REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 9 OF 2019

COLLINS RIOBA MUNYASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon. H. Ng'ang'a, SRM, delivered on 9/1/2019

in the Chief Magistrate's Court at Narok in Criminal Case No. (SOA). 48 of 2018,

Republic v Collins Rioba Munyasa)

JUDGEMENT

1. The Appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. In this court the appellant has raised seven (7) grounds of appeal in his amended petition of appeal.

4. I will start with ground 4, in which the appellant has faulted the trial court in finding that penetration was proved and that the appellant was positively identified. In this regard, the evidence of S.N. (Pw 1), who is the victim, is that she had taken the school uniform of the child of the appellant from outside into the house of the appellant; since it was raining. She placed the school uniform on the seat where the child was sleeping. When Pw 1 wanted to leave the house, the appellant pulled her inside and blocked her mouth with his hands. He then closed the door. After that he took her to his bed. The appellant then removed her underpants and had sexual intercourse with her by penetrating her vagina. She testified that: "A*kaanza kuniingisha hio kitu yake kwa vagina*." *(He put his thing in my vagina).* After this the appellant released the victim to go as neighbours were asking for her whereabouts.

5. The eleven years (11) old victim continued to testify that the appellant is her neighbour and the time of this incident was at 7.00 pm on 4/6/2018.

6. Furthermore, the mother of the victim namely VA (Pw 2), was told of this incident. She returned home and took the victim to Narok referral hospital. At that hospital the victim was examined by Benjamin Tum (Pw 3). Pw 3 is a clinical officer. Upon examining the victim on 5/6/2018, Pw 3 found as follows. The genitalia examination revealed there were bruises around the vulva. Her hymen was freshly broken. Her vaginal wall was swollen with reddening. Syphilis and HIV tests were negative. High vaginal swab did not reveal presence of spermatozoa. Pw 3 then put the victim on pain killers, antibiotics, AIDs PEP to prevent HIV. He also estimated the age of the victim as being 11 years old. PW 3 then produced his report of examination as exhibit Pexh 2, being the P3 form. He also produced the clinical treatment notes of Dr.Kuria as exhibit exh 3 (b). Pw 3 further testified that he knew the handwriting and signature of Dr. Kuria, whom he had worked with for two years.

7. This is a first appeal. As a first appeal court, I am required to re-assess the entire evidence and make my own findings. I am also required to consider the submissions of both counsel. I have done so. As result, I find as credible and cogent the evidence of the victim (PW 1) and the clinical officer (Pw 3) that the victim was sexually assaulted. I further find that penetration of the vagina of the victim was proved.

8. Furthermore, I find that the victim positively identified the appellant as a neighbour.

9. The medical evidence of the clinician (Pw 3), which showed that there were injuries in the vagina of the victim cannot in law amount to

corroboration. That evidence merely proves that the victim was sexually assaulted and does not on its own point to the appellant as the defiler. Corroboration must be independent evidence that incriminates the appellant in respect of the offence charged. I therefore do not agree with the submission of the prosecution the medical evidence of Pw 3 corroborates the evidence of the victim.

10. In this regard, I find that the evidence of VA (Pw 2) that after this incident the appellant attempted to run away, but Pw 2 called *"thief thief "* in reference to the appellant. As a result, they tied the appellant and took him to the police station. This evidence provides corroboration of the victim's evidence. This is so notwithstanding that the evidence of the victim did not as matter of law require corroboration. See *Kibangeny arap Kolil v Regina [1959] EA 92.*

11. In the circumstances, I find that ground 4 lacks merit and is hereby dismissed.

12. The second ground that calls for consideration is ground 5; in which the appellant has faulted the trial court for failing to take cognizance of the fact that the appellant is a victim of an estranged relationship with his neighbours especially Pw 2; who counsel has stated that was on a revenge mission against the appellant. In this regard, the trial court after considering this issue stated that:

> *"It is a fact that PW 2 was not in good terms with the accused. I however, observed the demeanour of the witnesses and on the strength of the prosecution case, I find the accused was not framed. The accused, I find had the motivation to commit the offence. His defence did not impeach the prosecution evidence and it was not fatal to fail to avail other neighbours as witnesses."*

13. There is ample evidence on record that the relationship between the appellant and Pw 2 was strained. Pw 2 testified that whenever the appellant was drunk, he insulted her. Pw 2 also testified that the appellant used to leave his son with Pw 2, whenever he went to work. Pw 2 further testified that she did not have a grudge with the appellant.

14. It is clear from the foregoing finding by the trial court that the issue of a frame up by Pw 2 was considered and rejected. There is ample evidence in support of that finding. I have re-assessed the evidence and as a result I find that the appellant was not framed by Pw 2. I therefore reject ground 5 for lacking in merit.

15. The third ground for consideration is ground 1, in which the appellant has faulted the trial court in failing to find that the prosecution did not prove their case beyond reasonable doubt. He has further faulted the trial court for failing to allow him to call his defence witness.

16. In this regard, the trial court considered the prosecution evidence and found the victim to be a truthful witness, whose testimony in respect of defilement was believed by the trial court. That evidence is amply supported by the medical evidence of the Pw 3. I have re-assessed that evidence and I have come to the conclusion that the victim was a truthful witness. She reported the defilement to her 14-year-old sister namely FA (Pw 4) and her mother Pw 2. Her sister testified that she was asked by mama Juliana and Mama Allan as to what the victim had gone to do in the house of the appellant. She went there and found the victim leaving the one roomed house of the appellant. As at that time the appellant was at the door of his house. She then asked the victim what she was doing. The victim then narrated to her how the appellant had defiled her. The appellant submitted that the evidence of FA (Pw 4), who was a minor could not in law corroborate the evidence of the minor victim. I find that in law the evidence of Pw 4, being sworn evidence corroborated the evidence of the minor victim. The appellant sought and was granted an adjournment for two weeks to call his witness. During the resumed defence hearing, the appellant on his own motion applied to close his case. Thereafter, the court closed his case. It is clear that he was not denied the opportunity to call his witness. I therefore reject the submission of the appellant in this regard.

17. The submission of the defence that the evidence of the sister (PW 4) of the victim could not in law corroborate the evidence of the victim is not sound and I hereby reject it.

18. The defence of the appellant was that Pw 2 framed him. This defence was considered and rejected by the trial court. I have also re-assessed the entire evidence and I find that the prosecution proved their case beyond reasonable doubt. I find that the appellant was convicted on sound and ample evidence. I therefore reject ground 5 for lacking in merit.

19. In a coalesced form grounds 2,3,6 and 7 are in relation to the 20 years sentence of imprisonment imposed upon the appellant, which the appellant states is manifestly excessive. The appellant has faulted the trial court for failing to take cognizance of the Supreme Court decision in *Francis Muruatetu & Another [2017] e-KLR,* which decision held that that courts have discretion to impose an appropriate sentence and are no longer bound to impose the statutory prescribed minimum.

20. I find that the trial court was alive to the fact that he was not bound by the prescribed minimum of life imprisonment. That is why that court imposed a 20 years' imprisonment. I therefore reject the submission of counsel for the appellant in that regard.

21. The general principle is that sentencing is a matter in the discretion of the trial court. An appeal court may interfere with the exercise of that discretion in the following circumstances. First, where it is shown that the trial court failed to take into account relevant factors. Secondly, where the trial court has taken into account irrelevant factors. Thirdly, where the trial court has imposed a manifestly high or low sentence, that has resulted in a miscarriage of justice.

22. It is clear that the trial court considered the mitigation of the appellant. The appellant's mitigation was as follows. The appellant was a first offender. He was remorseful. He had a son whom he was educating, who now lives with his mother.

23. The trial court also took into account the aggravating factors which include the following. The emotional trauma that was caused to the victim.

24. I find that the trial court failed to take into account that the appellant had been in remand custody for over four months. Section 333 (2) of

the Criminal Procedure Code (Cap 75) Laws of Kenya mandatorily directs a court to take into account the period an accused has been in custody in sentencing him. Additionally, the sentence is manifestly excessive.

25. In the circumstances, I find that due to the commission of those errors by the trial court, this court is entitled to interfere with the discretion of the trial court. As a result, I hereby set aside the sentence of 20 years' imprisonment. After taking into account both the aggravating and mitigating factors, I hereby impose a sentence of ten (10) years' imprisonment, which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 8th day of July, 2020 through video link in the absence of the Appellant and Ms. Torosi for the Respondent.

J. M. BWONWONG'A.

J U D G E

08/07/2020