REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 135 OF 2017

MOSES NEONDO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence in Butere SRMC Criminal Case No. 734 of 2016 by F. Makoyo, SRM, dated 17/10/2017)

JUDGMENT

1. The appellant was convicted in Count 1 of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to twenty years imprisonment. He was also convicted in Count 2 of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to serve 2 years imprisonment. The appellant was aggrieved by the conviction and the sentence on the two Counts and filed the instant appeal. The grounds of appeal are:-

(a) That the learned trial magistrate grossly erred in law and facts in basing the appellant's conviction and sentence on an incurably defective charge sheet.

(b) That the learned trial magistrate grossly erred in law and facts in failing to inform the appellant of his rights as enshrined under article 50 (2) (g) and (h) of the Constitution, thereby occasioning serious prejudice.

(c) That the learned trial magistrate grossly erred in law and facts in finding the charge proved without observing and/or considering that the vital ingredient of age was not disclosed as desired in a charge of this nature.

(d) That the learned trial magistrate grossly erred in law and facts in convicting the appellant on the basis of evidence which failed to satisfy the requirement of section 36 of the Sexual Offences Act No. 3 of 2006.

(e) That the learned trial magistrate grossly erred in law and facts in conducting a biased trial when he failed to recall PW1 as prayed by the appellant.

(f) That the learned trial magistrate grossly erred in law and facts in basing the conviction on inclusive, doubtful and non-incriminating medical evidence.

(g) That the learned trial magistrate grossly erred in law and facts in convicting in light of weak, fabricated, inconsistent and doubtful evidence.

(h) That the learned trial magistrate grossly erred in law and facts in rejecting the appellant's sworn defence without proper evaluation.

2. The particulars of the charge against the appellant in Count 1 were that on the 8th day of October, 2016 in Butere Sub-County within Kakamega County, he intentionally caused his penis to penetrate the vagina of DA, a child aged 17 years.

3. The particulars of the charge in Count 2 were that on the same day, time and place as in Count 1 he unlawfully assaulted the above said complainant thereby occasioning her actual bodily harm.

4. The appellant made written submissions in the appeal while the state relied on the record of the lower court.

Case for the Prosecution -

5. The prosecution called 6 witnesses in the case. Their evidence was that the complainant had on the 8/3/2017 attended an overnight funeral vigil at Shioka village. She stayed in the funeral upto 3 a.m. of the following day when she met the appellant. She struck a conversation with him. The appellant asked her to accompany him to his home. When she turned down the offer the appellant produced a panga and threatened her with death. She went with him to his home. On getting there he took her into a house. He forced her to undress and forcibly had sex with her until 6 a.m. When she complained that she was tired he started hitting her with a panga. He cut her on the left palm. She also receiving injuries on the thighs. She screamed. The appellant's father went to the place. The complainant ran away while being half naked.

6. Meanwhile **Christine Omutanyi** PW3 was working at her shamba when a girl came towards her while running and half naked from the waist downwards. She was bleeding from the left hand. The girl told her that she had been hurt by a certain boy. She escorted the girl to the home of the village elder, PW2.

7. PW2 on his part testified that he was at home at 7 a.m. when PW3 went to his home with the complainant. The complainant was bleeding from the left hand. That she had a black coat and that she was naked on the inside. She told him that she had been defiled by the appellant and that she had left her clothes at his home. He, PW2, called the area Assistant Chief who went to his (PW2's) home. They went to the home of the appellant but they did not find the appellant there. Neither did they find the girl's clothes. They took the girl to Butere Sub-County Hospital and reported at Butere Police Station. At the hospital the complainant was examined by a clinical officer PW5 who found her with bleeding cut wounds on her head and left arm, and swollen and reddish vagina. He stitched the cut wounds. PC Salina PW4 of Butere Police Station issued a P3 form to the complainant. The P3 form was completed by the clinical officer PW5 who classified the degree of injury as harm. He formed the opinion that the complainant had been defiled. He filled a Post Rape Care Form. A dental technologist at Butere Sub-County Hospital PW6 examined the complainant and assessed her age at 17 years. PC Salina PW4 thereupon charged the appellant with the offences. During the hearing, the clinical officer PW5 produced the complainant's treatment notes, the P3 form and Post Rape Care Form as exhibits. The dental technologist PW6 produced the assessment report as exhibit, P Ex.1.

Defence Case –

8. When placed to his defence the appellant stated in a sworn statement that on the 6/10/16 he left his home for a place in Siaya where he and a colleague were digging a well. That he returned home on the 9/10/16. He met the area chief who told him that he was being sought by Butere Police over a charge of defilement. The chief escorted him to Butere Police Station. On getting there he was locked up. He was taken to hospital for examination and returned to the cells. He was charged. He denied the charges. He said that the charges were a frame up.

Submissions –

9. The appellant submitted that the assessment of the age of the complainant by use of dental formula was not conclusive and watertight. That this method of examination duly gave the estimated age and not the exact age. That since it was an estimated age, it is possible that the complainant is over the age of 18 years. Therefore that the age of the complainant was not proved.

10. The appellant submitted that the prosecution failed to call crucial witnesses who accompanied the complainant to the funeral vigil – E,M and M. That these witnesses would have given the court the right turn of events.

11. It was further submitted that the complainant was not a credible witness. That her claim that the friends of the appellant had threatened her with death if she testified in the case were investigated by the DCIO Butere and found to be false. That the trial court was out to convict him at all cost.

Analysis and Determination –

12. This being a first appeal the court is required to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while at the same time bearing in mind that the lower court had the advantage of seeing and hearing the witnesses testify - See **Okeno Vs Republic (1972)EA 32.**

13. The appellant challenged the decision of the lower court on the following grounds:-

- ***That the conviction was based on an incurably defective charge sheet.***

- ***That there was a violation of Article 50 (2) (g) and (h) of the Constitution.***

- ***That the age of the complainant was not proved.***

- ***That there was no compliance with Section 36 of the Sexual Offences Act and that medical evidence tendered in the case was doubtful.***

- ***That the trial court rejected his defence without proper evaluation.***

- That the evidence adduced in the case was doubtful, weak and fabricated.

14. Though the appellant stated in his memorandum of appeal that the charges were defective he did not explain in what manner the charges were defective. I have carefully examined the charge sheet. I do not see any defect in the charge sheet.

15. The age of a person can be proved by both medical, oral and documentary evidence as was held by the Court of Appeal in **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR)** (as cited in) **Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR** where it was held that:-

> ***"…the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ".. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

16. The complainant in this case stated that she was aged 17 years. This was confirmed by a dental technologist PW6 who examined the complainant's dental formula and assessed her age at 17 years. The age assessment report corroborates the oral evidence of the complainant that she was aged 17 years. The age of the complainant was proved at 17 years.

17. Section 36 of the Sexual Offences Act gives a court the discretion to direct that an appropriate sample be taken from an accused person for the purposes of forensic and other scientific testing, including a DNA test, in order to gather evidence to ascertain whether or not the accused person committed the offence. It is clear that the provisions of this Section are not mandatory. In **Hadson Ali Mwachongo –Vs- Republic (2016) eKLR** the Court of Appeal while citing **Robert Mutungi Murumbi -Vs- Republic, Cr. App No. 524 of 2014 (Malindi)** stated that:-

> ***"Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."***

In the premises, failure to comply with the provisions of the said section was not fatal to the prosecution case.

18. An offence of defilement can be proved by oral or circumstantial evidence and not necessarily by medical evidence. In **AML –Vs- Republic (2013) eKLR** the Court of Appeal held that:-

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

This position was restated by the same court in **Kassim Ali –Vs- Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:-

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or by circumstantial evidence."***

19. In the instant case the clinical officer who examined the complainant found her with swollen and reddish labia minora. He also found her with cut wounds on the head and left arm. The witnesses who saw the complainant immediately after the incident, the village elder PW2 and a villager PW3 testified that the complainant was half naked. PW2 said that the complainant told him that she had left her clothes at the house of the person who had defiled her. The distressed condition of the complainant when PW2 and PW3 saw her corroborates the evidence of the complainant and the findings of the clinical officer that the complainant had been defiled.

20. PW2 and PW3 stated that the complainant went to them at 7 a.m. PW3 was working in her shamba when the complainant went to her. The complainant stated that she met the appellant at 3 a.m. That he defiled her in his house between 5 a.m. and 6 a.m. In my view the complainant had ample time to identify the appellant. It was day time when she ran out of the appellant's house. The complainant identified the appellant as the person who defiled her. It was therefore proved that the appellant was the assailant.

21. The clinical officer classified the degree of injury on the complainant as bodily harm. There was no reason to differ with that finding.

22. Though the complainant stated that she had gone to the funeral vigil with two other girls, there was no evidence that they saw her going away with the appellant. There was no evidence that they were material witnesses in the case.

23. Article 50 (2) of the Constitution grants an accused person the right to a fair trial which includes the right-

> (g) to choose and be represented by, an advocate, and to be informed of this right promptly;
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> (h) to have an advocate assigned to the accused person by the state and at state expense, of substantial injustice would otherwise result, and to be informed of this right promptly.

24. There is no record that the appellant was informed of his right to legal representation. The appellant however participated in the trial and

cross-examined the witnesses at length. He has not indicated any prejudice that he suffered by not being provided with an advocate at state expense. I do not find any substance in this ground of appeal.

25. The trial court stated that there was no discernible motive for the complainant to frame up the appellant with the case. The trial court found the complainant's evidence to be candid and credible. I have no reason to differ with the trial magistrate on his findings on the credibility of the complainant. There is no basis on which this court can say that the charges were a frame up. The complainant had met the appellant on the material night. She had visible injuries on the left hand. There was credible evidence that the appellant is the person who had defiled the complainant and assaulted her. There was thus no truth that the appellant was working in Siaya on the material night. The trial court did not err in dismissing the appellant's defence.

26. On my own analysis of the evidence I find that the appellant was convicted on solid evidence. The appeal on conviction is thus dismissed.

Sentence –

27. Section 8 (1) as read with Sub-section 8 (4) of the Sexual Offences Act prescribes a minimum sentence of 15 years imprisonment. The Supreme Court in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** declared the sentence of death for murder as provided in Section 204 of the Penal Code to be unconstitutional in that it deprives a court the discretion not to impose the death sentence in an appropriate case. Following the said judgment the Court of Appeal in **Evans Wanjala Wanyonyi –Vs- Republic (2019) eKLR** considered the effect of the said case to the mandatory sentence under Section 8 (2) of the Sexual Offences Act and held that:-

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; 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. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
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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. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.***
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> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."***

28. The law then as it stands now is that the mandatory sentence provided under Section 8 (4) of the Sexual Offences Act of 15 years imprisonment is a discretionary sentence. The appellant was sentenced to 20 years imprisonment. In Evans Wanjala Wanyonyi Case (supra) where the victim was aged 14 years, the Court of Appeal reduced the sentence imposed by the High Court to 10 years imprisonment. In this case the appellant assaulted the complainant in the cause of defilement. I am of the view that a sentence of 12 years imprisonment is appropriate for the offence committed in Count 1. The sentence in Count 1 of 20 years imprisonment is therefore set aside and substituted with one of 12 years imprisonment. The sentence in Count 2 has already been served and there is no need to revisit it.

Delivered, dated and signed in open court at Kakamega this 28th day of November, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Appellant in person

Court Assistant - Polycarp

14 days right of appeal.