REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 35 OF 2019

AUGUSTINE SIMIYU MAWANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement (conviction and sentence)

delivered by Hon. D. O. Onyango, CM, on 26/2/2019 in Criminal Case No. 65 of 2016

in the Principal Magistrate's Court at Kimilili, Republic v Augustine Simiyu Mawani)

JUDGEMENT

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

2. The state has supported the conviction and the minimum statutory sentence of 20 years' imprisonment.

3. In this court, the appellant has in his petition of appeal raised four grounds.

4. I will for convenience start to consider ground 4 in which the appellant has faulted the trial court for convicting him on the contradictory evidence of the prosecution witnesses.

5. In this regard, the evidence of the victim (Pw 1) namely V.J.N., the initials of her name, was that she was aged 13 years. She identified her baby dedication certificate, which was produced as exhibit 2. Exhibit 2 shows that the victim was born on 5/7/2002. She was allowed to testify on oath after being subjected to a *voire dire* examination. She further testified as follows. She was in class 8. On 2/10/2016 at 9.00 am she was going to church. The appellant called her into his video shop. She went inside that shop and the appellant told her that he was going to send her. She stayed in that shop until 1.00 pm. The appellant still told her to wait. She feared returning home as she had not gone to church and her mother was not going to be happy with her. At 7.00 pm she told the appellant that she feared going home. The appellant persuaded her to accompany him to his home at Kamukuywa.

6. They went there and the appellant locked her inside the house. The appellant returned at 10.00 pm. She asked him to take her to her home. The appellant declined to do so. Instead the appellant asked her to stay until the next day. During the night the appellant forcefully inserted his penis into her vagina and she felt pain. As a result, she wanted to scream but the appellant blocked her mouth using his hand.

7. She again asked the appellant to escort her to her home but the appellant refused. The appellant then escorted her to his video shop, where she stayed until 8.00 pm. He repeated this daily until Friday 7/20/2016, when the victim left for her home.

8. The victim was using her sister's phone into which she had saved the phone number of the appellant. When the appellant rang, her sister (BN, Pw 4) took his phone and pretended to be the victim. The appellant was arrested with the assistance of her sister (Pw 4). He was then escorted to the police station. The victim was also arrested and escorted to the police station and eventually taken to hospital for medical examination. The victim identified the P3 form (medical examination report), which was produced as exhibit 1.

9. In cross examination, the victim testified that she feared going to her home as her mother was going to cane her. She also testified that the appellant only knew B (her sister, Pw 4), who arranged for the arrest of the appellant.

10. After five (5) days the victim returned to her home from the appellant's place. When the victim saw her mother (DN, Pw 2), she tried to

run away, but they managed to arrest her. The victim then told her mother that she had been with the appellant. She confirmed that the victim had been using the cell phone of her sister. The evidence of her sister (Pw 4) supported that of the victim. She only added that she called the appellant on her phone. The appellant then went to where Pw 4 was with the policemen. Upon arrival the police arrested him.

11. Beatrice Akhosa (Pw 3) is the clinical officer, who examined the victim on 10/10/2016 at Kimilili sub-county hospital. Her findings were as follows. The victim was aged 13 years old. She had bruises in her private parts on the labia minora. Pregnancy and syphilis tests were negative. She was given drugs to prevent HIV infection as well as to prevent pregnancy. She then produced the P3 form as exhibit Pexh 1.

12. Upon being placed on his defence, the appellant made an unsworn statement. He stated that he does not know the victim and the other witnesses. He further stated that he only knew B (Pw 4), who was the sister to the victim.

13. The appellant made long submissions in support of his appeal. He submitted that he was denied legal representation, citing *Greyhound Racing Association [1968] All ER 545,* in which the court observed that an accused who is unrepresented is disadvantaged as he is unable to defend himself effectively.

14. I response to his submissions, the prosecution submitted based on *David Njoroge Macharia v Republic, Criminal Appeal No. 417 of 2017 [2014] e-KLR,* that not in every case is an accused assigned an advocate for his defence and that an accused is assigned counsel in the following circumstances. First, where substantive injustice would occur in complex cases that involve complex issues of law or fact. Second, where an accused is unable to conduct his defence. Third, where the public interest demands that legal representation be provided to an accused.

15. Based upon the foregoing premises, the prosecution submitted that the appellant has failed to demonstrate that he suffered substantive injustice due to lack of legal representation. The prosecution further submitted that the proceedings show that the appellant cross examined all the prosecution witnesses and that it is not noted in those proceedings that the appellant had difficulty in conducting his defence.

16. I have considered this issue and the submissions of both the appellant and the prosecution. As a result, I find that the right to legal representation is not automatic. It is only granted where substantial injustice is likely to occur as set out in article 50 (2) (h) of the 2010 Constitution of Kenya. In the instant appeal, a perusal of the proceedings shows that the appellant conducted his cross examination without any difficulty. I further find that the appellant has not demonstrated any injustice resulted from the lack of legal representation. In the circumstances, I find no merit in the submissions of the appellant and I hereby dismiss it.

17. Furthermore, the appellant also submitted that the age of the victim was not proved. The mother of the victim produced the victim's child dedication certificate as exhibit Pexh 2; which shows that the victim was born on 5/7/2002. The clinician, Beatrice Akhosa (Pw 3) estimated the age of the victim to be 13 years old as shown in her report exhibit Pexh 1. According to the penal statute the offence of defilement is established if the age of the victim is between the ages of 12 and 15. The age of the victim falls within that age bracket. In the circumstances, I find that the age of the victim was proved as required by law. I therefore find no merit in this submission, which I hereby dismiss.

18. The appellant further submitted that there were contradictions in the prosecution evidence as the charge sheet shows the age of the victim as being 13 years, whereas the dedication certificate exhibit Pexh 2, shows the age as being 14 years. I find that the age of the victim was 14 years because the age indicated in the charge sheet is an allegation; whereas the age on the dedication certificate exhibit Pexh 2, is evidence. In this regard, it is important to point out that courts rely on the evidence adduced and in this appeal, the dedication certificate exhibit Pexh 2 is credible evidence. Any conflict between the age on the charge sheet and the dedication certificate exhibit Pexh 2, must of necessity be resolved in favour of the said dedication certificate. I therefore no merit in this submission, which I hereby dismiss.

19. The appellant also submitted that the prosecution failed to call the arresting police officer to testify, which is fatal to the conviction. The appellant cited *Bukenya & Others v Uganda [1972] EA 549*, in which the court held that the failure to call essential witnesses may lead to an adverse inference being drawn. In the instant appeal, the prosecution did not call the arresting police officer, because the court had granted the prosecution a last adjournment to call him within that period, which they failed to do. The said failure to call him and the resulting delay does not entitle the court to draw an adverse inference. This was not fatal to the conviction. I find no merit in this submission, which I hereby dismiss.

20. The appellant has also submitted that the trial court failed to indicate that the appellant was being placed on his defence pursuant to the provisions of section 211 of the Criminal Procedure Code (Cap 75) Laws of Kenya. According to him, the failure to do so is proof of an unfair trial. Although, it is not indicated so in the typed record of appeal, it clearly appears that this was so indicated in the original hand written notes of the trial court. It therefore follows that this was a typing error. The submission of the appellant is without merit and is hereby dismissed.

21. The appellant also submitted that his defence was not considered. The trial court considered the defence evidence and found that: "*The defence by the accused has failed to displace the overwhelming evidence of the prosecution which clearly implicates him with the charg*es." The defence evidence was not in law required to displace the prosecution. I find as harmless the finding that the appellant's evidence failed to displace the overwhelming prosecution evidence. This is a clear indication that the defence was considered and rightly rejected. I therefore find no merit in this submission, which I hereby dismiss.

22. The appellant ha also submitted that no DNA profile was carried as required by section 36 (1) of the Sexual Offences Act No. 3 of 2006. It is not always the case that a DNA profile has to be conducted as part of the investigation process. It depends on the circumstances of each individual case. The offence of defilement may be proved without conducting a DNA profile as is the position in the instant appeal. In the circumstances of this appeal, the failure to conduct a DNA profile was not fatal to the conviction. I therefore find no merit in this submission, which I hereby dismiss.

23. The appellant also has submitted that he was not taken to court within the 24 hours as required by the 2010 Constitution of Kenya. The charge sheet shows that the appellant was arrested on Friday 8/10/2016. He was taken to court on 10/10/20116, which appears to be a

Sunday. It appears that after his arrest, the following days were weekends, when courts generally do not sit. It therefore follows that there was no breach of the 24 hours' requirement rule; which is embodied in article 49 (1) (f) (i) (ii) of the 2010 Constitution of Kenya. This submission lacks merit and is hereby dismissed.

24. The appellant has faulted the trial court for imposing upon him a manifestly excessive sentence of 20 years' imprisonment and has urged the court to reduce it. He has cited the cases of *Francis Muruatetu &Another v Republic, Petition No. 15 of 2015 and William Okungu Kittiny v Republic [203] e-KLR* in support of his submission.

25. In sentencing the appellant, the trial court took into account his mitigation, which consisted of the following matters. The appellant was an orphan. He relied on casual jobs. He was a first offender. The court then stated that: *"The charges (sic) carries mandatory minimum sentence and the hands of the court are tied. Sentence: The accused to serve 20 years' imprisonment."*

26. The respondent supports the 20 years' imprisonment.

27. The sentence was imposed after the Supreme Court decision in *Francis Muruatetu &Another v Republic, Petition No. 15 of 2015* was handed down. In that decision the court held that the automatic imposition of the death penalty following a conviction for murder was unconstitutional. The court further held that courts had a discretion to impose an appropriate sentence and were not bound to impose the prescribed minimum statutory sentence. It seems that the trial court was not aware of the decision of the Supreme Code decision. The sentence was handed down by the trial court in disregard of that decision. In the circumstances, this court is entitled to interfere with the sentence imposed by the trial court. In doing so, I am required to take into account the circumstances of the case including the mitigating and the aggravating factors.

28. In addition to the foregoing matters, I am also required to take into account that the appellant has been in prison custody since 26/2/2019, which translates to about one and half years.

29. Furthermore, I have also taken into account that the appellant kept the victim in his house for five (5) days for his sexual purposes, which is an aggravating factor**.**

30. After taking into account all the circumstances of the case including the mitigating and aggravating factors, I hereby reduce the sentence of 20 years' imprisonment to ten (10) years' imprisonment, which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 6th day of October, 2020 through video link conference in the presence of the appellant and Mr. Robert Oyiembo for the Respondent.

J. M. BWONWONG'A.

J U D G E

6/10/2020