REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. 40 OF 2015

MICHAEL KIPROTICH CHERUIYOT.....1ST APPELLANT

BENARD TONUI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case no 18 of 2013 Bomet PMs court Hon Kiage RM)

JUDGMENT

The two appellants above mentioned were convicted and sentenced to life imprisonment for the offence of gang defilement contrary to section 10 of the sexual offences Act no. 3 of 2016

The particulars being that on the 9th day of June 2013 at Bomet Township within Bomet county in association with Benard Tonui internationally caused his penis to penetrate the vagina of S C a child aged ten (10) years.

Being aggrieved by the decision of the learned trial magistrate the two appellants have preferred this appeal.

1. The grounds are that the plea was not an-equivocal.

2. That the charge was defective

3. That the sentence was harsh in the circumstances of the case

4. That the appellants did not understand the language used during the trial.

When the matter came up for hearing of the appeal, the court was urged to find that the Accused persons were not given adequate time and facilities to prepare their defence in that on the 22nd day of July 2013 the prosecution presented in court an amended charge which was read over to the Accused persons on the same day and case proceeded to hearing.

The court was further urged to find that the prosecution case was full of contradictory statements and in particular evidence by PW1.

That the incident happened during the night and hence there was no proper identification.

On severity of sentence the court is urged to find that it was harsh and excessive bearing in mind that the section with which the appellants were charged with provides for a sentence of 15 years imprisonment

Further that the Accused persons were first offenders.

This appeal is opposed.

The amendment introduced on the 22.7.2015 is said to have added the name of the second appellant only and nothing else and that the other particulars remained the same.

Further that the appellants informed the court that they were ready to proceed with hearing.

It is in the contention by the prosecution that there was no contradiction in the evidence by the complainant.

That what she told the court was that the 2nd Appellant defiled her although it is the first appellant who did the penetration, the 2nd appellant was present holding the minor as the first Accused defiled her.

On the issue of identification

It is the prosecution case that the appellants were known to the complainant before as they were close neighbours and that there was ample time and opportunity to identify them

As regards the language used.

It is contended that at page three of the proceedings its shown that the amended charge was read over to the Accused persons in Kipsigis language which they understood. Thereafter the proceedings were in Kipsigis language.

On the severity of the sentence it's the contended that under section 10 of the sexual offences Act the minimum is 15 years but with a provision for enhancement if the victim is below the age of 15 years. It is also submitted that the petition was filed out of time and without leave of the court.

Analysis and Determination

From the outset it is noted that the grounds of the appeal and the submission by counsel are at variance and in particular on the first and second grounds.

It is the contention by the defence that the charge was defective but in their submission they have urged the court to find that the appellants were not given adequate time so as to prepare for their defence. It is further contended that the prosecution presented an amended charge on 22.7.2015 which was read over to the Appellants and there after the case proceeded to hearing. Defective charge and failure to be given adequate time and facilities to prepare are not the same. The court has not been prompted to find that the charge was defective. As regards the circumstances surrounding, the amendment I find that nothing substantive was introduced in the amendment which only added the name of the 2nd appellant.

Further the appellants did not request for an adjournment so as to find why the charges and the case proceeded to hearing.

Language

At page three of the record of proceedings its clearly shown that the language used was Kipsigis. Thereafter the proceedings were in Kipsigis and English languages. A perusal of the proceedings does

indicate that the two appellants understood Kipsigis language and participated fully in the proceedings

Un equivocal plea

The two Accused persons properly took their plea in a language they understood which was Kipsigis language. They denied the charges and the case proceeded to full hearing and determination. The issue of un equivocal plea therefore does not arise

Identification

The learned trial magistrate did observe in his judgment (last paragraph of page 6) "The complainant pleaded that she saw two people whom she recognized as Dadi and Mrefu and that she knew both of them before the night of the incident because Dadi (1st Accused) lived in the same compound as hers and Mrefu 2nd Accused used to stay with Dadi.

In her evidence in chief the complainant told the court that they stay in a place with many people and that their house is door 3. It is that door which was forcefully broken by the two that night. She testified to have seen the two attackers who carried her out to some building outside where she was defiled by the 1st Accused as the 2nd Accused stood there holding a torch. Afterwards the 1st Accused took her back to the house. This incident did not happen in a flash. There was enough time for the complainant to see the two appellants who had forcefully opened the door of her mother's house, taken her out to another building and returned her back.

Severity of sentence

Section 10 of the sexual offences Act provides for a minimum sentence of 15 years imprisonment which can be subject to enhancement if the victim is below 15 years.

It is noted that the complainant sustained serious injuries but the two Accused persons were first offenders. They were sentenced to the maximum. I find there is need to interfere with the sentence which I hereby reduce to 20 years.

The upshot is that the two appellants will serve a term of 20 years imprisonment from the time of conviction.

This appeal succeeds to that extent only.

Judgment delivered dated and signed this 15th day of December 2016 in the presence of learned counsel for the prosecution Miss Gitahi, learned counsel for the defence Mr Koech holding brief Orayo. Court assistant Mercy/Rotich

M. MUYA

JUDGE

15.12.2016