REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 126 OF 2009

K.S ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the Judgment of Hon. S. Atonga (Principal Magistrate) in Kapsabet Principal Magistrate's Court Criminal Case No. 89 of 2008 delivered on 31st July, 2009)

JUDGMENT

The Appellant, KS was charged with the offence of incest by male in violation of Section 20 (1) of the Sexual Offences Act, No. 3 of 2006.

Particulars of the charge are that on the 1st day of February, 2008 at Rift Valley Province, unlawfully did cause his penis to penetrate the vagina of RC a girl aged 9 years who he knew to be his daughter.

In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006.

Particulars of the charge are that on the 1st day of February, 2008 at Rift Valley Province, did intentionally and unlawfully cause his penis to come into contact with the vagina of RC a girl aged 9 years.

The lower court found the Appellant guilty in the main charge and sentenced him to serve twenty (20) years imprisonment.

He has appealed to this court both against the conviction and sentence. The Petition of Appeal was filed on 13th August, 2008. It raises three main grounds of appeal, namely:-

(a) That the learned Magistrate, erred both in law and fact in convicting him on the basis of medical evidence which was produced by use of technical language which made it hard for the Appellant to cross-examine the medical officer who testified in this regard.

(b) That the charges against him were framed because he had a dispute with his wife.

(c) That there was no eye witness called to corroborate the evidence of PW2.

It seems thereafter the Appellant intended to amend the grounds of appeal. On record is an undated Notice of Motion which does not also bear a court stamp. The same seeks an order to amend the grounds of appeal.

I have carefully perused the court record and noted that the court was never moved on this application. The grounds raised therein are more or less similar to those contained in the Petition of Appeal filed on 13th August, 2008. And since the former does not form part of court record (as it was not formally received by the court), I will only rely on the latter.

The appeal was canvassed before me on 18th April, 2013 by way of oral submissions.

On his part, the Appellant submitted that, he was implicated by his wife because he was opposed to her love relationship with one D C. According to him, D has been his wife's boyfriend and when he became opposed to her relationship, his wife implicated him in an offence he never committed.

Mr. Munene, the prosecuting counsel opposed the appeal. He submitted that the evidence tendered against the Appellant was overwhelming. He said that the complainant gave candid evidence of how the Appellant sexually defiled her and used threats against her to conceal his heinous actions.

It was his submissions that the medical evidence of PW2, the clinical officer who examined the complainant confirmed that indeed the complainant had been severally defiled.

He stated that the said D testified as PW4 and the Appellant never cross examined him on the purported relationship with his wife or existing grudge between the two sides.

On sentence, Mr. Munene submitted that the penalty given to the Appellant was sufficient and should not be varied.

This being a first appellate court, its duty is to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind that it has neither seen nor heard the witnesses and make allowance for that – **AJODE -VS- REPUBLIC (2004) 2 KLR, 82**.

Also in **MWANGI -VS- REPUBLIC (2004) 2 KLR, 28** the Court of Appeal held that:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness."

With regard to ground number 1, the P3 form was produced as P. Exhibit 1 by PW3. PW3, one, Misoi Isaac was the clinical who examined the complainant. He was based at Kapsabet District Hospital.

His testimony was that, upon examining the patient, RC, he noted that the libia minora was torn and healed and the hymen was raptured. According to PW3, the complainant reported to have been defiled severally by his father. He stated that he saw her on 3rd February, 2008 and according to the complainant, she was last defiled on 2nd February, 2008. He further testified as follows:-

"We did lab tests. However, no spermatozoa was seen, no puss cells seen, syphilis test negative. H.I.V. Test negative. She was given antibiotics and analgesics. I formed the opinion that she had been defiled. I classified the injuries as harm ..."

The Appellant was given an opportunity to cross-examine PW3 and this is what came out of the cross-examination:-

"You were examined by my colleague and doctor Embeko. He is at Kapsabet District Hospital."

Record shows that PW3 testified in Kiswahili language, which language the Appellant also used in cross-examining the witness. He did not raise any objection to either the use of the language or the medical terms used by the witness. This notwithstanding though, it is obvious that the words of the witness were translated to the Appellant in Kiswahili language. He cannot therefore be heard to say that the medical terms used by the witness made it difficult for him to cross examine the witness.

Even assuming that he had difficulties cross examining PW3, he did not indicate to the court that he had difficulties in understanding what the witness said. This, he should have done at the time he was given an opportunity to cross examine the witness.

In this respect, I find that ground No. 1 has no basis and is not founded on any tangible evidence. In any event, I think, the witness used the words that best suited his explanation on his findings upon examining PW2. I am not sure he would have substituted his medical terms with any other words. And since the interpretation of the medical terms was done to the Appellant in the language he best understood, it is my candid finding, that no injustice was occasioned to him by the testimony of PW3.

Again, the P3 form is an expert document, whose content cannot be varied to suit any other purpose than it was intended for. Moreso, it was produced by its maker who examined the complainant. Therefore the opinion of PW3 formed cogent evidence which the lower court relied on.

On ground No. 2, the Appellant states that he was implicated by his wife with whom he had a dispute. In court, he submitted that, one D C was or is still a boyfriend to his wife. That the wife implicated him after he discouraged their love relationship.

The said D C testified as PW4. He introduced himself to court as a village headman. He testified that the mother of the complainant (PW1) reported to him that the Appellant had defiled his daughter. That upon receipt of this report women arrested the accused and took him to the Chief's office. His further testimony was that he saw PW2 on the date the accused was arrested.

The Appellant was given an opportunity to cross examine PW4. It would appear he only asked he witness one question to which he replied:-

> *"**you were arrested by many people."***

He did not ask the witness any question relating to his purported relationship with his wife. Having failed to do so, I conclude that, the assertion by the Appellant that he was implicated by his wife is not credible at all and was put forth as an afterthought. Indeed, it is meant to portray PW4, who is a village leader in bad light.

I do accordingly dismiss the second ground of appeal.

With respect to the third ground of appeal, the Appellant avers that no eye witness was called to corroborate the testimony of PW2, the complainant.

It must be noted from the onset that sexual offences will normally not be committed in the full glare of third parties. The latter would only occur as a matter of accident when the offender is caught unawares by the third party(ies).

Therefore, in determining whether the evidence of a minor complainant is credible enough, courts will normally be guided by two principles;

One, by assessing whether the child/complainant is capable of testifying on oath so that the defence is accorded an opportunity to test the elasticity of such evidence.

Two, as long as the court is convinced that the child complainant is giving cogent evidence and has no reason to doubt it, then such evidence can found a ground for a conviction even without corroboration.

In her evidence in chief PW2 stated as follows:-

*"**I knew the accused …. He is my father. He had bad manners with me. He forced me to sleep on my back He removed my under pant. He removed his trouser and underwear. He slept on me. He put his thing here (points to her groin). He told me not to tell anybody … The accused beat me after I told PW1 .. He had done that to me several times on different dates …."***

On cross-examination, PW2 had this to say:-

*"**I was with R and C when PW1 went to buy milk. Those other children are younger than me. It is true you did bad things to me that day. You also did that to me another day at night. When I tell PW1, you usually beat me. You told PW1 to take flour to my grandmother so that I remained with you in the house, then you defiled me. Even when I was studying at** [particulars withheld] **you defiled me. Yes, you bought uniform for me. You have never chased me to the bush."***

Regarding the testimony of PW2, the learned Magistrate observed as follows:-

*"**PW2 is a child who would have no malice. I do not think she lied to court. She told PW1 that the accused had defiled her. When she did so she risked being beaten by the accused who warned her not to tell anybody. The accused fulfilled his promise by beating her after he learned that PW2 had told PW1 what had transpired. The child looked candid. She would not lie and risk being beaten by the accused. Besides PW1, PW3, PW4 and PW5 corroborated PW2's evidence. I find that the prosecution has proved beyond reasonable doubt that the accused defiled PW2, who is the daughter of the accused aged ten years."***

The above notwithstanding, PW2's evidence is further corroborated by that of PW1, her mother. She testified that PW2 repeated the offence to her on 1st February, 2008. That on this date she told her that her father had done bad things to her, that he had removed her pants and defiled her. That unfortunately the accused was furious when she reported the matter to her and he beat her mercilessly. It was also her testimony that PW2 told her that the accused had severally defiled her.

On cross-examination, the Appellant did not in any way rebut or shake the consistent testimony of PW1.

PW4 and 5 also confirmed the same report made to them. They also reaffirmed that the Appellant was the father of the complainant.

The corroborative evidence of PW1, 3 and 4 further added weight to the prosecution's case that remained water tight against the Appellant.

To buttress my finding on the testimony of a child, **Section 124** of the **Evidence Act**, puts a proviso in the following words:-

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed tom convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The Court of Appeal in **KIBET –VS- REPUBLIC (2009) KLR, 48** held as follows with regard to the testimony of a minor:

*"**Though the complainant's sister who was with her in the appellant's house at the time of the alleged offence did not give evidence, the trial court Magistrate was entitled to rely on the evidence***

of the complainant child if she was satisfied that the child was telling the truth. See the proviso to section 125 of the Evidence Act brought in by Act 5 of 2003, which was in force then…"

On satisfying itself that the child understands the nature of evidence given on oath, Court of Appeal in **OPICHO –VS- REPUBLIC (2009), KLR, 369** held as follows:-

"The procedure for investigation, or preliminary examinations of a witness, otherwise referred to in old French and Anglo-Norman as the 'voire dire' or voir dire is taken in two steps as summarised in Kinyua vs. Republic [2002]1KLR, 256:- '(a)The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child and to take his or her evidence. (b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court will proceed to record unsworn evidence from the child witness"

The proceedings of the lower court are a testimony that the learned Magistrate was keen in ensuring the right procedure of taking PW2's evidence was followed as enunciated in **OPICHO –VS- REPUBLIC (Supra)**.

He also gave reasons why he felt he had no doubts in believing the testimony of PW2. As such no further corroboration of PW2's evidence was required than was already tendered and upheld by the trial court.

From the foregoing, I find that the learned Magistrate properly evaluated the evidence before him. He convicted the Appellant based on candid evidence that was not shaken by the defence evidence. In fact, his defence was a mere denial that he did not defile his daughter. He also attributed his owes to the alleged domestic problems he had with his wife due to her purported love relationship with D. The court has already found the latter as unfounded allegations.

Effectively, I find that the case in the main count was proved beyond all doubts and the appeal against conviction must fail.

I now address myself as to the legality of the sentence handed to the Appellant.

The Appellant was charged under Section 20 (1) of the Sexual Offences Act No. 3 of 2006 which provides that:-

"***Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt, or grandmother is guilty of an offence termed incest and liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

From the P3 form produced as P.Exhibit 1 the complainant's age at the time of her examination was estimated at nine (9) years. At the time of her testimony she said she was 10 years old Whatever the age, she was below 18 years at the time of the defilement.

Therefore, my understanding of Section 20 (1) above implies that the sentence should have been guided by that stipulated under the proviso to the section.

In this respect, the Appellant was entitled to no less than life imprisonment.

Section 354 (3) (iii) of the Criminal Procedure Code empowers the court, if it finds there is sufficient ground for interfering, dismiss the appeal or may alter the finding or maintain the sentence, or with or without altering the finding reduce or increase the sentence.

This provision of law is affirmed in the case of **KINYANJUI –VS- REPUBLIC (2004) 2, KLR, 366**, in which it was held;

"***Under Section 354 (3) of the Criminal Procedure Code, the court had the jurisdiction to impose an appropriate sentence on appeal, including enhancing the sentence imposed by the Magistrate's court."***

Further the Court of Appeal has observed that the minimum sentences provided under the Sexual Offences Act, are with time lines which cannot be varied to anything else – see **DAVID KUNDU SIMIYU –VS- REPUBLIC, CRIMINAL APPEAL NO. 8 OF 2008, COURT OF APPEAL SITTING IN ELDORET.**

"Those are minimum sentences and parliament appears tom give no discretion to the courts to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the Act which is prevention and protection of all persons from harm, from unlawful sexual acts."

The same Court of Appeal has emphasized that life sentence means no less than **"life sentence".**

In the case of **FRED MICHAEL BWAYO –VS- REPUBLIC, CRIMINAL APPEAL NO. 130 OF 2007**, cited in **JOSEPH KIPLIMO -VS- REPUBLIC, CRIMINAL APPEAL NO. 416 OF 2010, Court of Appeal sitting in Eldoret (unreported)** the Court Appeal stated thus:-

"The challenge is the substitution of number of years imprisonment for life where, as in this case the law allows for discretion. As far our research goes, there are variations in approach in different countries of the world. A few examples will suffice: in Uganda life imprisonment is taken to mean 20 years maximum, although the debate continues after a recent constitutional court decision that it should mean 'the whole of person's life'. In Australia it would be between 10 to 20 years followed by parole depending on the degree of the offence. In Argentina it is between 13 to 25 years while in Belgium it is 10 to 16 years pending parole. In England and Wales, the term is indeterminate but until the year 2002, the HomeSecretary reserved the right to set the minimum length before that power was reposed on the courts; while in Congo (DRC) the maximum penalty is 30 years imprisonment. Generally in many countries there will be a number of years followed by parole."

In the **JOSEPH KIPLIMO –VS- REPUBLIC** case, the court said:-

"***The Superior court apparently did not deal with the issue of sentence as a separate issue… The learned judge did not for example consider as to whether a definite term of imprisonment was available and if so, whether the 50 years was appropriate in the circumstances of the case. The issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was awarded. We have jurisdiction to interfere. As we have stated above, the law as it stands that life imprisonment is the only sentence provided for the offence that the appellant was charged with and is mandatory sentence. The sentence of 50 years awarded by the trial court was unlawful and was not interfered with by the first appellate court as it should have done. We have no alternative but to put right the position. The appeal is dismissed. Sentence of 50 years imprisonment is set aside and in place, the appellant will serve life imprisonment."***

In the premises I am mandated by law to vary the unlawful sentence passed by the trial court by enhancing it accordingly.

In the result, I dismiss the appeal in its entirety. I confirm the conviction and substitute the sentence of twenty (20) years imprisonment term with one of life imprisonment. The sentence shall, of course start running from the date of the conviction.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 25th day of June, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Wainaina for the State/Respondent