REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAKURU

CRIMINAL APPEAL NUMBER 43 OF 2019

EDWIN AMDANY KIPLANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Molo Chief Magistrate's Sexual Offence case No 91 of 2017 by Hon E S Soita Resident Magistrate)

J U D G M E N T

The appellant Edwin Amdany Kiplagat was charged with defilement under section 8(1) as read with 8(3) of the Sexual Offences Act and in the alternative committing an indecent Act with a child under section 11(1) of the same Act.

It was alleged that the offences were committed on diverse dates between 22/10/2017 and 27/10/2017 at Umoja Area in Rongai sub county within Nakuru County where he intentionally caused his penis to penetrate the vagina of CC a girl aged 15 years and in the alternative touched her vagina with his penis.

After a full trial the appellant was found guilty of the main charge and sentenced to 20 years' imprisonment on 4/6/2019.

The appellant was aggrieved by the conviction and sentence and he filed this appeal on 10/6/2018.

Grounds of Appeal were;

a. That the appellant has learned through pain that crime does not pay.

b. That the appellant feels the sentence is extremely excessive based on the circumstances.

c. That he is remorseful of the act he committed and promise to be a ….

d. That the learned trial magistrate erred in law and in fact in convicting the appellant whereas the appellant's constitutional right for disclosure had not been afforded.

e. That the learned trial magistrate erred in law and in fact in failing to appreciate that critical witnesses were never called by prosecution thus the prosecution case remains unproved.

Mainly that he had now reformed but that the prosecutor had not disclosed their evidence to him before trial, that critical witnesses were not called by the prosecution.

At the hearing of the appeal he made oral submissions. He submitted that the charge sheet was defective and he did not know which section he had been charged with. He argued that two different sections of the law were used.

He also argued that the evidence of the doctor did not support that of the complainant hence the charge against him was not proved.

In opposing the appeal, the state argued that the three ingredients of the offence of defilements were proved: -

AGE – that complainant was born on 4/7/2002 and was 15 years at the time of the offence.

PENETRATION – the evidence of the complainant of being detained in the appellant's house for 5 days from 22/10/17 and defiled severally and the medical evidence of a broken hymen.

IDENTITY OF PERPETRATOR- that appellant was positively identified by his voice, appearance and that he was found under the bed in the same house with complainant.

Sentence was appropriate in the circumstances of the offence.

In response the appellant urged the court to release him arguing that he had been in custody for 5 years and was completely reformed.

Considering that this is a 1st appeal the appellant is entitled to reassessment of the evidence as placed before the trial court and for this court to draw its own conclusions bearing in mind that I never saw or heard the witnesses testify. See **Okeno v R**

As I look through the evidence I will have to keep in mind the issues raised by the parties.

- *Whether the prosecution disclosed its evidence to the appellant as is required by the constitution.*

- *Whether the prosecution proved its case beyond a reasonable doubt,*

- *Whether crucial witnesses were left out.*

- *Whether the sentence is harsh and unreasonable in the circumstances of the offence.*

Plea was taken on 30/10/2017 and the appellant pleaded not guilty. The matter was scheduled for hearing on 14/12/201. On that date the prosecution said they were ready to proceed but the appellant told the court that he was NOT ready to proceed because he did not have the statements.

The court directed that the matter to proceed at 12.00 pm same day and that the appellant **"be provided with the statements at his own cost".** Clearly this was misguided as it was the duty of the state to avail the evidence against the accused person to the accused to enable him prepare his defence.

The matter came up at 12.09 pm. The prosecutor called its 1st witness. The appellant confirmed he had now been supplied with the witness statements but needed more time to read the statements and prepare for the case.

The court adjourned the matter to 21/12/17.

The record shows that the appellant was supplied with witness statements and his contention that his right to disclosure was violated cannot stand. The matter did not proceed on 21/12/2017 but on 4/1/2018, hence from the record he had sufficient time to prepare.

The case for the prosecution was that on 22/10/2017 the complainant asked the mother PW 3 for 50/= to go buy a blouse she had seen at the shopping centre. It was about 5.00 pm. She did not come back home, and about 8.00 pm, she rang her father PW 1 on his mobile phone asking him to go pick her up. Before she could say where she was, the phone was switched off.

PW 1 tried to call the phone later but it was switched off. There followed a running of activities to look for her. The following day he sent in 10/= to the phone number that called him, and it brought up the name Samwel Chemtoi. He began looking for that person.

- Reported to Menengai and Rongai police stations but police were not of any help as they were involved in elections and were not available.

-then to *Nyumba Kumi* – PW 4 who referred him to the Assistant Chief Umoja sub location PW 5 and together with some relatives, they conducted investigations and established that the complainant was with the appellant.

A visit to the home of the appellant did not produce any positive results as he was not at home. However, according to PW 2, PW 4 and 5, the mother told them where they would find the appellant at another house.

These men went to that house. There was a servant's quarter and a main house. On calling out the name of CC she responded from inside the house. They gained access and found her in one of the rooms and the appellant in another, hiding under the bed.

Both the appellant and the complainant were taken to Rongai police station from where investigations commenced.

According to the complainant at the material time she was 15 years old. This was supported by her certificate of birth. She was on her way from the market when she met the appellant who the pillion passenger on a boda boda. She knew the appellant as one Kemboi because she used to buy vegetables from their home.

The two greeted her and offered her a ride. She thought they were going towards her home but instead they took her to other place in Kanyanet.

It was now around 6.00 pm and they took her to a certain house on a farm where there were no neighbours nearby. The house had several rooms. They left her inside the house and went outside where she would hear them talking. They then left and came back after one hour. She requested to call her father, and the appellant went and came with his friend's phone. She called her father but before she could say where she was the appellant snatched the phone. What followed were nights of defilement by the appellant and occasionally his friend.

She was rescued on the 27/10/2017 at 5.00 am by her father, uncles and the assistant chief.

The P3 and PRC were produced by PW 6 Bildad E Bargoge. He testified that upon examination of the complainant the confirmed that there was penile penetration.

No 75961 **CPL Kennedy Ngetich** from Rongai Police Station testified that the complainant and the appellant were escorted to the police station on 27/10/2017 at 10.45 am by chief, chairman *nyumba kumi* and her father for the complainant. The police recorded statements and issued P3, and escorted them to Rongai sub county hospital for examination.

In his defence the appellant made an unsworn statement. He said that he was 21 years old at 2/5/2019 and that in July 2017, he met the complainant. She told him that she had finished school and wanted to get married. He said that they then began to live together and had lived together for three months. He would leave her at home which he went to work. He found out that she had a temper and he sent her away. In October 2017 two people went to his home saying that they had been sent to find out if he knew her, that there was information that he had chased her from his house, and had assaulted her. He was called by the chief and when he went there it was said the issue would be sorted out there. Later he was taken to Rongai Police station and he was charged with this offence.

From the evidence on record it is clear that the complainant and the appellant were known to each other. It is doubtful that the appellant and the friend would have forcefully lifted the complainant and placed her on the motor bike in the market and no one would have noticed. So I found that bit of evidence to be a bit exaggerated. The complainant somehow ended up in the appellant's house where appellant admits to have lived with her for three months not 6 days as alleged by the complainant. Taking into consideration and the testimony of the complainant's father and the appellant's defence there appears to be more to this case than meets the eye.

PW 2 testified that the police at Rongai and Menengai police stations were not available to assist when he reported that his daughter had been abducted by a person whose particulars he had on his mobile phone, is it possible? The investigating officer never mentioned any of this in his testimony – that there was indeed a report made on 23/10/2017 of a missing girl and a suspect. Can we believe the story that the father made the report and no action was taken? Neither was any evidence produced to support the allegation that a phone call was made on the night of 22/10/17 from the alleged phone number to the PW 2's phone number nor was the MPESA message with names of the other suspect produced. This was crucial evidence that would have supported the abduction theory. However, this information appears not to have been shared with the police hence the lack of follow up.

Nevertheless, there were no investigations in this case is taking despite the seriousness of the offence. Clearly the manner in which the appellant is said to have been traced by the PW 2 was riddled with gaps in the evidence. The scene was never visited hence the investigating officer did not establish whether it was true/not that the appellant was keeping the complainant in an isolated place where there were no other neighbours nearby.

PW 2 mentioned that there was a person who was having the key, to the main house by the name Nick who it is who opened the door for them.

This NICK was a key witness because he was said to be the caretaker of the house where this girl was being kept. He was an accessory/if he was the one keeping the keys to the house and ensuring that the house was kept locked. He was never called; no statement was recorded from him as he was complicit to the offence.

It was also testified that the appellant defiled the complainant every night. Both were taken to hospital for examination but no medical report was produced for the appellant. There was no spermatozoa seen though the hymen was missing. There was no evidence of forceful sexual intercourse as alleged by the complainant as she had no injuries. All these go to point that the investigating officer did not make any effort to establish the circumstances under which the offence was committed.

The appellant denied defiling the complainant. His defence suggested that whatever happened was consensual

In 2017 he was 19 years and the complainant was 15 years hence the possibility of there being a relationship between him and the complainant is not farfetched and perhaps this explains yawning gap in the complainant's testimony. What was happening in the 6 days she says, she lived in that big house was she alone all the time, was the house locked all time? What about the people living in the servant quarters of that house? There appears to be some truth in what the appellant is saying that he and the complainant were not complete strangers, and although the complainant could not have consented to sexual intercourse, it appears probable that she was not forced to stay with him.

However, it is noteworthy that he never put any of these issues to the complainant during cross examination or to the father of the complainant.

All that said, were the elements of defilement were proved, age was proved by the certificate of birth. She was 15 at the time. Penetration was proved by the fact that the hymen was missing and her testimony of sexual intercourse every night of the time she was held in that house, a fact that was is conceded by the appellant in his defence that indeed he lived with her as husband and wife for three months. That also takes care of identity of the offender. Hence as far as the legal proof of defilement as an offence, the prosecution did prove its case.

Hence the appeal on the conviction cannot stand.

On the sentence.

The appellant has given the "Mandatory minimum" sentence of 20 years' imprisonment.

Taking into consideration the holding in **DISMAS WAFULA KILWAKE VS R [2018] eKLR** on sentencing in Sexual Offences under s. 8 of the Act, and s. 354(3) (b) of the Criminal Procedure Code which provides for the power of the High Court

> ***in an appeal against sentence, [to] increase or reduce the sentence or alter the nature of the sentence***

Taking into consideration the age of the appellant, the age of the complainant and the circumstances of the offence, I order that Probation and Aftercare Services to avail a pre-sentence report within 14 days hereof to assist in the determination of an appropriate sentence.

Delivered dated and signed at Nakuru this 9th October 2020

Mumbua T Matheka

Judge

In the presence of: Via ZOOM

Edna CA

Appellant: Present

For State: Ms. Rita