REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 40 OF 2018

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon.W. Juma (C.M) in Narok CMCR SOA No. 41 of 2016 on 18th August 2017)

JOHANA NYAGAKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. This appeal is challenging 10 years' sentence on his conviction for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. This was an alternative charge. The trial magistrate found that the main charge of defilement under Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006 had not been proved.

2. In his appeal, the Appellant raised seven (7) grounds in what he called mitigation grounds of appeal. However, in his submissions he summarized his grounds of appeal as follows;

> **a. That the learned trial magistrate erred in law in convicting and sentencing him to serve 10 years yet failed to take into consideration all the mitigating factors raised by him which was manifestly harsh and excessive in the circumstance and occasioned a failure of justice.**
>
> **b. That the learned trial magistrate erred in law in convicting and sentencing him minus considering section 333(2) of the criminal procedure code.**

Appellant's submissions

3. Based on **Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR**, the appellant submitted that the trial court should have taken into account the mitigation and impose proportionate sentence. That the court failed to consider that the appellant pleaded not guilty, is an orphan, was a sole bread winner of the family, young, first offender and that he has young family to take care of.

4. The appellant submitted that the period spent in remand custody was not computed into his sentence as provided for under Section 333(2) of the Criminal Procedure Code.

5. The appellant submitted that the sentence meted on him was severe. He relied on Article 50(2) (p) of the constitution and the cases of ***Francis Opondo V Rep [2017] eKLR, Daniel Gichimu & Another V Rep [2018] eKLR And Ahamad Abolfathi Mohammed & Another V Republic [2018] eKLR***

6. The appellant urged this court to allow his appeal and quash his sentence.

PROSECUTION'S SUBMISSION

7. On the part of the Respondent, **Mr. Ndung'u**, learned prosecution counsel submitted that the age of the victim was proved through the production of an age assessment report **P Exh 2.**

8. The prosecution submitted that the evidence of the victim; PW1 as well as the observations of PW3 and that of the clinical officer; PW6

shows that the appellant committed an indecent act with the child as he touched PW1's private parts with his penis with such force that he caused injuries on her private parts.

9. The prosecution submitted that PW3 corroborated the evidence of PW1 and PW2 as to the identity of the perpetrator the appellant. There was no mistaken identity.

10. The prosecution submitted that taking into totality the viva voce evidence and medical evidence adduced by the prosecution the same was corroborated and there was no need for the court to fall back to Section 124 of the Evidence Act.

11. The prosecution submitted that the defence put forward by the appellant was an afterthought as he was not able to show how the victim, her brother and the medical officer were influence to concoct such a case.

12. The prosecution submitted that the sentenced imposed was reasonable and quite appropriate in the circumstances of the case.

13. The prosecution submitted that the trial court noted and considered the aspect of time spent in custody during trial but it stated that it could not give him credit for the time spent.

14. In conclusion, the prosecution submitted that the conviction was safe as against the appellant and urged this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

Court's Duty

15. This is a first appellate court and is under duty to evaluate the evidence afresh and drawn own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32**

16. I have considered the submissions made by the parties, the record as well as the applicable law in this appeal. The appeal is on sentence. The court will therefore be concerned with the legality or propriety or appropriateness of the sentence. It will also consider relevant factors *inter alia*, the penalty clause, mitigating and or aggravating factors, and the objects of punishments.

17. It was the Appellant's submission that the learned trial magistrate erred by failing to take into consideration the mitigating factors and time spent in custody in determining his sentence.

The test

18. According to the case of **Wanjema v. Republic (1971) EA 493** a first appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that; the trial court did not exercise discretion judicially in that; i) in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor; or ii) that in all the circumstances of the case, the sentence is harsh and excessive.

Prescribed sentences

19. The penalty for committing an indecent act with a child under Section 11(1) of the Sexual Offences Act is prescribed as follows:

> **1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.**

20. What is the appropriate sentence in the circumstances of this case?

21. In passing sentence, the court takes into account the individual circumstances of the case.

22. It is material factor that the appellant committed an indecent act with a child aged 6 years. From the evidence on record, the appellant persuaded the victim's brother to leave her behind so that he could easily devour her. The appellant also knew the victim was a minor when he committed the act.

23. I also consider this offence to be serious especially in light of the evidence by **PW6**-The Clinical Officer, Mr. Isaac Kenyanya based at Narok Referral Hospital. He testified that he examined PW1 on 19/05/2016. He examined PW1. She was well. On her private parts she had bruises on both labia minora and labia majora. A high vaginal swab showed she had epithelial cell 2+ and urinalysis had epithelial cells 2+. He filled that p3 form on 20/05/2016. He produced the P3 form, lab results, treatment notes, post rape care forms and pre rape care form as **P Exh. 3 (a), (b**), **(c) and (d)** respectively. This evidence may have found a more serious offence.

24. I also do note that, contrary to the submission by the appellant, at page 42 of the record, the trial magistrate considered the mitigation by the appellant. However, I note that the trial court held that the law gives a minimum sentence below which she cannot go not even to give the appellant credit for the period he has been in custody. Such kind of statutory fetter on discretion of the court to impose appropriate sentence is objectionable in light of the Constitution.

25. I have taken into account the fact that the appellant is a first offender, is young and has responsibilities. I also consider the manner the offence was committed, the seriousness of the offence and the age of the complainant; these aggravating factors warrant a sentence for 10 years. I find the sentence of 10 years to be appropriate, for, it acts as a deterrent measure, yet, giving this young person an opportunity to be re-integrated into society and eke a productive life for himself. I so find and hold.

Of section 333(2) of CPC

26. The finding by the trial court that she could not give him the benefit of time in custody due to the minimum sentence prescribed offends the Constitution. The finding was a wholly misconceived notion of law as Section 333(2) of the Criminal Procedure Code prevents arbitrary and unlawful detention of a person (Art. 29), violation of the right to; (i) a less severe sentence (Art. 50 (2) (q)); and (ii) equal protection and benefit of law (Art. 27(1) & (2)) of the Constitution. Section 333(2) of the CPC therefore, pertains to fair trial and justice. And, failure to give full effect to the section is a violation of these rights.

27. By the spell of the Constitution, courts must be prepared to take on a different view of section 333(2) of the CPC, and break free from the bindings of narrow interpretation of the law, and always favour the path which protects or promotes rights and fundamental freedom. Let section 333(2) of the CPC take fight under the Constitution, as we obey the command of the Constitution in article 259 and 20; to developing the law to give effect to a right or fundamental freedom.

28. I am not delusional: decisional law as well as literal writings emphasize on courts giving full effect to section 333(2) of the Criminal Procedure Code. See the Court of Appeal in ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.*** (See also ***Bethwel Wilson Kibor vs. Republic [2009] eKLR)***.

20. Courts should never defend a less austere version of the model of the Constitution on rights, by weakening the notion of right or redress for denial or violation of right or fundamental freedom. In the upshot, I will give full effect to section 333(2) of the CPC.

30. Consequently, the sentence herein shall commence from the date of arraignment in court that is; **23rd May 2016**. His appeal succeeds only to the extent expressly stated above. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 11TH DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. M/S Torosi, for DPP

3. Kasaso C/A