REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 10 OF 2 018

ONESMUS KARISA KARABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon M. Onkoba in the SPM's Court in Voi

delivered on 20th December 2017 in Criminal Case No 441 of 2016)

J U D G M E N T

1. The Appellant before the Court was convicted on 20th December 2017 of defilement under Section 8(1) of the Sexual Offences Act Cap No 3 of 2006 and sentenced to 15 years imprisonment. The Appellant filed his Petition of Appeal on 29th January 2018. At the same time the Appellant filed an application for leave to appeal out of time. Leave was granted by Hon Lady Justice J. Kamau on 22nd February 2018.

2. The Appellant is appealing against both conviction and sentence. His Grounds of Appeal are:

> "1. I pleaded not guilty charges
>
> 2. The investigating officer did a shoddy job as defilement is concerned he never visited the scene of crime
>
> 3. That the evidence presented before court by the prosecution witness belong to the same family
>
> 4. Your honor I am the sole bread winner of my family after my parent's demise.
>
> 5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.
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> 6. In the view of circumstances of this case, the custodial sentence of 15 years is harsh, severe and manifest excessive punishment,
>
> 7. Your honour I beg your honorable court to reduce the conviction, give option of fine, quash conviction or order re-trial or whichever your honorable may deem fit.
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> 8. That in the event of my humble appeal may find merits. I would wish to be allowed to be present during the hearing of my appeal.

After receiving a copy of the Certified Proceedings the Appellant filed Amended Grounds of Appeal. These are:

> "1. That the learned trial magistriate erred in both law and fact in convicting and sentencing me while not considering that, the appeallant was not assigned an advocate by the state as required by the law since I am a layman in law
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> 2. That the Learned trial magistrate erred in both Law and fact in not considering that, the Burden of Proof was not discharged beyond reasonable doubt.
>
> 3.That the Learned trial magistrate erred in both law and fact in not considering that, I the appeeallant was a first offender hence deserved an alternative sentence.".

3. Both Parties were directed to serve written submissions. The Appellant filed his Submissions on 23rd January 2019. Unfortunately, the Respondent did not comply with the direction until nearly a year later. The Respondent's Submissions were filed on 30th January 2020.

4. The Appellant's first Amended Ground of Appeal is that he was not provided with an advocate. The record does not show that the Appellant asked for an advocate to be signed. At the present point in time an Advocate will only automatically be provided for capital offences. Defilement is not a capital offence. In the circumstances, the fact that an advocate was neither asked for nor provided does not mean that the Appellant did not have a fair trial.

5. The Second Ground is that the Prosecution did not prove its case to the required standard, namely that it did not prove its case beyond reasonable doubt. The Appellant seems to be saying that since there was no eye witness to any part of the offence, it is not proved. Also that since "all" the witnesses are related, their evidence is not believable.

6. As the first appellate court, this Court has a duty to reconsider and re-evaluate the evidence before the lower court and come to its own conclusion bearing in mind that it has not had the advantage of observing the testimony of the witnesses and coming to its own conclusion about their demeanour and consequently veracity.

7. The Appellate was charged with the offence of "*Defilement of a girl contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006*. The Particulars of the Offence are that; *ONESMUS KARIS KARABU: On 27th day of May 2016 at [particulars withheld] area in Voi within Taita Taveta County intentionally caused your male genitalia (penis) to penetrate the female genitalia (vagina) of LC a child aged 16 years"*. There was also an alternative charge of "*Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006"*. The Particulars of the alternative charge were that: *ONESMUS KARISA KARABU: On 27th day of May 2016 at [particulars withheld] are in Voi within Taita Taveta County intentionally touched the vagina of LC a Child aged 16 years with your penis*.".

8. The evidence before the Court came from 6 Prosecution Witnesses and the Appellant as well as the documents they introduced into evidence. Firstly, as to the identity of the assailant, there is no doubt. The Accused was identified as the perpetrator by the Complainant (PW-2) and her Mother (PW-1). The could recognise him because he worked as a herdsman for their neighbour. They knew his name and what he looked like.

9. Section 8(1) of the Sexual Offences Act No 3 of 2006 provides:

> "8. **Defilement (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement**. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years**.".
>
> "

10. The primary evidence before the Court comes from the Complainant. She told the Court that she was 16 years old. She produced an Original Birth Certificate PExh-1 which proved that her date of birth was 16th April 2010 making her 16 years and one month old on the date of the offence. She said that she has been living in [particulars witheld] Village since 29th May 2016. She said prior to that she was living in [particulars withheld] Village with her grandmother.. She attends [particulars withheld] Polytechnic. The Learned Trial Magistrate decided that he did not need a voire dire to assess her understanding of the proceedings and the Complainant was allowed to give evidence on oath.

11. In relation to the offence she said that on 24th May 2016 she attended school. She left school at 4.30 pm and went to visit her aunt who lives in [particulars withheld] Shopping Centre. At around 6.30 she left her aunt's house to return home. She was still wearing her school uniform. On her way she came across OK. She knew him because he was employed by a neighbour to herd the neighbour's cattle. The Appellant asked her to accompany him to his house. She declined his request so he demanded that she accompany him on threat of being cut by his panga. He was holding a panga to demonstrate his threat and intent. Even then she tried to resist but he held onto her hand/arm and dragged her to his house. As it was late there were no passersby. He managed to force her to his house. She noticed it was newly built. She also noted that he too used to live in [particulars withheld]. The House had one room containing one bed and 2 jerricans together with some clothes in a bag. When she came into the house, the Appellant forced her onto the bed and undressed her. He then undressed himself. When she tried to escape he reiterated his threats saying "in a very frightening voice" that he would "cut her into pieces with his panga. She described his clothes as shorts and a red shirt. He forced her onto the bed and had sexual intercourse with her. She said she screamed but no-one came to her aid. She said she pleaded with the Appellant to let her go but he would have none of it. Later he dressed himself and went out. He locked the Complainant in the house. The Appellant came back with a loaf of bread which he gave the Complainant to eat which she did. They then both slept on the same bed. The next day, she asked the Appellant to let her go so she could attend school. He tried to extract a promise from her that she would not disclose what he had done. She refused and he left the house and again locked her inside by locking the house from the outside. She ate what was left of the bread from the previous day. When he returned he again demanded to have sexual intercourse and did so. His conduct was such that it made the Complainant inquire whether he wanted to use her as a wife. That is a telling choice of phrase.

12. After sexual intercourse he went to take a bath. He brought water for the Complainant to wash. She bathed in the house. She also washed her undergarments. Again the Complainant tried to leave and again he stopped her. He locked her inside at about 6pm and returned at 9pm. He brought some cake and soda and that is all she had to eat. On the next day, 26th May 2016, the Appellant left and returned at around 4 pm. The Complainant was still in the house. They did not have intercourse on that date. On the next day was 27th May 2016. The Complainant says that the Appellant left and when he came back at 5pm he was accompanied by her Mother and a Female Village Elder

called HM. When the Complainant's Mother (PW-1) asked the Appellant what he was doing with her daughter, he said that he had married her. The Assistant Chief was called and the Police from Voi Police station. The Police are said to have arrested the Appellant as well as the Complainant.

13. The Court heard from PW-1 the Mother of the Complainant. She confirmed that her daughter was only 16 years old. She confirmed that she was a student at [particulars withheld] Youth Polytechnic. She produced the original Birth Certificate Serial No. *****. She told the Court that on 24th May 2016 the family were concerned because the Complainant did not come back home after school. On the next day the Complainant still had not returned. The Mother then commenced a search for her daughter. On 27th May 2016, she finally received some news of her daughter. She met a Village Elder called H, who informed her that her Child was seen at the home of a boy called Onesmus Kalisa, the Appellant. She says that the Accused then happened to walk past. She said she knew him from the area. She confronted him and asked if he was holding her daughter in his home. He did not respond and started walking away. She followed him and when they reached the house it was padlocked from outside. She says when he opened the house, her daughter was inside. She confirms that the Police came and arrested the Accused as well as her daughter. The Complainant was not released from the Police station until the next day- 29th May 2016. She said that the P3 was completed much later – on 10th June 2016. Under cross-examination PW-1 confirmed that she found her missing daughter in the home of the Accused/Appellant.

14. The Complainant was eventually taken to the Moi General Hospital and a P3 Form completed. The Form was completed by a Dr Walid. Dr Walid did not bother to attend to give evidence on any of the many hearing dates. He was replaced by Dr Kagona Gitau. Dr. Gitau gave evidence that when the Complainant was (eventually) examined, the examining doctor found that the hymen was broken and that she was suffering from a urinary infection. However, there was no injury noted to the external genitalia. There was no blood however, there was some pus. She said she was defiled by someone she knew. A conclusion of defilement was made. It is noteworthy that the P3 (PExh-2) records that the offence was reported on 27th May and the P3 was not provided nor completed until 10th June 2016 – about two weeks after the offence. The P3 states that the time of the Offence was between 24th and 27th May 2016. Also included in the file was a Post Rape Care Form. It was completed by a doctor on 27th May 2016 and countersigned by a Police Officer called Waswa. It is recorded that the girl went to the boys house. It also reports defilement. The girl was recorded as being sad and unkept. It is also noteworthy that the word "not" has been added to the word unkept in a different colour pen.

15. Therefore, the Court has before it the evidence of the Complainant. Her evidence has been consistent throughout. She said she was defiled by the Appellant. She also told the Court that he threatened to cut her into pieces with his panga if she resisted. Her evidence, if believed is sufficient to found a conviction under ***Section 124*** of the ***Evidence Act Cap 80.*** It is also corroborated by the evidence of PW-1 the Mother of the Complainant. She said her daughter disappeared and was found three days later in the home of the Appellant. That would have been circumstantial on its own but it is corroborated by the Complainant. Both are corroborated by the medical evidence.

16. It is further corroborated by the conduct of the Accused himself. When he was confronted by the Mother alleging he had abducted her daughter, he did not respond. That is not the response of an innocent man. Then when he was caught with the Complainant in his home, he claimed that she was his wife. She was 16. He said it to a number of people including the Mother and the Village Headman. That amounts to a confession. When he was charged, the Appellant denied the offence. However before this Court, he argued that the Complainant did not give evidence, only the arresting officer did. That is patently untrue.

17. The Learned Trial Magistrate heard evidence from the arresting officer as well as the investigating officer. When the Appellant says that the arresting officer did a shoddy job, he is completely correct. This Court would go further and say that both the arresting officer and the investigating officer (Josephine Waswa) did the minimum necessary. She did not even bother to record dates correctly. They did not search for the panga, they waited nearly two weeks before the Complainant was examined. It is clear that they completely let her down. The investigating officer gave evidence that the Accused wanted to ask the Complainant for forgiveness but then they went on to concoct a story about them being in a consensual relationship. Under cross-examination, the Investigating Officer confirmed that the prosecution was not a stitch up as alleged by the Appellant.

18. The Appellant has now changed that plea to a complaint that he was framed by his employer because his employer owed him Kshs.25,000/=. He did not say that at trial. Although that scenario of itself is implausible. It does not explain how the Child was found locked in his house. He was the only person with the key.

19. In the circumstances, there was more than sufficient evidence before the Court to found a finding that the offence was committed beyond reasonable doubt. Therefore, the appeal against conviction fails. However, this Court notes that both the Post Rape Form and the evidence of the Complainant refer to the defilement taking place between 24th May and 27th May 2016. In keeping with the complete lack of attention to detail referred to above, the Charge Sheet refers only to the last date ie 27th May 2016. Therefore, the conviction of the Lower Court is hereby replaced with a conviction of the Offence of Defilement taking place at various times between the 24th and 27th May 2016.

20. Moving onto the issue of sentence. The Appellant argues that the sentence is too harsh. However, looking at Section 8(4) it is clear that the Learned Trial Magistrate gave the Appellant the minimum sentence. It seems to this Court that in doing so he misdirected himself. He completely neglected to take into account the many aggravating factors. Firstly, he failed to consider that the Appellant abducted a child. He then held the Child hostage (false imprisonment) using the threats of violence including cutting with a panga (grievous harm). This Court also takes cognizance of ***the Penal Code, Sections 256 (Abduction) read with Section 260,*** abducting in order to subject to grievous harm, which also provides for a sentence of 10 years. The Accused knew the Complainant was a Child because he knew the family and in any event she was wearing her school uniform at the time. The Court is also cognisant that if the scenario had that the Accused had used a panga to steal material property from PW-1 he could potentially be sentence to death. The fact that he abducted a human being instead of stealing does not make his offence less heinous. In the circumstances, the sentence is hereby increased to 20 years in light of the numerous aggravating factors.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 9th April 2020

Signed and Delivered in Voi this the 27th day of April 2020

In the Presence of

Court Assistant: Josephat Mavu

Appellant: In person by Skype Video Link to Manyani GK Prison

Respondent: Ms Mukangu by Skype Video Link to ODPP Voi.