REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 10 OF 2019

DAVID EKITELA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being an appeal from the original conviction and sentence Lodwar Senior Principal Magistrates Court Criminal Case No. 94 of 2017 delivered on 22nd March 2019 by Hon. Muchiri RM)*

JUDGMENT

1. The appellant was charged, tried, found guilty convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement contrary to section 8(1) as read with Section 8(3) 0f the Sexual Offences Act No. 3 of 2006.

2. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds:

a. That the trial Magistrate and the prosecution side erred in law and fact in convicting him without availing the documents that shows the real age of the complainant

b. That his defence was not considered.

3. When the appeal came up for hearing, the appellant who was not represented, filed an amended ground of appeal and written submissions which he relied upon, while the prosecution also filed written submission.

SUBMISSIONS

4. On behalf of the appellant, it was submitted that he was not properly identified by the prosecution witnesses. It was contended that at the time of the alleged offence, the complainant, did not know the appellant, and therefore the identification could not have been by recognition. It was the appellant's case that the age of the complainant was not proved as none of the witnesses save for PW7 the Investigating Officer, who produced the age assessment report, knew of her real age.

5. It was submitted that age was an essential ingredient in the sexual offences, which had to be carefully interrogated as was stated in the case of **HILARY NYONGESA v REPUBLIC, ELDORET CRIMINAL APPEAL No. 123 of 2009.**

6. It was the appellants case that the prosecution witnesses contradicted themselves as to whether the appellant was found on top of the complainant. It was contended that PW6's evidence to the fact that defilement had taken place fifteen minutes before examination, was false, taking into account the distance between the scene from the hospital.

7. It was contended that the complainant according to the evidence of PW6 was used to sexual intercourse as her hymen was absent, and there was no bleeding, leading him to conclude that it was not the first time for her to have intercourse. It was stated further that penetration was not proved, as there was no presence of semen, sperm and blood in the victim's vagina. Reference was made to the following cases **WANJERA v REPUBLIC 1944** and **BEN MAINA MWANGI v REPUBLIC NAIROBI HCCRA No. 471 of 2007** but without tendering the said authorities.

8. It was finally submitted that the underpants of the victim, which was allegedly torn by him and his clothes which were collected from the scene were not produced as exhibits, thereby raising doubt in the prosecution case.

9. On behalf of the prosecution, it was submitted that the complainant testified that her age was 11 years whereas PW7 corroborated her evidence through age assessment report to be 15 years. It was therefore submitted that the age assessment report was a credible and sufficient

proof of the complainant's age as stated in the cases: - **FRANCIS OMURONI v UGANDA, COURT OF APPEAL CRIMINAL APPEAL NO. 2 of 2000** and **CHIPALA v REP [1993] 16 (2) MLR 498**

10. It was submitted that there were three eye witnesses to the act of penetration and that the appellant's penis was examined and found to be wet and had laceration, same as the complainant vagina which had lacerations and white deposits. It was contended that the law does not require that evidence of spermatozoa be availed, as was stated in the case of:- **MARK OIRURI v REPUBLIC, CRIMINAL APPEAL NO 295 of 2012 [2013] eKLR.**

11. It was contended that the contradictions stated by the appellant were of minor nature and did not raise doubt in the prosecution case as was stated in the case of **ERICK ONYANGO ODENY v REPUBLIC [2014] eKLR** and that the burning of the complainant's panty and the absence of the appellant's clothes at the trial were not fatal to the prosecution case as was stayed in the case of **MW v REPUBLIC [2019] eKLR.**

12. On sentence it was submitted that the sentence be upheld as the authority of MURUATETU case did not prohibit the court from adopting the penalty stipulated by the law, depending on the peculiar circumstances of the case.

13. This being a first appeal, the court is required to re-evaluate the evidence tendered before the lower court and to come to its own conclusion thereon, while giving allowance to the fact that unlike the trial court, it did not have the privilege of seeing and hearing witnesses, as was stated in the case of **OSANO v REPUBLIC**.

PROCEEDINGS

14. The prosecution case against the appellant was that on the material day, the complaint (PW1), who was found by the court not to be a child of tender age, went to the bush to pee and when she was done, the appellant approached her and suddenly gagged her mouth, fell her down, removed her panty and skirt, he then removed his trouser and in her word "proceeded to have sex with her", while strangling her.

15. After the appellant was done, he did not leave the scene and was arrested by one KPR officer (PW2), who took both the Appellant and PW1 to the police station, before referring them to the hospital. It was her evidence, that there was daylight and that it was the first time for her to see the appellant. In cross examination she stated that she did not know where the appellant lived.

16. **PW2 JAMES LOKAL** stated that he found the appellant lying on top of the complainant, having sexual intercourse with her, he took both of them to the complainant's mother who advised that they be taken to the police. **PW3 F. E,** a sister to the complainant, stated that she knew the appellant and that on the material day, she went to look for the complainant in the bush, but she did not respond to her call, only for her and the appellant to be brought home naked.

17. **PW4. LONGOR EPAKAN** was with PW2 when they found the appellant having sexual intercourse with the complainant in the bush. This evidence was corroborated by **PW5 WYCLIFFE EREGAE** who stated that he is the one who removed the appellant from the complainant.

18. **PW6 MICHAEL OTIENO** a Clinical Officer examined the complainant's genitalia and concluded that there was penetration, as there were white deposits on the vaginal introits. He also examined the appellant who appeared drank and confirmed that his penis was wet and had laceration.

19. **PW7 PC MSAVASON** produced the age assessment report and from the investigation report deduced that the complainant had been defiled.

20. When put on his defence, the appellant stated that he was arrested by NPR Officers while he was walking to his house. It was his evidence that the NPR officers wanted money from the proceeds of the sale of some four goats and that they later on took him to the GSU camp and they later on came with the complainant and said that he had defiled her, which he denied.

DETERMINATION

21. From the record of appeal and the submissions herein, I have identified the following issues for determination on this appeal:-

a) Whether the appellant was positively identified.

b) Whether the age of the complainant was proved.

c) Whether the penetration was proved.

d) Whether the sentence against the appellant should be interfered with.

22. On the issue of the identification of the appellant, the prosecution case is that the same was arrested at the scene while on top of the complainant having sex with her as per the evidence on record. The appellant was arrested by PW4 and PW5 both NPR Officers who found him at the scene. This evidence was corroborated by PW3 the complainant's sister who had gone to look for her at the bush. This evidence was further confirmed by PW6 who examined both the appellant and the complainant having been brought to the clinic by six people. I therefore find and hold that the appellant was positively identified and that his identification was to mistaken having been arrested at the scene.

23. On the age of the complainant, whereas it was her evidence that she was 11 years old, the age assessment report confirmed her age to be 15 years and in convicting the appellant the trial court rendered himself thus:

> ***"It is essential to note that the complainant testified that she was 11 years old. The prosecution never adduced evidence to confirm that the complainant was actually of that age but in lieu took the complainant for age assessment where it was established that the complainant was actually 15 years of age. It would be a mockery of justice if this court were to acquit the accused simply because PWI does not know her age. In any event, I find that the age assessment report produced as evidence before this court is conclusive proof that pw1 is a minor aged 15 years old."***

24. From the judgement herein, it is clear that the age of the complainant was established beyond any reasonable doubt and therefore find no fault with the trial courts finding on the same. The fact that the complainant testified that her age was eleven (11) while the age assessment report confirmed it to be 15 years was not fatal to the prosecution case. I therefore find no merit on this ground of appeal.

25. On the issue of penetration; from the evidence of PW6, both the appellant and the complainant were examination, having been taken to the clinic together and he formed an opinion that penetration had occurred. The complainant's evidence was corroborated in material particulars through the evidence of all the eye witnesses who found the appellant in the act. The appellant in his defence did not deny having been caught red handed on top of the complainant neither did he challenge the witnesses' account to that effect in his cross examination. I therefore find and hold that penetration was proved beyond any reasonable doubt.

26. From the evidence on record, all the ingredients of the offence of defendant were proved by the prosecution beyond reasonable doubt and the appellant's defence that he was arrested for refusing to give the NPR officers who arrested him money was an afterthought as the same did not put it to them during his cross examination so as to enable them offer an explanation thereon. I would therefore dismiss the appellant's defence.

27. The final issue for determination is on the sentence meted out to the appellant, which was the minimum sentence provided for under Section 8(3) of the Sexual Offences Act looked at against the Supreme Court decision in **FRANCIS KARIUKI MURUATETU** which outlawed the mandatory sentences and giving the court discretion on what sentence to pass based upon the circumstances of each case.

28. In this matter I have looked at the conduct of the complainant as stated in her evidence in which she stated that the appellant "proceeded to have sex with her," looked at against the evidence of the Doctor which confirmed that she had previously engaged in sexual activities and the evidence of her sister, PW2 to the effect that she went to the bush where the complainant had gone to and called her name and she did not respond to her call.

29. From the evidence on record, it is not very clear whether the appellant and the complainant were having an illicit sexual relationship or whether the complainant did not respond to her sister's call, because she was assumed of what had happened to her, there is further no evidence on whether she was school going at the time who should have been protected by the appellant at all costs. The court was only left to speculate on these issues.

30. Having taken into account the mitigation by the appellant and the fact that his age was not established by the trial court and the conduct of the complainant of not responding to her sister's call while the complainant was on top of her having sex with her.

31. I am of the considered opinion and hold that in the circumstances of the case a minimum sentence of 20 years was excessive and would therefore interfere with the trial court's finding on the same and substitute it with a sentence of 15 years.

32. In the final analysis I find no merit on the appeal against conviction which I hereby dismiss but allow the appeal on sentence and substitute the same with a sentence of 15 years with effect from 12th September, 2017 when the appellant first appeared in court and it is ordered.

33. The appellant has right of appeal on both conviction and sentence while the State has a right of appeal on sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MAY, 2021

....

J. WAKIAGA.

JUDGE

<u>In the presence of:</u>

Mr. Tanui for the State

Appellant in person

Court Assistant – Potishoi