REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.54 OF 2016

ABDI OMAR ISSACK………..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 659 of 2015 by the Chief Magistrate's Court at Garissa vide a Judgment delivered by Ho. M.W Wachira on 14.07.2016)

JUDGEMENT

Introduction:

1. The Appellant Abdi Omar Issack was charged with two counts and an alternative charge. The first count is the offence of Sexual Assault contrary to section 5(a)(ii) as read with section 5(2) of the Sexual Offences Act No. 3 of 2006. The Particulars being that on the 10 th Day of June 2015 in Dadaab District within Garissa County unlawfully penetrated the vagina of WAH with a metal rod he manipulated.

2. Under the above charge, the appellant was also charged with an Alternative Charge of Committing an Indecent Act with an adult contrary to section11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 10th day of June, 2015 in Dadaab district within Garissa County he intentionally touched the vagina of WAH with his hands against he will.

3. The second count the appellant faced is assault causing actually bodily harm contrary to section 251 of the Penal Code. The Particulars being that on 10th June, 2015 in Dadaab District within Garissa County he assaulted WAH thereby occasioning her actual bodily harm.

4. The appellant pleaded not guilty to the charges and after full trial he was convicted on all the counts including the alternative count. On the first Count he was sentenced to 25 years Imprisonment, the alternative Count 10 years Imprisonment and on the second count 2 years Imprisonment. Being aggrieved by the trial court judgment, he has appealed against the conviction and sentence. The Appellant's amended grounds of appeal as filed in his written submission are as follows:

> **1) That the pundit trial magistrate erred in law and fact to sentence me most severely a penalty which is manifestly harsh and excessive in contravention of Article 50(p) of the Constitution.**
>
> **2) That the Learned trial magistrate sentenced me on prosecution witnesses' evidence without considering the fact that I was not positively identified at the scene of crime.**
>
> **3) That the medical evidence adduced was not certain due to the fact that the doctor who prepared the P3 form was not availed hence creating room for exaggeration on the petty matters.**
>
> **4) That the pundit trial magistrate erred in law and fact to sentence on both Count 1 and its alternative charge altogether.**
>
> **5) That the learned trial magistrate erred in law and fact to convict me without considering that the arresting officer and investigation officer failed to conduct identification parade hence promoting mistaken identity.**
>
> **6) That there was prevailing vendetta between me and the complainant.**

Submissions:

5. The appellant filed his written submissions in support of his appeal. When the matter came up for hearing on 23rd July, 2019 he relied on his written submission. He addresses the following issues and grounds in his submissions.

6. The first ground addressed by the appellant is that the sentence meted and imposed on him is manifestly harsh and excessive. He submitted that the penalty in the Sexual Offences Act under section 5(2) is not less than 10 years. And the Constitution of Kenya under Article 50(p) provides that an accused person if convicted is entitled to the lesser sentence of the prescribed, and therefore in this case the court ought to have given him 10 years instead of the 25 years.

7. The second issue addressed by the appellant regards to his conviction and sentencing on the Alternative charge. He submits that the Learned Magistrate erred in law by convicting him on both the main charge and the alternative, arguing that the court was being emotional.

8. The third issue addressed by the appellant is the failure by the prosecution to call the Doctor who examined the complainant. He submits that calling a colleague of the said Doctor to testify on his behalf disadvantaged him. He argues that the statement by the medical doctor called that he had known the said doctor for over a year is not enough in his view for him to understand his writing and the contents of the medical report.

9. The final ground argued by the appellant in his submission is on Identification. He submitted that the Investigation officer ought to have conducted an Identification parade for the complainant to identify the assailant. This is due to the complainant allegation that the assailant had partly covered his face with scarf during the attack, and that when the scarf allegedly fell, the complainant alleges that she was unconscious and therefore her evidence ought not to stand. Further he adds that at the time the said scarf fell the child (PW2) had left the scene and therefore an Identification Parade ought to have been conducted.

10. In sum he urges the Court to allow his appeal arguing that the whole thing is out of a vendetta against him by the complainant.

11. The Prosecution Counsel Mr. Mlati opposed the appeal and supported the conviction and sentence, submitting that the charges against the appellant were proved by the prosecution witnesses called, being the victim (PW1) the Doctor(PW5) and PW2 who was the eye witness.

The evidence:

12. **PW1 (WAH)** the complainant testified that on 10th June, 2015 together with her child PW2 aged 12 went to the forest to fetch firewood. She recalled that after collecting firewood and while in the process of tying them together, she saw the appellant approach with a donkey, he had partially covered his face with a red cloth, the appellant approached her and stood behind her with his legs apart, she attempted to run but the appellant caught up with her, held her hair and knocked her head on the ground severally, she became weak. The appellant stepped on her neck then held her legs apart with force, removed a razor from his pocket and put his hand inside her vagina and cut inside severally with the blade and kicked her. He thereafter picked a piece of metal rod used to pitch tent and forcefully penetrated her vagina and pushed it inside severally, he later held her neck and beat her severally with the metal as she bled profusely. She recalled that she saw her son with two elders' approach and that on appellant seeing them he took off. On identification, she stated that while the appellant was beating her, the scarf that he had partially used to cover his face fell and that she saw his face and realized it was a person she had seen before.

13. **PW2 (AM)** a 12 years minor and the child of PW1 testified that on the material of the crime she accompanied her mother to the forest to collect firewood. He recalled that after they had completed collecting firewood, a man approached PW1 and started beating her with a metal rod, he ran away and called people who came and rescued her. He stated that he saw the appellant riding the donkey, and that he knew him before that date. He stated that he saw him remove a razor blade and used it to cut her mother.

14. **PW3 (AA)** testified that he is the husband of the complainant PW1, and that on 10.06.2015 he was informed that his wife had been attacked, he went to the scene and found her unconscious, he took her to hospital where she was admitted for 2 nights. She told him that she had been attacked by a person she knows. He stated that he knew the appellant after meeting him at CARE during food distribution.

15. **PW4 (Emmanuel Longole)**a Police Constable attached to Ifo police station testified that on 10.06.2015 at 1300hrs a report was made that the complainant had been sexually assaulted. He investigated the matter, issued a P3 form and arrested the accused and charged him.

16. **PW5 (Dr. Njue Kabugi)** testified that he is a medic with Islamic Relief Kenya where PW1 the complainant was admitted after the attack. He stated that the Medical report Form P3 was filled by his colleague who has since left employment and went to West Africa, and having worked in the same department for a year he knew his handwriting and signature. He confirmed that the complainant was examined by one Dr. Chege. He described the state of the complainant when arrived at the hospital as unkempt, dirty and blood stained clothes, she looked confused with a laceration on the left ear, cut wound on left temporal parietal of the head, upper limbs and abdomen laceration, right leg laceration and she had an actively bleeding vagina. He stated that there was no reason to examine the appellant. He produced the P3 form as filed.

17. **PW6(PC Joseph Kamau)** testified that he is a police officer attached to IFO police station and stated that the complainant was visited by PC Mutori and PC Mbeche who confirmed the incident and issued the P3 Form. A search for the appellant was commenced and on 29.06.2015 he was spotted and identified by the complainant and subsequently arrested and charged.

18. The appellant was found with a case to answer and in his defnce he gave a sworn statement that he comes from IFO Refugee camp, denied committing the offence stating that the charges he was facing were all a frame up.

19. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of ***Okeno vs Republic (1977) EALR 32*** and further in the Court of Appeal case *of* ***Mark Oiruri Mose vs Republic (2013) eKLR*** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyses it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

20. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the said charges facing the

appellant were proved and as so required in law; beyond any reasonable doubt. I wish to note that i have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the party's submissions.

21. The appellant faced the first count of Sexual Assault contrary to section 5(a)(ii) as read with section 5(2) of the Sexual Offences Act No. 3 of 2006, the Alternative Charge of Committing an Indecent Act with an adult contrary to section11(1) of the Sexual Offences Act No. 3 of 2006 and the second count being assault causing actually bodily harm contrary to section 251 of the Penal Code.

22. I have considered the grounds of appeal and the arguments made thereon by the Appellant and Prosecution in their respective submissions. I will therefore consider whether the prosecution proved each of the counts facing the appellant to the required standards; being beyond reasonable doubt and finally considers the appellant appeal on the sentence.

23. On the first count of Sexual Assault contrary to section 5(a)(ii) as read with section 5(2) of the Sexual Offences Act, section 5 1(a) (1)(2) of the Sexual Offences Act provides for the offence of sexual assault as follows:

> **"(1) Any person who unlawfully—**
>
> > **(a) penetrates the genital organs of another person with—**
> >
> > > **(i) any part of the body of another or that person; or**
> > >
> > > **(ii)an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**
> >
> > **(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.**
>
> **(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."**

24. The Court of Appeal in ***John Irungu vs Republic (2016) eKLR*** in regard to the key elements of the offence of sexual assault stated as follows: -

> **"Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."**

25. Section 2 of the Sexual Offences Act defines penetration as follows:

> "**the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

26. Considering the circumstances of this case, the complainant alleges that the appellant stepped on her neck then held her legs apart with force, removed a razor from his pocket and put his hand inside her vagina and cut inside severally with the blade and kicked her. He thereafter picked a piece of metal rod used to pitch tent and forcefully penetrated her vagina and pushed it inside severally, the medical report tendered by PW5 establishes that the complainant was bleeding from her vagina.

27. It is my view that the evidence of PW1 complainant as corroborated by PW5 the medical Doctor establishes that indeed the offence of sexual assault was committed by the appellant. PW1 in his testimony was so clear on what had transpired and this evidence has not been displaced by the appellant. It is my conclusion that the prosecution established the fact of penetration of PW1 by an object and therefore the offence of sexual assault was established.

28. On the alternative charge facing the appellant, which is the offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act which provides as follows:

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

29. **Section 179** of the *Criminal Procedure* Code empowers the court to convict an accused person of a lesser offence, where the court is of the view that the main charge has not been proved, and this forms the basis of the alternative charge.

30. The Court of Appeal in ***Robert Mutungi Muumbi vs Republic Criminal Appeal No. 5 of 2013*** in this regard stated as follows:

> **"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be**

convicted.

31. Further, the same court in ***James Maina Njogu vs Republic Criminal Appeal No. 38 of 2004*** regarding section 179 of the Criminal Procedure Code stated:

> **"It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence."**

32. The offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, is a lesser cognate offence to sexual assault for reasons that since penetration is not an ingredient of the offence, the offence can still be committed in the absence of proof of penetration. In addition, while the penalty for the offence sexual assault under section 5(2) of the Sexual Offences Act is a minimum sentence of ten years, the sentence for an indecent act with an adult is imprisonment for 5 years. This shows the subsidiary nature of the offence.

33. Consequently, the trial court having convicted the appellant on the main charge of sexual assault, it ought not to have convicted and sentenced him on the alternative charge. I therefore agree with the appellant submissions in this regard. Therefore, this court quashes the conviction and sentence on the alternative offence.

34. On the second count of assault causing actually bodily harm contrary to section 251 of Penal Code, the complainant alleged that the appellant assaulted her occasioning her actual bodily harm. It is my view based on the evidence on record that indeed the prosecution established this offence to the required standards and therefore the appeal on conviction under this count fails.

On whether the Appellant was the perpetrator:

35. The appellant has contested identification; he has challenged his identification as the perpetrator alleging that the police ought to have conducted an identification parade to establish the identity of the person who committed the offence. In support of this ground, he submitted that it would not be possible for the complainant to identify the person who attacked her as she claims that she was unconscious during the attack.

36. Considering the record and the evidence tendered, PW1 and PW2 in their testimony were forthright that they recognized the appellant as the perpetrator. PW1 in her testimony stated that while the appellant was assaulting her with the metal rod, the scarf he had partially used to cover his face fell off and she was able to see and recognize the appellant. PW2 equally testified that he recognized the appellant, evidence which was not effectively challenged by the appellant. Additionally, the appellant was arrested after being identified by the complainant. Therefore, in my view, the identification of the appellant as the person who committed the offence is not in doubt.

Sentence:

35. The appellant has urged this court to exercise its discretion and review the sentence. The minimum sentence for the offence of sexual assault is indicated as 10 years imprisonment. In ***B.W vs Republic Kisumu Criminal Appeal No. 313 of 2010 [2019]eKLR***, the Court of Appeal has considered the constitutionality of mandatory minimum sentences under the Act; *and* adopted what the Supreme Court decision held in ***Francis Karioko Muruatetu & Another vs Republic*** **Supreme Court Petition No. 16 of 2015** ***[2017] eKLR*** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

36. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislature position that offences of defilement are serious offence and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

37. In ***Dismas Wafula Kilwake vs Republic [2018] eKLR***, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

> **"[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**
>
> **The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."**

38. Further, **section 354** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya*)*** provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, *"in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence"*.

39. In the case of ***Wanjema vs Republic (1971) EA 493*** the court laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

40. Considering the nature of the offence and the manner it was undertaken by the Appellant and the Appellant's mitigations, the 25 years sentence for the offence of sexual assault in my view is excessive. A 10 years sentence would suffice as sufficient lesson to the appellant and a 1 year sentence for the offence of assault. In my view the appeal on sentence ought to succeed to that extent and the conviction and sentence on the alternative charge be quashed.

41. Thus the court makes the following orders;

i. The convictions in counts 1 and 2 are upheld.

ii. Conviction in alternative count is quashed.

iii. Count 1 sentence is reduced from 25 years to 10 years.

iv. Count 2 sentence is reduced from 2 years to 1 year.

v. The sentences to run concurrently from 29/6/2015 date of arrest.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF OCTOBER, 2019.

..

C. KARIUKI

JUDGE