REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 50 OF 2019

LCK ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(*Being an appeal against the decision of the trial Magistrate before Hon. Dr. Julie Oseko (CM) at Malindi Law Court in S. O. No. 42 of 2018 in the Judgment dated and delivered on 20.07.2018)*

Coram: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the state

JUDGMENT

The accused person was charged with the offence of sexual assault defined in terms of Section 5(1) (a) (i) (b) (2) of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty. After a full trial, he was found guilty as charged. He was therefore convicted and sentence to serve ten years imprisonment.

The factual matrix of the case indicates that the appellant inserted his fingers inside the minor's genitalia, a child of 8 years. The accused's family and that of the complainant is closely related such that they live in the same homestead. The complainant told the court that she was called by the appellant while she was on her way from school. She responded and went towards the accused while **PW2** and other children proceeded on with their journey home.

The appellant took her to his house, removed her clothes and inserted his fingers into her vagina and anus. When she tried to raise alarm, the appellant covered her mouth with hands. PW2 searched for the complainant only to catch the appellant and the complainant in *fagrante delicto*. **PW3** took the complainant to the hospital in pursuant of the sexual assault. The Doctor who examined her told the trial court that the child suffered a swollen vagina surface and she lost her hymen. Further, that her anal orifice was indicative to be swollen and painful especially when taking a long call.

There is also evidence that since the complainant and the appellant are family, they had started to discuss the issue but word had gone out. The children rescue organization in Watamu went to the complainant's home and took the child. It then handed over the case into the hands of the police.

In the instant case, he has appealed against both conviction and sentence. The appellant's case is founded upon the following grounds:

(a). That the court did not conduct voire dire examination.

(b). The age of the appellant was not considered.

(c). The court ignored the appellant's mitigation.

This is the first appellate court and as such, it is trite that the duty of this court is to reconsider the evidence, evaluate it anew and draw its own conclusions or findings in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. The aforesaid duties of the first appellate court are clearly set out in the Court of Appeal case of **Okeno vs Republic Criminal Appeal No. 32 of 1972 EA. LR.**

On the question of voire dire, the appellant claims that the court did not conduct the examination. A perusal of the record of appeal shows that the court considered the voire dire examination. It was the court's opinion that the minor was intelligent enough to give the account of her ordeal before a court of law, despite the fact that she did not know the meaning of oath.

This goes to the question of competence. The trial made a finding that the minor was intelligent, which means she was competent enough to give cogent and credible evidence in support of the prosecution case. I have perused through the evidence adduced by the complainant. It was consistent throughout her testimony. She was candid that the appellant defiled her. She vividly described the manner in which the offence was committed by the appellant. Her testimony was also consistent which the doctor's testimony which confirms that she was indeed defiled. Furthermore, the evidence of **PW2** support the complainant's testimony. She told the court that she caught them in the act.

Apart from the above, it is also the prosecution's position that after the commission of the offence by the appellant, the families of the appellant and that of the complainant embarked on dialogue to deal with the abomination. This was cut short when the children rescue organization intervened and placed the matter into the hands of the police. This shows that even the appellant's defence was an aforethought since the family were well aware of the perpetration.

Another shred of evidence which supports the complainant's case is the fact that the accused was arrested after 6 months later after having gone into hiding. What boggles the mind may be the reason why he ran away after the commission of the offence. If he had not committed the offence, there was no reason for him to run away.

Matters of credibility are better handled by the trial court for obvious reasons. In an appeal hearing, the court does not enjoy the benefit of seeing both the complainant as well as the appellant. It is trite in our law that an appellate court will not interfere with the findings of facts made by a trial court and which are based on the credibility of witnesses. This owes to the reason that the trial court is a better position to assess the witnesses from its vantage point of having seen and heard them, subject to certain exception. Some of the exceptions is where there has been a misdirection or a mistake of fact or where the basis the court a quo reached its decision was wrong.

In this matter there is no suggestion that the finding that the witness were competent and credible was based on a wrong contextual basis. The testimony of the minor was coherent to that of PW2 and the medical expert. In the result, I find no merit in the appeal against conviction.

As for the appeal against sentence, he complained that the Honourable Magistrate did not take into account that he was a minor of 17 years at the time of the commission of the offence. His contention is that the Learned Magistrate was duty bound to inquire his age. He therefore submitted that the sentence of 10 years imprisonment is hard and excessive to him. He feels that this resulted in miscarriage of justice.

Contrary to the foregoing contention by the appellant, I have noted that this issue was raised in his mitigation when he told the court that he needed to continue with school. The court in its wisdom decided against the appellant by settling on an active prison sentence. The Honourable Magistrate pronounced that the offence is serious such that it carries a life sentence but due to the youthfulness of the appellant, she therefore sentenced him to 10 years imprisonment.

My view is that owing to the gravity of this offence, the sentence imposed cannot be said to be excessive. The court took into account all the relevant factors which it was obliged to consider in assessing sentence.

The offence is rampant in Kilifi County and there is need for the court to deter the same. This has destroyed the lives and future of young girls. Sexual assault is a vile crime. It is an assault on the integrity and dignity of a person. The consequences for the victim are far reaching. The appellant being a relative to the victim, he shamelessly committed this crime against a child society expected him protect. He has no one to blame when courts, in their indignation, impose the sentence he received on this occasion. He deserves his just deserts. In the result, the appeal ground on sentencing fails.

In light of the above, the appeal against both conviction and sentence be and is hereby dismissed in it's entirely.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 21ST DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Kirui for the state

2. The appellant