REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 25 OF 2016

CHARLES YEGON CHERUIYOT...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 1576 of 2015 in the Chief Magistrate's court at Narok, R. v. Charles Yegon Cheruiyot dated 9/5/2016]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 15 years imprisonment in respect of the offence of defilement contrary to section 8(4) (1) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. In this court the appellant has raised 14 grounds of appeal in his petition. His counsel has in addition filed a supplementary petition of appeal in which he has raised 10 grounds of appeal.

4. In ground one the appellant has stated the unchallengeable fact that he did not plead guilty.

5. In ground 2 the appellant has faulted the trial court for convicting him on evidence that was incredible, contradictory and inconsistent. He has specifically stated that A C (PW 1) was incredible, contradictory and inconsistent in her evidence. In this regard, PW 1 testified that she was a nursing officer at Chepalungu Hospital. It was her evidence that on 14/9/2015 she saw the accused passing by the gate of the said hospital. She then followed his movement. At the same time, she saw the complainant (who is not a witness) walking in the opposite direction. She was loitering while carrying a stick.

6. Suddenly the appellant grabbed her by her hand and pulled her into the maize plantation. As a result, she got suspicious and raised an alert to other women and men who were nearby. Four women joined her as she led the way in the maize plantation in search of the appellant and complainant. Eventually, they found the appellant lying on top of the complainant, having sexual intercourse with her. Upon seeing this, PW 1 screamed loudly. He then wrestled with PW 1.

7. In the process of wrestling, he bit PW 1 in the head. He bit her so hard that the head of PW 1 swelled. As a result, those who were in company of PW 1 started to beat him up. In response thereto, the appellant became furious, he picked a stick and hit the arm of PW 1. He then chased PW 1 around the maize plantation.

8. As a result of the noise which followed, a large crowd of people gathered. The appellant was able to strip naked with a view to frustrate them in taking him to the police station. PW 1 and other members of the public were able to control the appellant. They bound him up with sisal ropes. They then took him to Ololulunga police station.

9. Thereafter, PW 1 and other members of the public took the complainant to Olololulnga sub-county hospital for treatment and medical examination. Her P3 form was put in evidence as exh PMF 1. The post rape care form and treatment notes were put in evidence as PMF 1 – 5.

10. The complainant was taken for mental health assessment. She was found to be mentally handicapped. The examining officer put in evidence the mental assessment report as exh 7. Exh.7 indicates that she was 17 years old. It also indicates that she was mentally retarded. It further found that she was a mother of 3 children who were in good health.

11. While under cross-examination, PW 1 admitted that the 3 children of the complainant were the children of the appellant. She further admitted that they had not known that the appellant was the father of those 3 children. Furthermore, she also admitted that the appellant had

asked PW 1 to release him so that he could take care of his children. Finally she admitted that the appellant owed her (PW 1) Shs.30/- for drugs that had been supplied to the appellant.

12. Regina Chepngetich Chepkwony (PW 2), who was a public health community officer testified that she saw a big crowd of people who were running about in a maize plantation. She went to the scene and found the appellant wrestling with members of the public who were trying to arrest him. At the same place, he saw a young woman lying down on the ground with her skirt pulled upwards to her thighs. She helped to cover that woman.

13. She testified that the crowd overpowered the appellant, whom they bound with a sisal rope. The appellant was able to remove his pair of long trousers, which he dropped to the ground. He then proceeded to tear his shirt. He was then overcome and taken to the AP camp at Koroga from where he was then taken to Ololulunga police station.

14. While under cross examination, she denied that the appellant was framed up. She also testified that the appellant was caught red-handed while on top of the complainant. She also testified that the appellant was beaten by members of the public apparently for being violent and unruly. Finally, she testified that the appellant was a stranger to her.

15. A C (PW 1) was recalled for further evidence and she testified that she is the mother of the complainant. She further testified that the complainant was dumb. She also testified that the complainant could not be able to speak. She further testified that the complainant did not understand sign language, because she had been locked up at home for most of her life. Finally, she testified that she could understand Kipsigis language.

16. The court then conducted a *voire dire* examination in respect of the complainant (PW 3) through the efforts of the court clerk using both sign language and Kipsigis. After doing so, the court found that she was not responding. The court then concluded that the witness was not capable of giving rational answers. The court also found that she did not have any hearing impairment but was incapable of sign language communication. The court then found that she was an incompetent witness by virtue of having a retarded mind, arising from her inability to give rational answers to the questions put to her in terms of section 125 (1) & (2) of the Evidence Act (Cap. 80) Laws of Kenya. As a result, she was stood down.

17. The prosecution also called Benjamin Tum (PW 4), who was a clinical officer, attached to Narok County Hospital. He examined the complainant (name withheld). He found her to be 16 years of age. He also found her to be an imbecile. He also found that there was a penile penetration of her female organ. The examination by PW 4 was done one day after the commission of the offence. He then put his report in evidence as prosecution exh 1.

18. As regards to mental status of the complainant, PW 4 relied on a psychiatrist report of his colleague by the name Mr. Kenyanya, whose report was put in evidence as prosecution exhi 7. According to exh. 7, the complainant was aged 17 years old and was a mentally retarded mother of 3 children, who were in good health. PW 4 testified that he knew the handwriting of his colleague Mr. Kenyanya.

19. No. 79450 Cpl Chebii Elra (PW 5) was the investigating officer. She testified that the complainant was unable to communicate due to mental retardation. She further testified that the appellant went with the complainant into a maize plantation where he was caught red-handed having sex with the complainant. When he saw some women who were looking for him, he got off the complainant as a result of which the women raised an alarm. He was then arrested and was beaten by members of the public.

20. I find from the entire prosecution evidence that there are no contradictions and inconsistencies as alleged by the appellant. It therefore follows that ground 1 of his petition of appeal is lacking in merit and is hereby dismissed.

21. In grounds 4, 5 and 9, the appellant has faulted the trial court by not considering his evidence. The unsworn evidence of the appellant was that the case against him was fabricated due to a grudge between him and PW1. He testified that the basis of the grudge was due to an unpaid debt of Shs.30/-, which he owed PW1 for drugs which had been supplied to him. PW 1 denied in her evidence that she did not have a grudge against the appellant. The trial court directed its mind as to the standard of proof and found that the evidence against the appellant was overwhelming. It found the appellant was caught red handed in the act of having sexual intercourse with the complainant. It also took into account the defence evidence and properly found that the charge of defilement was proved.

22. I have reconsidered the totality of the prosecution and defence evidence and I am in agreement with the trial court that the appellant was convicted on overwhelming evidence. I therefore find that his defence was considered and rightly rejected. It therefore follows that grounds 4, 5 and 9 are lacking in merit and are hereby dismissed.

23. Furthermore, in ground 10, the appellant has faulted the trial court both in law and fact for delivering a judgement that is full of errors and misdirections that have resulted in a miscarriage of justice. In this regard, I have considered the judgement and have found that it set out the cases for both the prosecution and the defence. It then considered the evidence and found that the offence was proved on the basis of the evidence presented to that court. I find no misdirections and errors as alleged by the appellant. In the circumstances, I find no merit in this ground of appeal which is hereby dismissed.

24. In ground 12, the appellant has faulted the trial court for not confirming the age of the complainant. In this regard, I find the evidence of PW 4 was that the complainant was aged 16 years while that of Mr. Kenyanya was that the complainant was aged 17 years. In this regard, I find that the trial court found that the complainant was a mentally retarded child aged 16 years. The trial court saw and heard the witnesses in particular PW 4 who testified in respect of the age of the complainant. He believed the evidence of PW 4 that the complainant was aged 16 years. I have re-assessed his evidence and I find that it is supported by evidence. It is not a must that the age of the complainant could only be established by a birth certificate. Furthermore, it is important to bear in mind that medical science like any other profession is not exact. In view of these considerations, I find that the complainant was aged 16 years.

25. In ground 14, the appellant has faulted the trial court for charging him with an offence of defilement with a girl of mental disability contrary to sect ion 7 of the Sexual Offences Act instead of charging him with acts of penetration of a person with mental disability. I have considered the statement of the offence which charges the appellant with defilement of a person with mental disability contrary to section 7 of the Sexual Offences Act. I have also considered the particulars in support of that offence which allege that the appellant intentionally and unlawfully caused his male organ to penetrate the female organ of a child, who was a child aged 16 years and had a mental disability. I find that the charge as drafted had defects. First section 7 creates 2 offences namely one of rape and another of an indecent act with another within the view of a family member. The evidence produced at trial shows that the complainant was the daughter of PW 1. That evidence also showed that PW 1 saw the appellant having sexual intercourse with the complainant. There is further evidence that the complainant was a child with a mental disability to the extent that she was found incompetent to testify. In the circumstances, I find the offence proved is that of committing an indecent act with the complainant within the view of a family member namely PW 1. I find that it was not proper to charge the appellant with defilement under section 7 of the Sexual Offences Act. He should have been charged with an indecent act with a person having a mental disability.

26. Furthermore, the particulars of the offence allege that the appellant intentionally and unlawfully caused his male organ to penetrate the female organ of a child aged 16 years with a mental disability without her consent. In view of the evidence tendered at trial, that is, the appellant had sexual penetration of the complainant; I find that in addition to penetration, he also indecently assaulted the complainant. In other words, the sexual penetration includes the offence of indecent act. In the circumstances, I find that the appellant was not prejudiced in the manner in which the offence was drafted and filed. I find that these are curable errors in terms of section 382 (Cap 75) Laws of Kenya on the Criminal Procedure Code.

27. In relation to ground 11, I find that the constitutional rights of the appellant were not violated as alleged. According to article 50 (2)(d) of the constitution, all trials must be held in public. However, under article 50 (8) the court has a right to exclude: *" the press or other members of the public from any proceedings if the exclusion is necessary in a free and democratic society to protect witnesses or vulnerable persons, morality, public order or national security."* This is also authorized by section 31 (4) a, b, c, d and e, which is in relation to protective measures for vulnerable witnesses. These same provisions authorize the court to hold proceedings in camera.

28. The evidence does not show whether the press or other members of the public were excluded from this trial. Assuming that there was such exclusion, the said exclusion is justifiable as a protective measure for the complainant who was both a vulnerable person and witness within the said constitutional provisions. I therefore find that this ground of appeal is lacking in merit and is hereby dismissed.

29. In grounds 3 and 13, the appellant has faulted the trial court for imposing a manifestly excessive sentence. I have considered the sentence and I find that it is not authorized by section 7 of the Sexual Offences Act. In terms of those provisions, the minimum sentence is one of 10 years and not 15 years as found by the trial court. I therefore set aside the sentence of 15 years imprisonment on grounds of unlawfulness. In its place, I impose a minimum sentence of 10 years imprisonment as required by section 7 of the Sexual Offences Act.

30. The upshot of the foregoing is that the conviction and sentence imposed by the trial court are hereby set aside. In their place, the appellant is hereby convicted and sentenced to the mandatory minimum of 10 years imprisonment as required by section 7 of Sexual Offences Act.

Judgement delivered in open court this 11th day of April, 2018 in the presence of Mr. Kilele for the appellant and Ms Torosi for the State.

J. M. Bwonwonga

Judge

11/4/2018