



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 74 OF 2019

REPUBLIC.....STATE

VERSUS

SOLOMON MUGO WAMBUGU.....ACCUSED

JUDGMENT

SOLOMON MUGO WAMBUGU, the appellant herein, was charged in the lower Court with the offence of defilement, contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 4 of 2016.

The particulars of this offence are that on the 23rd day of November 2015 within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of DK a girl aged 16 years.

In the alternative, the appellant faced an offence of Indecent Act with a child, contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars hereof being that on the 23rd day of November 2015 within Uasin Gishu County, the appellant herein intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of DK, a girl aged then 16 years.

Briefly, the prosecution case is that in the year 2015, the complainant in this case who gave evidence as PW-1, was living in Eldoret. She was born on 18th of August 1999 and on the date of the alleged incident of which was on 23rd of November 2015 she was aged 16 years. She was living with her parents as well as other siblings. The appellant herein was their neighbor and was living in a house opposite theirs with the doors facing each other.

On the material day the complainant at about 1.00p.m was washing utensils while the appellant was repairing the door to his house. The appellant greeted the complainant and then invited her to his house. The complainant acknowledged the invitation and went to his house. He was sitting and welcomed the complainant to sit next to him of which she did. He then asked the complainant how she viewed him. The complainant's mother (PW-2) called her, but she did not respond. The appellant pestered her requesting her to kiss him. She did kiss him. He then insisted that they have sex. The complainant told him they could not have sex since she did not know his status. He then dragged her to his bedroom and placed her on the bed. He unzipped her short and removed her shoes. She then undressed and they had sex. He used a condom and according to her he did not manage to penetrate her. It wasn't however her first time to have sex. After they were through the appellant left her and went to the door. He said he wanted to see whether there was any one outside. He told her that there was no one. The complainant dressed up and left the house.

PW-2 saw the appellant peeping outside the house. She then saw the complainant leave his house and heading towards the gate. She got outside the plot compound. She thereafter went home. PW-2 asked her where she was and she said she had gone to escort her friends. PW-2 called her father and reported to him what she has witnessed. The parents called her and interrogated her as to where she was. She hesitated to disclose. She was beaten by both of which prompted her to run away to her grandmother's house. PW-2 went and reported the incident at Kapsoya Police Station.

The complainant was examined at Moi Teaching and Referral Hospital on 23/11/2015. She had a swelling on the right eye, upper and lower lips on both thighs. There was hymenal tears. Her P3 was filled on 25/11/2015 and the opinion made that she had been defiled. PW-3 produces the P3 form as an exhibit.

The appellant in his defence stated that at the material time he was employed as a driver and was living at Munyaka. He knew PW-2 and not her daughter, the complainant in this case. The mother (PW-2) disliked him because of his success. He had delivered items to Nairobi and upon his return on 26/11/2016 he was arrested. He did not commit the offence charged with.

The trial Court evaluated the evidence and found that the offence established was of attempted defilement, contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The appellant was thus convicted of the said offence and sentenced to serve 10 years imprisonment.

The appellant is his grounds of appeal and written submission does not challenge the conviction. He has raised some mitigation and urged this Court to intervene on the 10 years imprisonment sentence and impose a more lenient sentence.

The prosecution opposed the appeal on the grounds that the victim was a minor aged 16 years and the sentence of 10 years is reasonable and lawful. They urged the Court not to interfere and to dismiss the appeal on sentence.

Prior to passing the said sentence of 10 years imprisonment, the trial magistrate observed that:-

“ I have considered the records and mitigation of the accused. I take note that there is mandatory sentence in this matter as prescribed by the Sexual offences Act No. 3 of 2006. I hereby sentence the accused to serve 10 years imprisonment”.

The 10 years imprisonment was the minimum sentence allowed then under Section 9(2) of the Sexual Offences Act No. 3 of 2006. The expression by the trial Court shows that if he had discretion to offer a more lenient sentence under the law, most likely than not he would have looked below the 10 years minimum. However, it appears that the trial Court was not aware of the Supreme Court finding in Criminal Petition No. 15 and 16 of 2015 (consolidated), of Francis Karioko Muruatetu, in which decision's spirit has been interpreted by the Courts to have declared the mandatory nature of sentences unconstitutional. Given that the decision was on 14/12/2017, on 3rd of May 2019 when the trial Court passed the sentence in this case, the said "spirit" was in operation and effective. The Court was not therefore bound by section 9(2) of the Sexual Offence Act not to go below the minimum sentence provided for in the said Act. Such minimum mandatory sentences are therefore only useful for purposes of offering guidance.

The appellant has made a good case which entitles this Court to intervene on the sentence passed of 10 years imprisonment. Having weighed the circumstances under which the offence was committed and the mitigating factors, I do reduce the sentence of 10 years imprisonment to 6 years imprisonment, from the date of 3/5/2019.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY, 2021

In the presence of:-

Appellant appearing in person

Ms. Limo for state

Gladys - Court assistant