainant's mother also confirmed that she took her to hospital for examination. DNA is not mandatory and the appellant's conviction based on the complainant's testimony was sufficient – **(See Section 124 of the Evidence Act).** The appeal on conviction therefore lacks merit and it is dismissed.

As for the sentence, I am not persuaded that a non-custodial sentence would meet the objectives of sentencing. Whereas the appellant was a first offender, the offence of defilement even when committed by one person is very grave. The offence is also very prevalent and calls for a sentence that can act as a deterrent not only to the offender but also to others who may be tempted to commit a similar offence. In the circumstances I find that the sentence imposed by the trial court is reasonable and accordingly dismiss the appeal in its entirety. It is so ordered.

Signed, dated and delivered in open court this 27th day of February 2020.

E. N. MAINA

JUDGE

In the Presence of: -

Mr. Majale for state

Kevin Moenga Nyangau

C/A - Millicent