REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 36 OF 2019

SULEIMAN BABUYA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court at Hola by Hon A. P. Ndege (PM)

delivered on 10th September, 2019 in MCSO Case No. 7 of 2018)

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Accused in person

J U D G M E N T

This is an appeal from the Principal Magistrate Court at Hola in which the appellant was tried of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. At the conclusion of the trial the appellant was convicted and sentenced to eighteen (18) years imprisonment. The appellant raised three main grounds of appeal that are:

> ***(1). That, the Learned trial Magistrate erred in Law and fact by not considering that, there was no D.N.A. conducted to ascertain the child paternity.***
>
> ***(2). That, the Learned trial Magistrate erred in Law and fact by not considering that there were contradictions and discrepancies from the prosecution evidence.***
>
> ***(3). That, the Learned trial Magistrate erred in Law and fact by not considering that Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006, denies, the judicial officers that are Magistrate and Judges in sentencing by not considering mitigation.***

The appeal was canvassed by way of written submissions. In brief the appellant was dissatisfied with the punitive sentence in which the Learned trial Magistrate ignored the principles in **Francis K. Muruatetu v R {2017} eKLR.** The Articles of the Constitution under 27, 50 (2) 25 (c) which resulted in prejudice and injustice necessitating a harsh, unfair, and unjust sentence. The appellant also relied and cited the cases of **Samwel Ochieng v R CCA No. 187 of 2015, Amedi Omurunga v DPP Petition No. 28 of 2016**.

Reverting to the above cases, appellant submitted that the Court should interfere with order on sentence. On the other hand, appellant submitted in respect of the prosecution witnesses which he termed as lacking consistency and credibility. He urged the Court to appraise the evidence by the complainant **(PW1), (PW2), (PW3)** and **(PW4).** According to the appellant, there were glaring defects and lacking gaps which the Learned trial Magistrate ignored to totally arrive at a wrong decision. In support of these submissions, appellant cited the principles in **Terekali v R {1952} EA 259, Joseph Sawe v R {2003} eKLR, State of Punjab v Jagir Singh {1974} 35 CC 277, Chemagong v R {1984} KLR, Christopher Murungaru v A. G Misc. Application No. 43 of 2006.**

In response to the ground on lack of a DNA to ascertain paternity, the appellant submitted that it left an iota of doubt to corroborate penetrative sex with the complainant. On this ground he relied on the case of **George Wilson Simba v Uganda CR Appeal No. 37 of 1995, Evans Simiyu v R {2016} eKLR, Joseph Kinyua v R CR Appeal No. 42 of 2016.**

As for the prosecution Learned prosecution counsel **Mr. Mwangi** vehemently opposed the appeal inviting the Court to find that all the ingredients of the offence were proved beyond reasonable doubt. The other rejoinder taken up by the Learned prosecution counsel was on

the character of the complainant prior to reporting the crime to the police. The Learned prosecution counsel urged the Court to take judicial notice that both the complainant and appellant had lived together as husband and wife. It was only after she deserted the matrimonial home a report on defilement was made to the police. The other concern raised by the Learned prosecution counsel was on the failure by the Learned trial Magistrate to comply with the mandatory provisions under Section 169 (1) of the Criminal Procedure Code.

Having appraised the submissions, the central question in this appeal is whether indeed the appellant was convicted and sentenced on the weight of the evidence proving the charge beyond reasonable doubt. This being a first appeal, the duty of this Court is as per the principles in **Peters v Sunday Post Ltd {1958} EA 424** is to reconsider the evidence, re-evaluate it and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and therefore should make allowance in this respect.

From this appeal, it emerges that before the lower Court the prosecution was under a duty to prove the following elements beyond reasonable doubt:

(a). The act of penetration.

(b). The complainant's age.

(c). Identification of the appellant.

On the first element of penetration, Section 2 of the Sexual Offences Act provides that the Court has to take into account whether the act of carnal knowledge was partial or complete insertion of the male genital organ into the genital organ of the complainant.

As regards this element, it was the case for the prosecution through the complainant's testimony **(PW1)** who narrated the events of 15.5.2018. She told the Court that her parents had decided that she be married off despite the fact of still being a student at [particulars withheld] Secondary School. Nevertheless, in **(PW1)** testimony they could not hear of it as they had made arrangement for her to meet the would be suitor, herein the appellant. It is at that homestead that the complainant spent a night in the appellant's brother's house. The following day, the appellant emerged and he persuaded her to spend another night with her. That is when it dawned on her that she was being forced to cohabit with the appellant as a wife.

Further, it appears from **(PW1)** evidence, that she was taken in by the appellant where they stayed in a rented room. That is the time according to the complainant, appellant had carnal knowledge for about one month. On 29.6.2018 she got an opportunity to escape from the homestead and thereafter decided to lodge a formal complaint with the police. She produced in Court treatment notes and examination report indicative of evidence of having conceived from that sexual act with the appellant.

Besides **(PW1)** testimony there was also evidence of **(PW2)** who saw the appellant drove off in a motor cycle on the 15.5.2018. According to **(PW3)** that escape by **(PW1)** did not end the cohabitation as the appellant went to search for her so that he can return her back to his home. There was a tussle over the issue but in the end they agreed that a report be made to the police. The police station booked the complainant as confirmed by **(PW4),** notwithstanding that it was about the appellant complaining about his missing wife.

The investigating officer happened to be **(PW5)** – of Wenje Police Station. In the evidence of **(PW5)** while at the station, the appellant, complainant **(PW1)** and her father drove in riding a motor cycle. The main complaint was in regard to **(PW1)** abandoning the matrimonial home and was therefore being looked for including seeking police assistance. According to **(PW5),** on investigating the complaints he came to the conclusion that it was a case of defilement and not that of a runaway wife as claimed by the appellant. **(PW5)** further gave evidence that the complainant was taken to the hospital where on examination, medical report indicated, occurrence of penetrative sex that the medical evidence corroborated the sexual act as the complainant was found to have conceived, going by the findings made by **(PW6),** a medical officer at Hola County Hospital. The P3 and treatment notes were admitted in evidence in support of the prosecution case. **(PW7)** further told the Court that she had also subjected the complainant to a medical examination which showed a ruptured hymen and evidence of pregnancy.

In answer to the charge, the appellant told the Court that there was nothing like defilement but an arranged marriage with the complainant. This testimony on the existence of customary marriage between the two was corroborated by **(DW1)** and **(DW2).** The defence witnesses alluded to the fact of marriage and payment of dowry.

In the instant case, the prosecution established that the complainant was sexually penetrated by the appellant on diverse dates of 24.5.2018 and 29.6.2018. The scene of crime was in the home of the appellant. The medical evidence even without DNA profile match, does corroborate the complainant's testimony on the alleged offence. The appellant in his defence, gave an account of the incident at length including the witnesses summoned to that effect corroborating the complainant's evidence on the act of having carnal knowledge. I find no evidence of a material nature to contradict the complainant's testimony on the fundamental features of the element on penetration.

On the issue of age, its significant to appreciate **(PW1)** testimony as supported with the birth certificate dated 15.2.2016 demonstrating that she was born on 26.8.2001 as at 24.5.2018. I accept the prosecution evidence that the complainant happened to be penetrated at the age of seventeen (17) years. In view of the evidence set out in the various aspects of the prosecution witnesses, above, it is clear that the detailed testimonies judiciously considered amounts to discharge of the burden of proof of beyond reasonable doubt. To me, there is no defence to controvert the admitted evidence as presented by the prosecution.

The Learned trial Magistrate had the opportunity to observe the demeanor of the witnesses who testified at the time and I have no reason to disturb that finding. There are no discrepancies which in my view would have prejudiced the appellant and a miscarriage of justice. Likewise, on identification it must be proved beyond reasonable doubt that the perpetrator of defilement was the appellant. The Court of Appeal in the case of **Maitanyi v R {1986} KLR 198** laid down the guiding principles on the issue of identification. This deeming principles provides for an objective test necessary to declare that the proof of certain facts present a *primafacie case*.

On identification what counts is the participation of the appellant in the criminal act as explained by the complainant. From the record, not only is there evidence of **(PW1)** that would hold him responsible for whatever results flowing from his criminal actions. On the fateful diverse dates, he knew, wished and intended them to take effect so that if I was to reconstruct the sequence of events the picture one gets is that **(PW1)** was the victim of defilement and she was driven into it by the appellant and her family members. In this case, its observed that the father of the complainant even went ahead to receive dowry on the basis that he was marrying his daughter to the appellant. There is no question that under our Criminal Law he is an accomplice to the crime of defilement. I have therefore considered this issue on identification, and my conclusion is that there was no error of Law or principle committed by the trial Court below in its finding that the appellant was properly and squarely placed at the scene.

Finally, the appellant was aggrieved with the sentence of eighteen (18) years imprisonment. To ground and focus our analysis, it is trite that an appeal's Court can only interfere with sentence if the appellant proves misdirection on factors taken into account or the principles applied that resulted in a wrong decision on sentence. The sentencing guideline suggest that Judges and Magistrates use certain key attributes in assessing an accused's blameworthiness and disposition to future criminal criminality. To reduce uncertainty, Judges and Magistrates develop rules of thumb to quickly assess an offender's dangerousness and the likelihood for rehabilitation as well as the degree of punishment the offender deserves. The sentencing model has various variables. As noted from the record, the approach taken by the Learned trial Magistrate, was to enhance the minimum mandatory sentence of fifteen (15) years imprisonment with an incremental of three (3) years to the weight of eighteen (18) years for that offence.

In the context of sentencing decision making there are no attempts made by the Learned trial Magistrate in his Judgment concerning the deviation from the minimum provided for in the statute. The result is that the sentence was inflated that yielded a punitive and excessive sentence. It seems clear that the approach adopted by the Learned trial Magistrate is quite non-responsive to the offence in absence of any extenuating circumstances for its enhancement.

It appears, that the Learned trial Magistrate anchored his sentence using the underlying seriousness of the convicted offence but forgot the hallmark of consistency to avoid discrimination methodology strategies used to contravene uniformity and proportionality guidelines. Beyond issues of fairness, disparate sentencing practices of long custodial sentences carry with them considerable economic implications for the country. The truth, prison and maintenance of convicted persons is an expensive venture a factor trial Courts should take judicial notice as a means to work out appropriate sentence.

I have no hesitation to interfere with the sentence of eighteen (18) years imprisonment by varying it to the minimum period of fifteen (15) years imprisonment as provided for under Section 8 (4) of the Sexual Offences Act. In light of this appeal and the Judgment as a whole, I think there is nothing useful presented by the appellant to compel me to interfere with the findings by the Lower Court, save to the extent of sentence. I order in sum that this appeal be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the State

2. The appellant