REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL APPEAL NO. 31 OF 2019

SAMWEL NYASIMI GWAKO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the whole judgment delivered on 11th May 2021 by Hon. B. Ochieng' (SRM) in Kilgoris S.O. No. 527 of 2011)

JUDGEMENT

1. The appellant, **SAMWEL NYASIMI GWAKO**, was charged with one count of child trafficking contrary to **Section 13 (a)** of the **Sexual Offences Act**. The particulars of the offence were that on 6th June 2011, at around 7:00 a.m. at [particulars withheld] area of Transmara West District within Narok County, he intentionally and unlawfully caused travel arrangements of a child within borders of Kenya with intention of facilitating commission of a sexual offence against the child aged 12 years.

2. He faced a second count of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 6th to 14th day of June 2011 at [particulars withheld] area of Gucha district within Kisii County he caused his penis to penetrate the vagina of LO a child aged 12 years. An alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** based on the same particulars was also preferred against him.

3. The prosecution called 9 witnesses to testify in support of its case. The first was the minor, LO (PW1). She testified that at about 7:00 a.m. on 6th June 2011, she was on her way to school with her sibling PW7, when the appellant accosted her. He took her to his home where he locked her up for 9 days and raped her. PW1's sibling PW7 confirmed that it was the appellant, who had grabbed his elder sister on their way to school that day.

4. The minor's father AM (PW2) and mother SN (PW6) testified that on the material day, the minor left for school and never came back. They were informed that the appellant, whom they knew as a neighbour, had been seen with their daughter. PW2 testified that he went to the appellant's house in the company of the police and found the minor in the appellant's house. The appellant managed to escape through the window.

5. PLN (PW3), a teacher at the minor's school told the court that the minor's parents had reported her disappearance at the school and he had referred them to the chief.

6. APC Julius Wahungu (PW8) was at Nyabitinwa administration police post when PW2 reported the disappearance of his daughter. PW8 narrated how he and his colleagues had to pass through the appellant's fence to rescue the girl. The appellant ran off when they got to his house but he later learnt that the appellant had been arrested for cattle theft.

7. Mercy Marando (PW5), a clinical officer at Kenyenya District Hospital, testified that the minor had been presented to her a week after the incident with back, abdominal and virginal pain. The minor told her that that was not her first sexual encounter. She testified that the minor had been clinically stable and tested negative for HIV and pregnancy.

8. Dr. Patricia Onguti (PW9) testified that she had prepared the P3 form. She observed that the minor had been psychologically affected by the incident and recommended counselling for her. She also conducted an age assessment test which put the minor's age between 11 and 13 years.

9. The investigating officer, PC David Marangi (PW4) gave a recap of the witnesses' testimonies and confirmed that the appellant was later

on arrested on charges of theft of stock in a different case.

10. When placed on his defence, the appellant stated that he did not recall what wrong he had committed and denied knowing the minor. He testified that he had been arrested and nearly lynched for having stolen cattle.

11. Based on the evidence summarized above, the trial court found the appellant guilty of the first and second count and sentenced him to serve 10 years' imprisonment on the first count and 20 years' imprisonment on the second count to run concurrently. Dissatisfied with that finding, the appellant filed this appeal challenging it on the following grounds:

> *a. That the trial court failed to find that my constitutional right to be served with the witness statements were deliberately delayed despite my constant request and that the same were given to me late after I had done a case with some vital witnesses just after making an application regarding the same at the High Court;*
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> *b. That the trial court further failed to appreciate that I was forced to proceed with the case with both PW1 and PW2 despite my request for adjournment since I was sick suffering from T.B; and*
>
> *c. That I pray for a fresh trial since I was not given a fair hearing.*

12. His written submissions were however focused on the sentence which he argued was manifestly harsh and excessive. The appellant submitted that he was very remorseful and begged for leniency. He urged the court to take into account the period he had served in custody and consider reducing his sentence or giving him a non-custodial sentence.

13. A letter dated 13th January 2021 from Kisii Main Prison confirmed the appellant's assertion that he had maintained high standards of discipline while in custody. The court was informed that the appellant was currently on the last stage of reformation and was a role model to other reforming inmates.

14. Mr. Otieno, counsel for the state, opposed the appeal. He submitted that the evidence adduced at the trial showed that the victim was between 11 and 13 years and that the appellant had been living with her as husband and wife. All witnesses knew the appellant as a neighbour and the medical evidence had confirmed defilement. He urged the court to sustain the appellant's conviction but submitted that he had no objection to a reduction of sentence.

ANALYSIS AND DETERMINATION

15. The appellant's appeal revolves around the fairness of the trial process. He contends that he was not supplied with witness statements in good time to prepare his defence. He also claims that the trial court forced him to proceed with the case despite his request for adjournment because he was sick.

16. The right to be informed of the evidence the prosecution intends to rely on in advance is provided for in **Article 50 (2) (j)** of the Constitution. The Court of Appeal in the case of ***Richard Munene v Republic CRIMINAL APPEAL NO. 74 OF 2016 [2018] eKLR*** dealt extensively with the issue of the supply of witness statements. It cited with approval the case of ***Simon Githaka Malombe V R, Criminal Appeal No. 314 of 2010*** where the court held as follows:

> *"…. Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of JUMA –VS- REPUBLIC [2007] EA 461 reasoned as follows, and we agree;*
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> > *'We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence…'"*

17. In ***Richard Munene(supra)*** the Court of Appeal dismissed the argument that the trial process was flawed for the reason that the appellant had not been supplied with witness statements. It observed that the appellant in that case had exhaustively cross-examined the witnesses and did not complain that he was handicapped due to witness statements.

18. The trial court's record shows that the appellant requested to be furnished with witness statements on 8th July 2011 after the minor had testified. The matter was adjourned to 19th July 2011, when the appellant asked the court to adjourn the matter to enable him study the case further. The prosecution opposed the request for adjournment claiming that they had given the appellant access to the file for him to read the statements. The trial court allowed the appellant's application for adjournment and directed the prosecution to issue the statements. After PW6 had testified, the appellant indicated to the court that he had read all the witness statements but had not been furnished with the last witness's statement. After that, the appellant did not raise the issue of witness statements.

19. The charges were read and explained to the appellant in his preferred language, Kipsigis. He was given access to witness statements and furnished with copies of the statements during the course of the trial. My analysis of the proceedings before the trial court shows that the appellant participated fully in the trial by cross examining the witnesses and testifying in his defence. It has not been demonstrated that the appellant was ill informed of the evidence the prosecution intended to rely on to enable him challenge the evidence and prepare his defence.

20. I have also not come across anything in the proceedings to show that the trial court forced the appellant to proceed with the case despite his request for adjournment on account of being sick. Due process was followed in conducting the trial and the appellant's contention that the trial process was flawed is found to be lacking in merit.

21. Having subjected the evidence to a fresh analysis as is required of a first appellate court, I find that the appellant's conviction on the first and second counts was sound. The prosecution adduced sufficient evidence to prove that the appellant abducted the minor on her way to school and defiled her in the 9 days he had her locked up in his house. The appeal on conviction is therefore dismissed.

22. The second limb of the appeal relates to sentence. As a principle, an appellate court will refrain from interfering with the discretion of the trial court on sentence unless it is demonstrated that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (See ***Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003*** and ***Thomas Mwambu Wenyi v Republic [2017] eKLR****)*

23. In the first count the appellant was charged and convicted of child trafficking contrary to **Section 13 (a)** of the **Sexual Offence Act**which was subsequently repealed by Counter Trafficking in Persons Act No. 8 of 2010. That provision stipulated:

> "*A person including a juristic person who, in relation to a child –*
>
> > *Knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against that child, irrespective of whether the offence is committed;*
> >
> > *Is, in addition to any other offence for which he or she may be convicted, guilty of the offence of child trafficking and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings."*

24. The appellant was also convicted of the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act** which provides:

> *8(3) 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.*

25. Following the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic Petition No. 15 of 2015 [2017] eKLR,*** the Court of Appeal has severally held that the provisions of the Sexual Offences Act must be interpreted in a manner that does not take away the discretion of the court in sentencing. (See ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 [2018] eKLR, Christopher Ochieng v R KSM Criminal Appeal No. 202 of [2018] eKLR 2011, Jared Koita Injiri v R KSM Criminal Appeal No. 93 of 2014 [2019]eKLR*** a***nd Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 of 2018 [2019] eKLR.****)*

26. In this case, the trial court merely applied the minimum sentences prescribed by the Sexual Offences Act on the first and second counts, without exercising its discretion on sentencing. The court was required to weigh the aggravating factors against the mitigating factors in imposing the sentence. It was also required to meet the following objectives of sentences as listed in the Sentencing Policy Guidelines, 2016:

> a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
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> b. Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.
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> c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
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> d. Restorative justice: To address the needs arising from criminal conduct such as loss and damages.
>
> e. Community protection: To protect the community by incapacitating the offender.
>
> f. Denunciation: To communicate the community's condemnation of the criminal conduct.

27. The appellant was not a first offender. He had been convicted for the offence of stock theft and was serving a 2-year sentence by the time he was sentenced by the trial court. The abhorrent nature of his crimes cannot be overstated. The appellant abducted the minor who was his neighbour and whom he knew to be a school going child and held her hostage for a period of 9 days while he defiled her. I agree with the trial court's position that the girl child ought to be protected by the law and shielded from backward customs that are repugnant to the law. I will therefore uphold the appellant's sentence on the first count.

28. That said, I take cognizance of the need to reform offenders into law-abiding citizens. Kisii Main Prison has communicated to this court that the appellant has reformed and any assistance accorded to him will enhance the behavior change of newly convicted prisoners. I will therefore reduce the appellant's sentence on the second count from 20 years' imprisonment to 15 years' imprisonment. The time spent by the appellant in custody during trial should also be taken into consideration in *accordance with* **Section 333 (2)** of the **Criminal Procedure Code**.

29. In sum, the appeal on sentence is found to be merited. I hereby set aside the sentence of twenty (20) years' imprisonment imposed by the trial court on the second count and substitute thereof with a term of imprisonment of fifteen (15) years. The sentence on the first count of imprisonment for ten (10) years is upheld and shall run concurrently with the sentence of fifteen (15) years on the 2nd count from 20th June2011 when the appellant was arraigned before the court.

Dated, signed and delivered at Kisii this 12th day of April, 2021.

A. K. NDUNG'U

JUDGE