



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL 14 OF 2020**

***(CORAM: F.M. GIKONYO J.)***

***(From the conviction and sentence of Hon. W. Juma (C.M))***

***in Narok SOA No. 55 of 2019 on 19<sup>th</sup> May 2020)***

**WILSON WAITEGEL.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

[1] The appellant was charged with the offence of defilement of an imbecile contrary to Section 146 of the Penal Code. It was alleged that on the 9<sup>th</sup> day of August 2019 at 11.00 a.m at [Particulars Withheld] village in Narok South Sub- County within Narok County intentionally and unlawfully caused his penis to penetrate the vagina of DS maasai female adult aged 18 years knowing or having reason to believe her to be imbecile.

[2] In the alternative charge, the appellant was charged with committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 2006. The particulars were that on the 9<sup>th</sup> day of August 2019 at 11.00 a.m at [Particulars Withheld] village in Narok South Sub- County within Narok County intentionally and unlawfully caused his penis to touch the vagina of DS maasai female adult aged 18 years.

[3] The appellant was convicted on the main charge and sentenced to serve 10 years' imprisonment.

[4] Being dissatisfied with the said conviction and sentence he preferred an appeal and cited six (6) grounds of appeal, namely;

**i. That the sentence awarded is highly excessive and punitive.**

**ii. That he suffers from erotic duodenum peptic ulcers a condition that is seriously complicated and aggravated by the harsh conditions within the prison environment. That he used traditional medicinal herbs a facility that is not available in prison.**

**iii. That he is aged 73 years with a family of nine and his wife is epileptic and is not able to play an active role in upbringing and fending off the family task that was squarely on his shoulders with his confinement in prison, the family is likely to suffer.**

**iv. That he earnestly pray that the sentence awarded therein be reviewed and a lesser sentence be considered.**

**v. That in consideration of his wife's ailment he be awarded a suspended sentence so that he may amend broken life.**

[5] Ultimately, he prayed that this appeal be allowed and sentence be quashed or that this court evaluates the evidence and make its own finding in conviction and sentence.

[6] The appellant orally submitted he is sick, toothless and blind. He prayed for a non- custodial sentence. He also urged this court to consider the 9 months he spent in remand and that he is now 75 years old.

## **Respondent's submission**

[7] Mr. Karanja, the prosecution counsel, submitted that the prosecution proved its case beyond reasonable doubt. There was intercourse according to the complainant's evidence through the intermediary. PW4 corroborated the fact of penetration. That PW2 produced medical evidence which proved there was penetration.

[8] The respondent submitted that the appellant was also seen heading towards where PW2 was.

[9] The respondent submitted that PW2 was intellectually challenged. The evidence of PW5 and PW3 and also the psychiatrist's report proved the victim was intellectually challenged. Therefore, the victim could not give consent to intercourse.

[10] The respondent submitted that the appellant committed the offence as he was within the homestead at the time of offence. The appellant knew the victim was mentally challenged and admitted this fact. He was trusted by her mother and took advantage of her.

[11] On the sentence, the respondent submitted that the sentence passed on the appellant is appropriate. The prescribed sentence is a maximum of 14 years. The trial court considered his mitigation, age and aggravating factors and imposed 10 years' imprisonment. Therefore, discretion was exercised judicially.

## **ANALYSIS AND DETERMINATION**

### **Court's duty**

[12] As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Okeno v Republic (1972) E.A. 32.*

[13] I have considered the grounds of appeal and evidence adduced in the lower court and find the main issue for determination is;

### **Whether the sentence was manifestly harsh and excessive**

[14] The appellant does not challenge his conviction. I uphold the conviction.

### **Sentencing**

[15] The sentence for defilement of such persons who are intellectually challenged is prescribed in *section 146 of the Penal Code Cap 63, Laws of Kenya* as follows:-

#### ***"146. Defilement of idiots or imbeciles***

***Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."***

[16] Under the command of the Constitution and humanity, I wish to state that this section should be read with such alterations and modifications in respect of; i) the manner the victims of defilement are described and addressed; and ii) the imposition of hard labour as part of sentence. See article 30 and 54 of the Constitution below.

[17] Article 30 of the Constitution prohibits imposition of forced labour in express mandatory manner, that: -

#### **30(2) A person shall not be required to perform forced labour**

[18] Article 54 of the Constitution demands respect for persons with disability as follows: -

#### **54(1) A person with any disability is entitled;**

##### **(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning**

[19] Parliament should however carry out appropriate amendment to the section.

[20] Having said that, in the instant case, the learned trial magistrate sentenced the appellant to ten years' imprisonment. The law provides for a maximum sentence of fourteen years. Therefore, the learned trial magistrate acted within the confines of the law.

[21] The Court of Appeal, in the case of Peter Mbugua Kabui v Republic [2016] eKLR held as follows: -

***"The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now settled. The predecessor of this Court, in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270,***

pronounced itself on this issue as follows: -

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".

To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore as an error of principle must be interfered with (see also Sayeka -vs- R. (1989 KLR 306)"

In the more recent case of Kenneth Kimani Kamunyu -vs- R. (2006) eKLR, this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful."

[22] Clearly the sentence in this case was legal. Except, however, it is important to take account of the fact that he is now of advanced age, 75 years; he has eaten into the bonus of his life, for the days of our lives are 70 years, and the bonus is ordinarily full of trouble and sorrow. See the Holy Bible, *New King James Version; Psalms 90:10* that: -

**The days of our lives are seventy years; And if by reason of strength they are eighty years, Yet their boast is only labor and sorrow; For it is soon cut off, and we fly away.**

[23] He has stated that he is now ailing and frail. No reason to doubt that. He is also a first offender. The appellant has also been in custody since 13<sup>th</sup> August 2019 when he was first arraigned in court; he must have learnt his lesson. When I weigh the aggravating circumstances alongside the mitigating circumstances, I am inclined, in the interest of justice to commit the appellant to probation sentence for 2 years. He shall be released forthwith from prison to serve the probation sentence. He is duly warned that every action has a consequence, and that he should never take advantage of the vulnerable. Sentence accordingly, reviewed. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF DECEMBER 2021**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of: -**

1. Appellant
2. Karanja for DPP
3. Kasaso C/A