REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 63 OF 2017

CONSOLIDATED WITH HCCRA NO. 98 OF 2017

EVANS MOGAKA MICHIEKA.....APPELLANT

=VRS=

THE REPUBLIC.....ACCUSED

{Being an appeal against the Conviction and Sentence of Hon. J. Mitey – RM Keroka in the original Keroka Principal Magistrate's Court Criminal Case No. 848 of 2013

JUDGEMENT

The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.

The particulars of the charge were that on 9th August 2013 in Borabu District within Nyamira County the appellant intentionally and unlawfully caused his penis to penetrate the anus of SAM a boy aged 7 years.

From the record the appellant initially pleaded not guilty to the charge and was granted a bond of Kshs. 200,000/= with a surety of like amount. The case was then fixed for the usual mention after a fortnight. When the appellant went before the trial magistrate for the mention he intimated that he wished to change plea. The charge was read to him and he pleaded guilty. He was subsequently sentenced to life imprisonment. His appeal is premised on the ground that he pleaded guilty due to frustration from the prosecution and he should therefore be granted a retrial of his case. The appeal is opposed.

At the hearing of the appeal the appellant relied on his written submissions where he reiterates that he changed plea due to coercion by the arresting officer and the entire prosecution. At paragraph 8 of his written submissions he alleges that he was beaten by the police while in the cells. He correctly points out that the trial court was under a duty to inform him of the gravity of the offence. The appellant also contends that the charge was defective as it did not state the time of the alleged offence. He submits that the facts read to him did not disclose an offence and that he was framed. He further contends that he was under the influence of alcohol at the time of the alleged offence. He alludes to a violation of his right to a fair trial and further contends that it is illogical that the complainant could have been **"raped"** on a busy road. He contended that the entire trial was a mockery of justice and has urged this court to re-evaluate and analyse the evidence and acquit him.

In her submissions Miss Okok Learned Prosecution Counsel submitted that the appellant did not demonstrate that he pleaded guilty due to frustration and intimidation. She submitted that the plea was unequivocal as the appellant had ample time to think through his admission. She contended that the facts read proved all the ingredients of defilement and that a P3 Form was produced to prove penetration. As for the age she submitted that it was proved through a clinic card. On the fresh trial, Counsel submitted that to succeed the appellant must avail new and compelling evidence which he did not do.

In reply the appellant submitted that he was framed because of a disagreement he had with the father of the victim. He urged this court to exercise leniency and reduce the sentence as he is ailing. He produced a medical report from the prison dispensary to prove that he is hypertensive.

As the first appellate court I have a duty to reconsider and evaluate the lower court proceedings so as to arrive at my own independent conclusion. I have also considered the submissions by both sides. My finding is that the plea of guilty entered by the appellant was unequivocal. It is instructive that he did not plead guilty on his first appearance in court. It was after two weeks when he went back for mention that he intimated to the court that he wished to change plea. The charge was read to him and he admitted the offence. Contrary to his allegation that he was beaten by the police on this occasion he came from the prison where the police could not have had access to him. He does not allege to have been beaten by Prison Warders or by anybody else in the prison. Even more instructive is the fact that even after admitting the charge the facts were read to him two days later. He nevertheless went ahead and admitted those facts and was therefore

convicted upon the court being satisfied that his plea was unequivocal. It is my finding that on both occasions he had sufficient time to reflect on his admission. The facts stated to the appellant were very detailed and proved every ingredient of the offence. A P3 Form was produced to prove penetration and the age of the victim was proved through a clinic card. The record reveals that the trial magistrate cautioned the appellant on the gravity of the offence and hence discharged his duty. I am satisfied that the appellant's right to a fair trial were fully observed. If there was a grudge between him and the victim's father he did not disclose it at the trial. To the contrary he informed the court that he got along very well with the victim as well as his family. His only defence was that he did not know what he was doing because he was drunk. Under Section 13 (1) of the Penal Code intoxication is not a defence save in certain circumstances provided in Section 13 (2) of the Penal Code. Section 13 (2) states: -

> **"(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –**
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> > **(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
> >
> > **(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."**

The appellant has not demonstrated either that the state of his intoxication was caused without his consent by the malicious or negligent act of another person or that he was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. My finding therefore is that the defence of intoxication is not available to him and the appeal against conviction has no merit.

On the sentence, the same is the minimum provided by the law and did not take into account that he is a first offender. In the case of **Jared Koita Injiri Vs. Republic [2019] eKLR** the Court of Appeal has ruled on the applicability of minimum sentences in sexual offences stating that: -

> **"This then leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, *SC Pet. No. 16 of 2015* where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by *section 204 of the Penal Code* was unconstitutional. The Court took the view that;**
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> > **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."**
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> **In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1) of the Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.**
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> **The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.**
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> **Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

That decision effectively does away with minimum sentences in sexual offences and leaves it at the discretion of the trial court to determine the appropriate sentence depending on the circumstances of the case. Whereas the appellant in this case was a first offender, the circumstances of the offence call for a stiff sentence which though not a life sentence still fits the crime and serves to rehabilitate him. A sentence of life imprisonment would merely serve to break him. I am satisfied that a sentence of twenty-five (25) five years from the date of conviction would suffice. Accordingly, the sentence of life imprisonment is set aside and substituted with one for twenty-five (25) years imprisonment. The same shall run from the date of conviction. It is so ordered.

Signed, dated and delivered at Nyamira this 25th day of July 2019.

E. N. MAINA

JUDGE