PSW v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 8269 (KLR) (5 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E037 OF 2023

RC RUTTO, J

JULY 5, 2024

BETWEEN

PSW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. P. Mugendi (SPM) at the Kiambu Chief Magistrate Court Sexual Offence Case No 75 of 2018 delivered on 14th March 2023)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the 20 years imprisonment sentence set aside.

2. The appeal is premised on the following grounds, that:

    a. The trial court erred in point of law by failing to observe that the prosecution case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt.

    b. The trial court erred in point of law by failing to find that key adversely mentioned witnesses were not recalled contrary to the provisions of sections 150 and 144 of the CPC.

    c. The trial court erred in point of law by failing to find that the key ingredients of the offence were not proved against the appellant as required by law.

d. The trial court erred in point of law by failing to give the appellant's defence adequate consideration as per the requirements of section 169(1) of the Criminal Procedure Code.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* in Count 1. The particulars of the offence were that on several occasions at Mwandus area in Kiambu town he intentionally and unlawful caused e his penis to penetrate the vagina of RAA a child aged 13 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on several occasions at Mwandus area in Kiambu town within Kiambu County, he intentionally touched the vagina of RAA, a child aged 13 years using e his penis. In Count 2, he was charged with the offence of killing an unborn child contrary to section 228 of the Penal Code. The particulars of the offence were that on the 7th day of December 2018 at Bethsaidia Catholic Dispensary in Turitu area within Kiambu county, by an act of abortion, prevented from being born alive a child who was to be delivered by RAA, a child aged 13 years.

4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 3 witnesses.

C. Prosecution case

5. The victim, PW1, R.A. testified that she was 17 years old living at Haven Rescue Center and training at Nyege vocational training. She stated that her mother passed away and that when she was in class 5 her aunt, Emily took her to live with her in Kiambu together with her aunt's 5 children and husband Paul Simiyu who is the appellant herein.

6. She stated that she was mistreated by her aunt who refused to provide for her but the appellant started to buy her school items on condition that she did what he said. The appellant then asked for sex and promised to pay her school fees. She stated that she had no option but to agree. R.A explained that she agreed to have sex with the appellant when her aunt went to deliver; that the appellant found her in bed and slept with her. She stated that the appellant dropped his trouser then removed hers and had sex with her and from that day they continued having sex.

7. R.A further stated that she was scared to tell, and whenever the aunt was not home the appellant would ask for sex. This happened for like six months until a cousin called Stella came to live with them, that is when she told her she was being mistreated and wanted to go with her.

8. R.A testified that the appellant refused her to go but she still went. This prompted the uncle to look for her and found her in Thika together with Stella, her husband and Stella's friend. After being found R.A stated that she told the appellant that she had not received her periods, whereupon the appellant took her to Kiambu Police Station and asked her to report that Stella's husband had defiled her.

9. That she was then taken to hospital where it was established that she was 13 weeks pregnant, and yet she had stayed with Stella for 1 week. After this, the appellant told her to go to hospital where she was given some medicine to swallow and others to insert. The next day she bled and the appellant told her that the pregnancy had aborted. They went back to hospital and were given some drugs. She states that she did not tell anyone.

10. After sometime the appellant started asking for sex again prompting her to run away back to Stella. This led to Stella, her husband and R.A being arrested. It is after this arrest that she stated that she

decided to tell the truth and they were released. She emphasized that the appellant kept telling her to frame Stella's husband.

11. On cross-examination, PW1 stated that the appellant was his uncle and that she had never slept with anyone else and that the appellant took her to Turitu hospital.

12. PW2 Dr. Mewin Matura a doctor at Kiambu Level Five hospital produced as Exhibit 2 a P3 Form filled on 30/9/19 and a PRC Form filled on 29/11/18 by his colleagues who had since gone back to school. He confirmed knowing both their hand writings.

13. He stated that the report indicated that the nature of offence was defilement. That the age of the victim was 14 years old. That the injury was classified as harm, nature of injury was defilement, the female genitalia hymen was not intact, there was white foul smelly discharge, HVS showed epithelial cells, pregnancy was positive, urinalysis showed pus cells, HIV and VDRL were negative. The pelvic ultra sound revealed a foetus 13 weeks of gestation.

14. PW3, CPL Salome Nyambura the investigating officer (IO) stated that on the 20/11/2018 the appellant reported that 2 of his daughters had disappeared. The following day he reported that he could show where the children were in Thika. He was given 2 police officers to go to Thika but he could not find them. After 2 days, officers from Kamcoangi police called and said the two kids were in Kamcoangi police station.

15. She further stated that R.A informed her that she ran away because the appellant used to sleep with her and that the appellant took her to Bethsaidia nursing home where she aborted and after recovering, he wanted to defile her again hence she took off.

16. PW3 confirmed that the person who actually performed the abortion was charged in court.

17. With these 3 witnesses, the prosecution rested its case. Upon the closure of the prosecution case, the court found that the prosecution had establish a prima facie case and the appellant was placed on his defence. He chose to give a sworn statement and called 3 witnesses.

D. Defence case

18. DW1, the appellant, stated that he is a watchman. That in the year 2018 he was leaving with R.A as his child. That R.A ran away with his sister, Agnes Simiyu, to Gatundu North. The following day together with police from Kamwangi, he found them each with a boy. He stated that the boy's boss followed him and offered kshs 2000 for him to withdraw the case and he declined and unfortunately, the next day he was told that he is the one who had defiled R.A.

19. He also stated that the sister called and informed him that R.A was bleeding. He went to rush her to hospital and first they went to Kiambu hospital but there was a long queue and so he took her to Bethsaidia and she was treated. According to the appellant, R.A informed him that she aborted and had been assisted by Agnes Fredrick Wabombe and Esther, sister to Fredrick in Gatundu North. He testified that the doctor who assisted them advised that they report to the police which he did. This prompted R.A to run away the 3rd time.

20. It was the appellant's testimony that he was informed by a neighbour that his children could go to men houses when sent to buy kales. That he asked the children and they admitted and said nothing happens. He also told court that he travelled to Bungoma on 10/8/2018 and after staying for 2 days, Agnes and Ruth ran away to Gatundu where they stayed for 1 month.

21. The appellant confirmed raising R.A since she had no parents and Agnes, was not happy that R.A was being educated. According to the appellant, R.A told Doris, his daughter that she was not sure who

impregnated her because she had 2 boyfriends Wamboba and Capro. That Wamboba sent kshs 2000 to R.A mother's phone and when he asked Wamboba what the money was for he was told that it was to settle the case.

22. On cross-examination he stated that the abortion took place on 7/12/2018. That the girls took off in August and came back in November, 2018

23. DW2 Emily Akinyi stated that she was the accused wife and that she was living with R.A after her sister died. It should be noted that the trial court observed that DW2 was stammering severely and wrote down her statement stating that her husband's daughter called Agnes came from Thika and took R.A and ran away. She also told the court that the appellant is the one who looked for them and brought them to Kiambu Police Station where R.A reported that the appellant used to defile her and had impregnated her. She said that she never mistreated R.A and was never informed by her or the neighbours that she was defiled. She also stated that they lived in a one bedroom house.

24. DW3 Sylvia Abeo stated that she is the appellant's in-law. She stated that Agnes came and picked R.A and ran off. That it is the appellant who went to look for them and brought R.A back. Thereafter, Agnes sent money to DW2 phone and R.A withdrew and took off. R.A was later found living with Agnes in a house with two men. She stated that she did not know about the defilement and had never heard about the abortion.

25. DW4 Doris Simiyu is the daughter of the appellant. She informed court that she was close with R.A and R.A never informed her that she was being defiled. She also stated that they were many in the house, 10 children and cousin Silvia. That their mother had also complained that Agnes was giving R.A the phone to talk to boys. She also stated that R.A told her Agnes used to take her to boys and took her to abort. That at no time was R.A left with the appellant alone.

26. After the close of the defence case the appellant, filed his submissions in which he set out the issues for determination as age of the complainant, proof of penetration, mode of identification of the perpetrator.

27. As to the age of the complainant the appellant submitted that the prosecution failed to call for age assessment report or to verify the birth certificate in order to clear any doubt and confirm the age of the complainant. Reference was made to the case of Criminal Appeal No. 504 of 2010 Kaingu Elias Kasumo v Republic in which the Court of Appeal held that age of a victim of sexual offence under section 8(1) is a critical component of the charge and one that calls for proper proof and the credible evidence.

28. On proof of penetration, the appellant submitted that the question is who between PW1 and PW2 was telling the truth and who is the owner of the real story? He stated that the evidence of R.A was not credible because she failed to report the matter to the police or anyone near her for help. Further that according to the medical narration R.A was not defiled by the appellant and the probable weapon that caused injury was not identified which shows that the allegations were fictitious and fabricated.

29. On the mode of identification of the perpetrator, reference was made to the case of Republic v Turnbull (1976 all E.R 549 to urge the court to disregard the evidence against the appellant as they do not collaborate each other.

30. He urged the court to find that the prosecution failed to establish that the appellant was possessed of the relevant mens rea and actus reus and hence he should be acquitted.

31. The trial court delineated the following issues for determination: whether the accused defiled the victim R.A.O a child aged 13 years; whether PW1 was speaking the truth and if the court believes her;

whether the accused caused the killing of an unborn child; and whether the prosecution proved its case to the required standard.

32. On the issue whether the accused defiled the victim R.A.O a child aged 13 years the court addressed itself on the age of the victim. It held that the victim produced a copy of birth certificate, Exhibit No. 4 indicating that she was born on 1/2/2005. The incident is said to have occurred on several occasions in the year 2018, thus the victim was aged 13 years at the time of the incident.

33. On penetration, the trial court observed that the Dr., Marvin presented medical evidence on behalf of his colleague and as per the PRC Form dated 29/11/18, Exhibit 2, the victim was 13 weeks pregnant and this proves that indeed penetration had occurred.

34. On the third ingredient of identity of the perpetrator, the trial court observed that the victim was leaving with the accused who was raising her as her father, she was an orphan. It is clear she knew the perpetrator.

35. On the issue whether the PW1 was speaking the truth and if the court believes her the trial court after analyzing her evidence, was convinced that the minor was telling the truth and that there was no reason for her to frame the accused considering that she had no other parents. The court also analyzed the appellant's as well as the evidence of the defence witnesses and found that it created doubt in her mind and that he, the appellant, was not truthful.

36. On the 2nd count, the trial court found that the prosecution had not proved its case to the required standard and proceeded to acquit the appellant of this count.

37. Ultimately, the appellant was convicted under section 215 of the Criminal Procedure Code on the first count of defilement. On sentencing the trial court considered all mitigating factors and noted that the offence was a serious one that cannot go unpunished and to send message to others would be offenders, the accused was sentenced to serve 20 years imprisonment.

E. The Appeal

38. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the 20 years imprisonment sentence set aside. The appellant seeks to rely on his undated written submissions filed on 31st May 2024, while the respondent sought to rely on its submissions dated 30th May 2024. The parties' submissions are as follows:

    a) Appellant's Submissions

39. The appellant submits that the court sentenced him to serve a sentence of 20 years imprisonment from the day of conviction which was contrary to the provisions of section 333(2) of the CPC. Further, that the trial court was wrong in concluding that the offence had a mandatory sentence since jurisprudence gives the courts discretion. Further, that based on the age of the minor, section 8(3) of the *Sexual Offences Act* gives a term of 15 years imprisonment yet he was given 20 years. The court erred. He relies on the case of Constitutional and Judicial Review Division Petition No 97 of 2021 Edwin Wachira &9 others v Republic among others.

40. He submits that he is a victim of corruption, that corruption disabled him from getting justice because first he had severally reported this matter before Kiambu Police Station which led to the arrest of the main offender who was one of the R.A boyfriends who had the unlawful custody of the minor and upon his arrest, he was offered Kshs 2000/= to drop the matter which he refused. Secondly, that the clinician Samuel Njuguna Ndirangu secured bond through Wills Angoya Keya all who disappeared from the hearing of this case. Later it was said that their case was dropped outside court. Thirdly, that

during the police raid by officers of Kwamwangi Police Station, Capro was arrested alongside her cousin Stella and her husband Fredrick Wabombe.

41. He urges the court to find that he had in mind the interest of the of the minor and could not procure an abortion for her given that he was fathering 10 children and it had never been mentioned that he had issues with any one of them. He urged the court to rely on the case of Maina v Republic [1970] E.A 370 which held that it is dangerous to convict on the evidence of the woman or girl alone.

42. He submitted that this court should be guided by the Okeno v Republic [1972] EA 32 and re-evaluate the evidence. If this is done he urged that the court will establish that prosecution case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt. He stated that the minor had reported another incident of sexual intercourse with a neighbour a month before she had claimed not to receive her monthly period at the time since 3/10/2018. The incident was reported on 20/11/2018 where the minor claimed she had not recognized the perpetrators and the PRC Form was filled on 29/11/2018. That the doctor stated that the minor was escorted to hospital by the police on 12/06/2019.

43. The appellant made reference to the case of Ndung'u Kimanyi v Republic [1979] KLR 282 and urged the court to look at the character of the minor. He submitted that, the R.A was interested in money. She had been sent some money kshs 2000 by her cousin's husband Wabomba; she was ungrateful and even said asante ye punda ni mateke; that she had been defiled twice before yet she wants court to believe that she had had sex with no one else apart from him; she ran away and was later found with Wabomba and Capro and when she was taken to hospital she was found to be pregnant; that it is only R.A who had a problem with his family and did not appreciated being accommodated and the assistance given to her.

44. The appellant outlined the following as the issues for consideration by this court;

    a. That he has been a watchman who took off at 6pm and returned back at 6am and the only time he had to rest is Sunday. He relies on the case of Kiragu v Republic [1953]KLR.

    b. That there was no crucial evidence to show that the he intended to procure an abortion of the fetus in the minor's womb. The court should have taken this into account to find the prosecution evidence incredible.

    c. The doctor who came to testify was not the doctor who was on record as having attended to the complainant and hence section 95 of the Criminal Procedure Code was not followed to the later.

    d. The investigating officer did not rely on intelligence and integrity. He was not thorough in his investigation as he failed to undertake medical tests to ascertain the father of the fetous.

    e. The issue of penetration should have been handled differently since it was in the public domain that the complainant was having sexual intercourse.

    f. The complainant kept contradicting herself. At first, she stated that she never knew the person who defiled her, she claimed it was Wabomba and Capro then lastly, claimed it was the appellant and that the appellant had told her to lie about others.

45. The appellant urged the court to allow the appeal and set aside the conviction and sentence.

    b) Respondent's Submissions

46. The respondent opposed the appeal in its entirety on grounds that the prosecution established and proved beyond reasonable doubt the ingredients of defilement namely; age, penetration and identification of accused.

47. On the ingredient of age, the respondent sought to rely upon the case of Kaingu alias Kasomo v Republic C.A 504 of 2010 U.R and submitted that documentary evidence was adduced to proof the age of the complainant. The birth certificate which was prosecution as Exhibit No. 4 showed that the complainant was born on 1st February 2005 which meant that she was aged 13 years at the material time in the year 2018. This was collaborated during the viore dire examination conducted four years after the incident where the complainant stated that she was 17 years old.

48. It was the respondent's submission that the complainant testified that she had been defiled several times by the appellant in the year 2018 over a period of 6 months and she eventually got pregnant. That this was collaborated by the medical evidence by PW2 in the form of the PRC form that provided that the complainant was 13 weeks pregnant on 29/11/2018.

49. The respondent contended that the issue of identification is not in doubt since the record is replete with evidence that the appellant and the complainant were familiar and known to each other since he was her uncle and lived together in the same house.

50. In urging the court to dismiss this appeal, the respondent stated that the appellant took advantage of a vulnerable orphan who was facing hostility from her aunt who was hosting her together with the appellant. Further the court was urged to find that the prosecution established all the requisite elements for the offence of defilement contrary to section 8(1) as read together with 8(3) of the *Sexual Offences Act*.

F. Analysis and determination

51. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R [1957] EA 336; Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> '' 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 conclusion on that evidence without overlooking the conclusion 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 conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''

52. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination:

    a. Whether the offence of defilement was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh

a. Whether the offence of defilement was proved

53. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While 8(3) states: a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

54. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as:

    a. Proof of the age of the victim;

    b. Proof of penetration or indecent act;

    c. Identification of the perpetrator.

55. On the issue of age, the prosecution relied on the evidence of R.A who informed court that she was 17 as at the time of testifying and was 13 years at the time the offence occurred. This was collaborated by a copy of the birth certificate which was produced in evidence as Exhibit No 4. There was no objection to its production hence it is evidence on record. I therefore find and hold that there was sufficient evidence to proof the age of the victim as being 13 years at the time the offence was committed. I note that age has not been contested by the appellant.

56. On penetration, R.A testified that the appellant asked for sex and promised to pay her school fees. That she had no option but to agree. R.A explained that the appellant found her in bed and slept with her when her aunt had gone to deliver. She stated that the appellant dropped his trouser then removed hers and had sex with her and from that day they continued having sex. This evidence is collaborated by PW2 through the production of the medical reports produced as Exhibit 2. The report showed that the injury was classified as harm, the female genitalia hymen was not intact, there was white foul smelly discharge, HVS showed epithelial cells, pregnancy was positive, urinalysis showed pus cells, HIV and VDRL were negative. The pelvic ultra sound revealed a foetus 13 weeks of gestation. This evidence confirmed that the victim was penetrated and even conceived hence corroborated the evidence of PW1. Notably, the trial court found that PW1 was a credible witness. It was convinced that she was telling the truth and that there was no reason for her to frame the accused considering that she had no other parents. I find her witness sufficient to prove penetration in accordance with section 124 of the *Evidence Act*, Cap. 80 Laws of Kenya.

57. Further, in the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus;

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

58. Consequently, guided by the above, I find that the evidence of the victim and the PW2, the Doctor, was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

59. Before this Court, the appellant in his submissions raises an issue that the doctor who came to testify was not the doctor who was on record as having attended to the complainant and hence section 95 of the Criminal Procedure Code (CPC) was not followed to the later. Perusing the record, he never raised this objection before the trial court. Indeed, the medical reports were produced by Dr. Mewin

Matura a doctor at Kiambu Level Five hospital who did it on behalf of his colleague who had gone to school. Was this irregular and/or fatal?

60. Section 95 of the Criminal Procedure Code provides for Service (of summons) on servant of Government. It provides that:

> " Where the person summoned is in the active service of the Government, the court issuing the summons shall ordinarily send it in duplicate to the head of the office in which that person is employed, and the head shall thereupon cause the summons to be served in the manner provided by section 92 and shall return it to the court under his signature with the endorsement required by that section, and the signature shall be evidence of the service"

61. While the appellant alleges a breach of section 95 of the CPC which is on the procedure for sending summons to a servant of government, I observe that this section does not apply to instance matter; where a doctor testifies on behalf of another who is not available. Section 95 applies in regard to summons issued by the court to an accused person. The doctor who filled the P3 form, and PW2 are witnesses and not accused persons, hence not governed by the provision of section 95 of the CPC.

62. I also note that the appellant has not particularly pointed out the alleged misgivings or breach of section 95 of the CPC. It is not enough for a party to make blanket allegations; the appellant has an obligation to inform the court of the exact breaches to which he is appealing.

63. Be that as it may, from the record, it is clear that PW2 testified that his colleagues had since gone back to school and he confirmed knowing both their hand writings. I therefore find that PW2 correctly testified and produced the medical evidence in accordance with sections 33 and 77 of the *Evidence Act*.

64. I thus note that during trial the basis and reason for Dr. Mewin testifying and producing the medical reports was explained and the doctor confirmed that he was conversant with the handwriting of his colleague. Further, the appellant did not object to the production of the medical reports as evidence. Based on the above finding I find that it there was no miscarriage of justice or an error in Dr. Mewin Matura testifying and producing the medical reports on behalf of his colleagues who had gone to school. The appellant's contention before this Court is thus without merit.

65. Turning to identification of the perpetrator, PW1 testified that her aunt, Emily took her to live with her in Kiambu together with her children and husband Paul Simiyu who is the appellant herein. This was further supported by DW2 Emily Akinyi who stated that she was the accused wife and that she was living with R.A after her sister died. The appellant too stated that in the year 2018 he was leaving with R.A as his child. All this goes to address the issue of identification of the appellant, by the victim. The appellant being an uncle, he was well known to the victim. The appellant was well identified as the person who defiled R.A and the trial court found that his evidence was not credible and dismissed it. R.A. was found to be credible and the court also found no ground for her to maliciously implicate the appellant. I hasten to add that the appellant does not dispute the fact that the victim knew him.

66. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground must fail as it surely does.

b. Whether there were contradictions and inconsistencies in the prosecution case

67. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " 34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993,that:
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> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

68. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

69. The appellant alleges that the contradictions arise in that the minor had reported another incident of sexual intercourse with a neighbour a month before she had claimed not to receive her monthly periods at the time since 3/10/2018. This court has examined the evidence of PW1 and note that at no point did R.A state that she had sexual intercourse with a neighbour a month before she had claimed not to receive her monthly period. Instead, R.A stated that the appellant picked her and told her to go to Kiambu Police Station and report that it was Stella's husband that had defiled her. Further, she stated that she had sex with the appellant and never slept with any other man. From the evidence on record, I do not find any contradiction in the evidence as alleged.

70. The appellant also states that the incident was reported on 20/11/2018 where the minor claimed she had not recognized the perpetrators. This court observes that PW1 stated that the appellant took her to Kiambu Police Station and told her to say that it was Stella's husband had defiled her, she did this and it is only after she was arrested again that she decided to speak the truth that it was the appellant that had defiled her. The trial court after observing the demeanor of the minor found her to be honest since her version of events was flowing and believable.

71. I take cognizant that as an appellate court I did not have the advantage of seeing the demeanor of the witness. Thus, the trial court having observed and found that the victim persuasive and credible, I find no reason to disturb this finding. I also find that the appellant has failed to demonstrate the existence of any glaring contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant. Consequently, this ground also fails.

c. Whether the sentence was harsh

72. The appellant was sentenced to 20 years imprisonment. In passing sentence, the trial court considered all the mitigating factors and noted that the offence is serious and cannot go unpunished. It stated thus: "In order to send a message to would be offenders, I do sentence the accused to serve 20 years in jail".

73. The appellant's submission is two-fold: first that the trial court sentenced him to serve a sentence of 20 years imprisonment from the day of conviction which was contrary to the provisions of section 333(2) of the CPC. Secondly, that the trial court was wrong in concluding that the offence had a mandatory sentence since jurisprudence gives the courts discretion.

74. On the first fold, the appellant seeks that this court considers the period he remained in custody as per the provision of section 333(2) of the CPC. It is worth noting that the charge sheet indicates that the appellant was arrested on 26th December 2018, and apprehended in court on 28th December 2018 where a plea of not guilty was entered, bond given but the appellant continued to remain in custody until 27th April 2020 when the cash bail of kshs 20,000 was paid.

75. In the case of Bethwel Wilson Kibor vs Republic [2009]eKLR the court expressed itself as follows:-

> " By proviso to section 333(2) of the Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

76. Further, guidance has been provided by the Judiciary Sentencing Policy Guidelines to wit:

> " The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

77. Accordingly, I find that the prayer sought under Section 333(2) has merit and is for granting.

78. On the second fold, the appellant argues that the court was wrong in concluding that the offence had a mandatory sentence since jurisprudence gives the courts discretion. I do not agree with the appellant argument. I have perused the file and noted that the trial court was guided by the probation report, and all mitigating factors. The court noted that the offence was a serious one that could not go unpunished and to send a message to others would be offenders the accused was sentenced to serve 20 years imprisonment. The court did not peg the sentence to the mandatory nature of sentence as provided for under the Sexual Offences Act. The court gave a deterrence sentence having considered the unique circumstances of the matter. This court finds no reason to disturb the sentence.

79. The upshot is that the appeal on conviction fails for lack of merit. As regards sentence, the 20 years imprisonment sentence is also upheld save that in its computation, regard shall be borne to the period in remand custody during trial, from 26th December 2018 until April 27, 2020.

80. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 5TH DAY OF JULY 2024

For Appellants: Present at Kamiti Maximum Prison

For Respondent: Ms. Torosi

Court Assistant: Peter Wabwire