REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.11 OF 2017

SILAS KINYUA WAGUAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgement of Hon. S.N. Makau – Senior Resident Magistrate at Gichugu SRM's Court in Sexual offence No.4 of 2016 on the 13th February, 2017)

JUDGMENT

1. The appellant SILAS KINYUA WAGUAMA was convicted of the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual offences Act No.3 of 2006 and sentenced to imprisonment for 20 years.

He was dissatisfied with both conviction and sentence and filed this appeal based on seven grounds. His contention is that the evidence was contradictory and conviction was based on the evidence of a single witness which was not corroborated.

The appellant further impugned the conviction on the ground that the trial Magistrate relied on medical evidence without considering that the complainant had spent the night in another man's house. It is also contended that the charge was not proved beyond any reasonable doubts and the evidence was hearsay.

2. The court gave direction that the appeal proceeds by way of written submissions. However, on 14.5.2019 when the appeal came up for mention to confirm filing of submissions the appellant abandoned the appeal and urged the court to proceed with the appeal on the sentence. The appeal was marked as abandoned and the appellant made oral submissions with regard to the appeal on the sentence.

3. The appellant urged the court to reduce the sentence of twenty years contending that he has learnt some courses in the prison. He has already served four years.

4. In response, Mr. Obiri Assistant D.P.P. submitted that the sexual offences Act does not give discretion to a Judical officer on sentencing. What guides a judicial officer is the age of the complainant. The Act has tiers based on age as stipulated under Section 8.

5. The complainant was thirteen (13) years old. The prosecution proved her age. The court gave the bare minimum. He urged the court to apply the law as given by parliament.

6. I have considered the appeal on the sentence. ***Section 354 of the Criminal Procedure Code Cap.75*** provides for the powers of this court on appeal. ***Section 354 (3) (a) (ii)*** provides;

"In an appeal from conviction-

i) Reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction, or

ii) Alter the finding maintaining the sentence or, with or without altering the finding, reduce or increase the sentence

iii) With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.

iv) In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

7. The High Court has jurisdiction to consider appeal on the sentence.

8. Sentencing is the discretion of the trial Magistrate. The appellate court will not interfere with the exercise of that discretion. The purpose of sentencing is to rehabilitate the offender, retribution, and to ensure that the public is protected from harm that they may suffer from some offenders. This was well articulated by the Supreme court in the case of ***FranicsKariuokoMuruatetu& Another –V- Republic & Others Petition NO.15/2015*** where the court stated in part;

> ***"We also acknowledge that in Kenya and internationally sentencing should not only be used for the purposes of retribution it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners"***

9. The considerations which the court has to make is whether the sentence is justified, whether the sentence is deserved considering the gravity of the offence and the need to guarantee the public that those who commit crimes receive just punishment. Jonathan Herring in the book Criminal Law fifth Edition while writing on the theory of retribution stated as follows;

> ***"This is that, quite simply punishment is justified because the offender deserves it. It is good in and of itself to punish regardless of the punishment. Through punishment the law treats people as human beings who are able to make choices and take the consequences of those choices……***
>
> ***retribunist accept of the offender paying his or her dues to society. Having suffered the penalty the offender can return to society. Having suffered the penalty, the offender can return to society as a fully acceptable member"***

10. I will move to consider whether the sentence was deserved. The facts of this case are that the complainant who was a girl aged 13 years and a pupil in class six on 7.5.2016 when the offence was committed, was sent by her mother to her aunt's home to pick flour and vegetable. It was at 7.30pm. After picking the items she kept in a shop and went to pick her shoes from a shoe maker. On her return to the shop she found it closed. When she reached home without the items, the mother threatened to beat her. She ran way from home and met Munyua. She went to his home and she was defiled. The following day she met the appellant who took her to his house and defiled her. She reported to the Sub-area who told her to look for her mother. The appellant was arrested by members of Nyumba Kumi who took him to Karumandi police station.

11. The complaint was examined by a Clinical officer Beatrice Wanjiru Kibuna (PW4). On examination, semen was detected from the vulva. She had a bacteria infection. She concluded that the complainant was defiled. She filled a P3 form exhibit 3 and treatment notes exhibit 2. The complainant was 13 years old as she was born on 23.10.2014 as shown by birth notification exhibit 1.

12. At the time of sentencing, the appellant did not say anything in mitigation. The trial Magistrate stated at page 44 from line 15-

> ***"I have considered the circumstances surrounding the case, that the accused is a 1st offender, he is not remorseful he does not deserve leniency. Section 8(3) provides for a mandatory minimum sentence and since the accused is a 1st offender I will sentence him to imprisonment for a period of 20 years which is the minimum sentence for the offence of defilement of a girl of age bracket the complainant herein".***

13. The trial Magistrate properly addressed her mind to the facts that a court has to consider when passing sentence. Of importance is the fact that the appellant was not remorseful.

14. The appellant did not show any remorse when addressing this Court. All he stated is that he has learnt some courses in prison and wants to leave prison after serving for years to go and practice carpentry.

15. The offence which the appellant committed was no doubt serious. There is no doubt that the sentence passed was deserved. ***Section 8(3) of the Sexual offences Act*** provides;

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".***

The appellant was sentenced to the bare minimum. The sentence was deserved and lawful. The trial Magistrate had discretion to consider the mitigation so as to take into account the circumstances of the offender. The appellant blatantly failed to make mitigation. The trial Magistrate had discretion to pass the minimum sentence. The minimum sentence was deserved in the circumstances of this case. The appellant has not made any mitigation before me. I find no reason to interfere with the sentence which I have no doubt in mind that it was deserved.

In conclusion

The appeal lacks merits and is dismissed.

Dated at Kerugoya this 6th day of February 2020.

L. W. GITARI

JUDGE