REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 30 OF 2019

NDAVI MASIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate Honourable Mwaniki J. dated 18/07/2018 in Makueni SPMCR No. 616 of 2015.)

JUDGMENT

1. **Ndavi Masio** the Appellant was charged with the offence of **Rape contrary to Section 3(1) (a) (b) (3) of the Sexual Offences Act no. 3 of 2006.**

The particulars were that the Appellant on the 27th day of September, 2015 in Kathonzweni district within Makueni county intentionally and unlawfully caused his penis to penetrate in vagina of **NM** without her consent.

He faced an alternative count of committing an **Indecent Act with an adult contrary to Section 11(A) of the Sexual Act No. 3 of 2006.**

The particulars were that the Appellant on the 22nd day of September 2015 in Kathonzweni district within Makueni county intentionally touched the vagina of **NM** with his penis against her will.

2. After a full trial the Appellant was found guilty and convicted on the principal count of rape and sentenced to twenty (20) years imprisonment.

3. He filed this appeal raising the following grounds: -

i. **That** the subordinate court erred in law and facts by conducting an unfair trial.

ii. **That** the subordinate court erred in law and facts when he relied on evidence which lacks the credibility of proper and full investigations.

iii. **That** the subordinate court erred in law and facts by relying on defective charge sheet.

iv. **That** the subordinate court erred in law and facts when he failed to note that the prosecution did not prove its case beyond reasonable doubt.

v. **That** the subordinate court erred in law and facts when he relied on contradictory evidence.

vi. **That** the subordinate court erred in law and facts when he failed to put into account the essential witness never attested before court.

4. The case before the trial court is that the complainant herein (N.M.) is mentally challenged and couldn't understand the proceedings and so did not testify. Pw2 (MK) aged eight years gave unsworn evidence and was cross examined by the Appellant. He said he was with his younger sister MK herding goats on 22/05/2015. He identified the complainant (NM) and the Appellant who were in court as people he knew. Together with them herding goats were NM and Mainga.

5. In the process of herding goats, the Appellant came and sent them to go and look at some goats at the river while he sent M to go and call their mother Pw3 LNK. When he went to look for goats at the river he left the Appellant and N.M behind, as the latter looked after the other

goats. At the river he found no goats and when he returned to the field he saw N.M and the Appellant lying together holding each other. The Appellant was lying ontop of N.M as the latter faced up. The Appellant had also removed his trouser while N.M's dress had been folded up to her chest region.

6. His kid sister M went to call their mother (Pw3) who came and witnessed what the children had seen. It was Pw3's evidence that MK reported to her what they had seen N.M and the Appellant doing. She ran to the field and found the Appellant and N.M having sex. She stood 3 metres from them and called out the Appellant, Ndavi Masio. He woke up and ran towards the market while holding his clothes. Pw3 shouted for help as she moved towards Kilome market.

7. She met a man going towards Kilome market and requested him to assist in arresting the Appellant. The man did as requested and that's how the Appellant was arrested and brought to Pw3's home. Pw3 (L NK) called **Pw1 Esther Wanza** a nyumba kumi member who in turn called the assistant chief Patrick Kimeu. Both Pw1 and Pw4 came and arrested the Appellant from Pw3's home and took him to Kitise police post.

8. **Pw5 Dr. Emmanuel Loiposha** produced the P3 form on behalf of Dr. Kagwe who had gone for further studies out of the country. He said the complainant was aged 25 years, and is an imbecile. She was examined the next day after the incident. **Findings upon examination: -**

- Broken hymen
- Tender and painful vaginal wall.
- Reddish vaginal wall
- Vaginal tear
- Whitish discharge

Conclusion was that N.M had engaged in penetrative sexual intercourse. Her inner wear was soiled but not blood stained. He produced the P3 form, PRC forms, treatment notes as PEXB1a – c.

9. In his sworn statement of defence the Appellant said he understood the charges against him and he knew N.M. That on 22nd September, 2015 he went to work in the morning and later went to a market place, from where he was called by a village elder, and he went to her. A man followed him from behind. It was then that N.M emerged screaming. That's how he was arrested and taken to the police and locked up. He was taken to hospital for examination. He denied the charges.

10. When the appeal came for hearing the Appellant relied on his written submissions. He contends that the trial was not fair as there was no interpretation during the trial. He was also not supplied with witness statements even after asking for them. He further submitted that failure to call the Investigating officer raises suspicion and the appeal should be allowed.

11. He also submitted that the charge sheet was defective because the age of the victim is not indicated. He urges the court to disregard what Pw1 said about N. M's mental capacity since her relative (Pw3) did not say anything about it. Further that there was no documentary evidence to confirm pw1's assertions in respect to N.M.

12. Finally, he submitted that the evidence of the witnesses contradicted each other. He adds that the person who arrested him never testified.

13. The Respondent's counsel Mrs. Owenga opposed the appeal saying the evidence was overwhelming. She contends that the Appellant was found in the act by Pw1's mother. Penetration was proved and the Appellant is Pw3's neighbor. That the sentence is reasonable. She however pointed out that the sentence could not run from 23/09/2015 which is the date of arrest. The date of sentence is 18th July, 2018.

Analysis and Determination

14. This is a first appeal and this court has a duty to reconsider the evidence and arrive at its own conclusion. It has to give an allowance since it did not see or hear the witnesses and in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** the Court of Appeal in reference to the duty of the first appellate court stated thus: -

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of***
>
> ***the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectable in doing so, provided it is clear that the court has considered itself on the correctness of the decisions."***

15. From the evidence on record, grounds of appeal and submissions by both parties, the issues for determination are:-

a) Whether the trial was unfairly conducted.

b) Whether there was penetration of the complainant's (N.M) female organ.

c) If (b) is in the affirmative whether the Appellant is the person who did it.

d) Is the sentence harsh and excessive?

Issue no. (a) whether the trial was unfairly conducted.

16. The Appellant has submitted that there was no interpretation done for him during the hearing. I have perused the record. The Appellant took plea on 24th September, 2015 and the court clerk is shown as Mwengi. Interpretation is clearly shown as Kiswahili. During the hearing the court clerk was still Mwengi. Interpretation was in both Kiswahili and Kikamba. The Appellant cross examined the witnesses in Kiswahili and gave his statement of defence in Kiswahili. This clearly confirms he was fluent in Kiswahili. I therefore find no merit in this ground.

Issue no. (b) ***Whether there was penetration of the complainant's (N.M) female organ.***

17. The complainant was said to be mentally challenged and could not communicate, hence her failure to testify. The Appellant in his submissions argues that Pw3 did not testify to this challenge which is true. Pw1 who is an administrator in the village of these parties said N.M. is a neighbor and lives with Pw3. She knew N.M to be mentally and even physically challenged. Secondly, N.M was in court on the 1st day of hearing and Pw2 pointed out to her. The Appellant must have seen her. Thirdly, the doctor (Pw5) confirmed that N.M is an imbecile. That condition was therefore proved even if Pw3 did not mention it.

18. Pw2 was in the field with N.M, his kid sister M and another taking care of goats during daytime when the Appellant whom he knew arrived there. He sent Pw2 and M to the river to see goats while M was sent to call the mother (Pw3). The Appellant slept with N.M as she herded the goats.

19. When Pw2 did not find any goats at the river he returned and found the Appellant having sex with N.M. He had removed his trousers while N. M's dress had been pulled up. Pw3 was called by M to the place where goats were being herded. She went and found the Appellant busy having sex with N.M in the field. He never heard her until she called him out loudly. He woke up and took off.

20. The doctor (Pw5) confirmed that N.M had been sexually penetrated. This is clearly shown in the P3 form, PRC form and treatment notes (EXB1a – c). Infact, the doctor's conclusion is that: -

> *"The complainant had engaged in penetrative sexual intercourse"*

21. My finding is that N. M's genital was sexually penetrated.

Issue (c) ***If (b) is in the affirmative whether the Appellant is the person who did it.***

22. Pw2 and Pw3 found the Appellant in the act of having sex with N.M. Their evidence is so consistent. It was daytime and both witnesses knew the Appellant. When the Appellant took off towards Kilome market Pw3 followed and was assisted by an unknown man who apprehended him and took him to Pw3's home. Pw1 and Pw4 arrived and tied him up and took him to the police station.

23. In his defence he admitted he had been arrested by a man and the village elder took him the police station. This is the village elder who allegedly called him before his arrest and he declined to go to her. This village elder testified as Pw1 and the Appellant had no questions for her. I am satisfied that the Appellant is the one who raped N.M.

24. There is evidence on record showing that N.M is an imbecile. Charging the Appellant under the Sexual Offence Act was an error since there is no provision under that Act which caters for mentally challenged victims. The offence and particulars remain the same, save for the fact that N.M was not capable of giving consent given her state of mind.

25. The Appellant ought to have been charged under Section 146 of the penal Code which provides that: -

> **Defilement of idiots or imbeciles** ***"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."***

26. The maximum sentence under Section 146 Penal Code is 14 years while the minimum sentence under Section 3 of the Sexual Offence Act is ten (10) years imprisonment and may be enhanced to life imprisonment. Section 179 Criminal Procedure Code allows the court to convict for a lesser offence though one was not charged with it. I therefore under Section 179 Criminal Procedure Code set aside the conviction for rape and substitute it with a conviction for the offence of defilement of an imbecile contrary to Section 146 of the Penal Code.

Issue (d) ***Is the sentence harsh and excessive?***

27. Having substituted the offence for one under Section 146 Penal Code the sentence of 20 years imprisonment cannot remain, as it would be an illegal sentence. I set it aside too. I have considered that the Appellant was in custody since 23/09/2015 but was convicted and

sentenced on 18th July, 2018. In his mitigation he said he had children who depend on him. I have also considered that mitigation too.

28. I have noted that the trial court *(Hon. J. Mwaniki)* had ordered that the sentence runs from the date of arrest i.e. 23/09/2015. That is an error which should not be repeated. When sentencing, he can only take into account the period of incarceration but not backdate the service of the sentence to the date of arrest.

29. I therefore sentence the Appellant to serve nine (9) years imprisonment from the date of conviction and sentence *(18th July, 2018)*. **A copy of this judgment to be served on the learned trial magistrate.**

30. The upshot is that the appeal partially succeeds with the following orders being made: -

i. The conviction for rape contrary to Section 8(3) Sexual Offence Act is set aside and substituted with a conviction for defilement of an imbecile contrary to Section 146 Penal Code.

ii. The sentence of twenty (20) years imprisonment is set aside and substituted with a sentence of nine (9) years imprisonment from the date of conviction and sentence (18/07/2018).

Orders accordingly.

Delivered, signed & dated this 28th day of November, 2019, in open Court at Makueni.

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Hon. H. I. Ong'udi

Judge