REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: HON. R. MWONGO, J.

CRIMINAL APPEAL NO. 4 OF 2020

PAUL MBUGUA MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and sentence of Hon. D. N. Sure (SRM) in Engineer SPMCR No (S.O.) 2 of 2018 delivered on 16th January, 2020)

JUDGMENT

Introduction

1. The appellant was charged and convicted with defilement of RNM a girl aged 17 years, contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act**. The particulars are that on 22nd December, 2017 at [Particulars withheld] Village Kinangop he caused his penis to penetrate RNM's vagina. He was acquitted of the alternative charge of committing an indecent act with a child. He was sentenced to 15 years imprisonment, following a hearing in which four prosecution and one defence witness and the appellant testified.

2. In his amended appeal, the grounds are as follows:

> *1) That, the learned trial magistrate erred in law and facts by failing to appreciate that the right to legal representation and provision of statements.*
>
> *2) That, the learned trial magistrate erred in law by failing to appreciate that the proof of penetration and complainant's conduct.*
>
> *3) That, the mandatory minimum sentence imposed by the trial court was harsh and excessive and not informed by the facts and circumstances of the offence.*

Factual Background

3. The brief facts of the case are as follows. On 22nd December, 2017, RNM had been sent to her mother's shop when a girl came by and told her the appellant was calling her. The appellant worked with her father so she knew him. At first she declined to go but the girl persuaded her and applied something on her hand which she thought was perfume.

4. In any event, she went with the girl to a house where the appellant was seated on a chair in a one roomed house divided by a sheet. She washed dishes and did all that girl told her to do, before the girl left her alone with the appellant.

5. When they were alone, the appellant gave her Kshs 50/=, locked the door, and forced her to sleep with him. He pulled her to the bed, pulled her dress up and as she lay facing up, he removed her biker and panty, forced her legs apart and penetrated her vagina with his penis. She said he did not penetrate her fully but halfway, and pulling out several times.

6. After about five minutes, he was through and she dressed up, leaving him sleeping. When she got home she had a headache and felt dizzy. She told her mother what had happened and they went to Murungaru Police Station from where they went to Engineer Police Station and thereafter to Engineer Hospital.

7. PW2, NRM is RNM's mother and works as a tailor. She testified that RNM is her fifth child. She produced her birth certificate as P. Exhibit 2. It showed RNM was born on 6th January, 2001. She testified that she had sent RNM to buy tailoring items. When RNM reported

the incident to her she knew who it was as the appellant and her husband had business dealings. She took RNM to hospital and they reported at Murungaru Police Station. They were given a P3 Form at Engineer Police Station and RNM was examined and treated at Engineer District Hospital.

8. In his cross-examination of, PW2, the appellant asked whether she tried to discuss a reconciliation of the case with him and sought Kshs 10,000/=. She denied any knowledge of the reconciliation or money.

9. PW3 PC Leah Kiiru was attached to Kinangop Police Station. On 25th December, 2017, RNM and her parents came to report a case of defilement that occurred on 22nd December, 2017 by a person called Mbugua. She recalled the report by the complainant and noted the accused was known to the complainant. She went with some colleagues and arrested the accused at Murungaru Trading Centre. The complainant did not know the name of the woman who lured her to the accused and she did not know her either.

10. PW4 Dr. Julius Murimi Ntwiga was the Medical Superintendent at Engineer District Hospital. He examined RNM and filled a P3 Form on 28th December, 2017 and the PRC Form on 29th December, 2017. He found that she had no physical injuries but noted that this was six days after the reported incident. He found that there had been penile vaginal penetration; that her hymen was freshly broken and torn; and that the penetration was recent. He noted that she had been treated previously at Murungaru Health Centre.

11. The appellant gave sworn testimony and availed one witness. In his statement he denied defiling the complainant. He said he was a scrap dealer and that when he was arrested for the offence he decided the case should be heard because his reputation had been soiled. He stated that the complainant's mother had sent the complainant to demand Kshs 100,000/= as a loan but he had declined. He said he lived in a plot with many tenants yet no one witnessed the defilement and the complainant never screamed. The trial court noted that the accused appeared distressed and his anger was palpable.

12. DW2 John Gitonga Kariuki testified that he is a friend of the accused. He said the accused told him that he had been charged with defilement and that the issue was defaming him. It was he, DW2, who helped bond the accused. DW2 said he sought to meet the complainant's parents but the meeting did not take place because they failed to attend. He was told by the accused that a demand of Kshs 10,000/= had been made but he advised the accused to undergo trial since he owed no debt.

Analysis and Determination

13. The appellant argued that he did not have access to the witness statements at commencement of the hearing on 7th October, 2019. He points to the record of proceedings which shows he made a request as follows:

> ***"Accused : I do not have statements.***
>
> ***State Counsel : I gave the accused statements on 16th January, 2018 and he signed for them. Hearing was confirmed on 3rd April 2018. Accused has attended court without asking for statements until today when he has seen the complainant in court.***
>
> ***Court- Ruling : I am not convinced accused has no statements since 2nd January, 2018 yet 1 year and 8 months have already elapsed; I decline to adjourn the matter because state counsel has convinced me accused was facilitated; hearing will proceed."***

14. Consequently, the appellant submits that his right to fair representation under **Article 50 (2) (j)** of the **Constitution** was isolated. **Article 50 (2) (j)** of the **Constitution** provides:

> ***"50 (2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

15. His submissions then veer off into an argument about the failure of the trial court to avail him legal representation. This was an issue that was not raised at trial as properly argued by the DPP who relied on the Supreme Court Case of **Charles Maina Gitonga v Republic [2018] eKLR**. There the Supreme Court noted that:

> ***"[9] (a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in Criminal Appeal No.78 of 2014 and the matter properly addressed by that Court within its jurisdiction, and;***
>
> ***(b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the Repealed Constitution and that under Section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;***
>
> ***(c)……..***
>
> ***(d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted***

through the Legal Aid Act, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged violation of Article 50(2) (g) & (h) of the Constitution of Kenya.

(e) ……;

(f)……." (Emphasis added)

16. The DPP has however not dealt with the allegation that the accused was not availed the prosecution witness statements.

17. I have perused the record of proceedings carefully and not as follows with regard to the issue of statements. The accused was charged on 2nd January, 2018; and was bonded on the same date. The court then stated:

"Court : Accused to be supplied with witness statements, documentary evidence and charge."

18. Further, the proceedings show as follows:

- On 16th January, 2018 a hearing date of 3rd April, 2018 was fixed in the presence of both parties. The accused did not say he had not been given the statements, nor is it recorded whether the prosecution supplied them.

- On 3rd April, 2018 the accused failed to attend court and an arrest warrant was issued. However, he accused attended the next mention on 3rd May, 2018 but did not complain that he had not been served with the witness statements despite the hearing being fixed for 17th September, 2018.

- On 17th September, 2018 both parties were present and one witness was present. The trial court fixed the hearing for 15th April, 2019. The accused said nothing about witness statements.

- On 15th April, 2018 the trial magistrate was on leave and hearing did not take off. It was fixed for 20th June, 2019.

- On 20th June, 2019 trial court was away but both parties were present. Hearing was fixed for 7th October, 2019.

- On 7th October, 2019 the accused alleged he had no witness statements.

19. On the issue, I am not persuaded that the accused did not truly have witness statements. He attended court on many hearing dates including on 17th September, 2018 when one witness was present, but did not raise any complaints, throughout, as to not having been given witness statements.

20. The obligation placed on the prosecution by **Article 50 (2) (j)** of the **Constitution** to inform the accused of the evidence the prosecution intends to rely on; and for the accused to have access to it. Usually, this is done at a pre-trial hearing which was not held in the present case.

21. Nevertheless at no time many hearing dates did the accused complain of not having had access to the witness statements. Nothing would have been easier than to raise the issue at any of those hearings.

22. In the circumstances, I am not satisfied that **Article 50 (2) (j)** of the **Constitution** was violated.

Penetration

23. The appellant argues that there was no proof of penetration and the investigation by PW3 was shady. He further submitted that from the proceedings:

"PW1 (complainant) went to the appellant's house on her own violation. She knew only too well what she was getting herself into and only disowned the appellant when things got musky for her."

24. He then buttressed the proposition that the complainant disowned the appellant to save her own skin by citing **Peter Maina Njeri v Republic** and **Martin Charo v Republic [2016] EKLR**.

In the **Martin Charo** case, it was stated:

"The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends. The conduct of the complainant plays a fundamental role in a defilement case. One can easily conclude that the complainant was defiled after hearing her evidence. Several issues come into focus. Did the complainant report the defilement immediately after the incident? Was she threatened after the incident? How long did it take for her to report. Was there threat on her life? How long was the relationship. Were the parents aware of the relationship. All these issues lead to the circumstances of the case as envisaged under Section 8(5) of the Sexual Offences Act."

25. I do not think that the appellant was arguing that he admitted the complainant was with him, because he later submits that the appellant was a total stranger to PW1, that she was not drugged as she alleged and that her story:

> ***"was a tale she was connoted (sic concocted) so as to mitigate wroth of her parents."***

26. Whatever the case, the appellant in his evidence did not respond to the allegation of defilement. Even in cross-examination, he appeared to be focused on an amount of Kshs 10,000/= allegedly offered for to stop the case.

27. The evidence on penetration was given by Dr. Ntwiga who ascertained, on examination of RNM, that there was penile vaginal penetration, that it was recent, and that the complainant's hymen was freshly broken and torn. Those findings were consistent with the information on the P3.

28. I am not satisfied that the evidence on penetration has been successfully impugned by the appellant, and I am unable to uphold the appeal on this ground.

Mandatory Sentence

29. The appellant argued that the trial court despite hearing the accused's mitigation, nevertheless meted the mandatory minimum sentence of fifteen years. He referred to the cases of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. He pointed out that in several other cases such as **Evan Wanjala Wanyonyi v Republic [2019] eKLR**; **Paul Ngei v Republic [2019] eKLR** and **Dennis Kibaara v Republic [2019] eKLR**, the courts had substituted the maximum mandatory sentence with lesser sentences. He urged this court to do likewise.

30. The appellant also relied on the Sentencing Policy Guidelines Paragraph 25 and argued that where higher courts have given lower sentences than the mandatory minimum, other courts are bound by those decisions.

31. On this point, I note that what the Supreme Court decided in the **Muruatetu** case**,** is that the trial court has discretion to mete an appropriate sentence instead of being slavishly bound by the mandatory sentence provision. That is one of the principles established by the Supreme Court in **Muruatetu**. The actual term of the sentence is, however, left to the discretion of each court.

32. In the present case, **Section 8 (4)** of the **Sexual Offences Act** places a minimum sentence of 15 years for defilement of a minor aged 16 to 18 years. In her judgment the learned trial magistrate recorded the sentence hearing as follows:

> ***"State Counsel : No record.***
>
> ***Mitigation : I have a wife. I deny the charges.***
>
> ***Sentence (Court) : Mitigation duly noted, accused is sentenced to 15 years in jail."***

33. I note that the trial court took into account the mitigation offered at trial. That included the accused's denial of the offence, suggesting there was no remorse. As such the trial magistrate imposed the full sentence term which she had discretion to do. In doing so, there was no failure in the sentence hearing and I decline to interfere with the trial court's judgment.

Disposition

34. All in all, the Appellant's grounds of appeal have all failed and the appeal is dismissed in its entirety.

Administrative directions

35. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

36. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

37. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 15th Day of December, 2020.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Paul Mbugua Maingi - Appellant in person - present in Naivasha Maximum Prison
3. Court Assistant - Quinter Ogutu