REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL N0. 11 OF 2O18

GKR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence dated 4th April 2018 in the

Chief Magistrate's Court in Criminal Case No 42 of 2017, Republic v GKR)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against his conviction and sentence of thirty years' imprisonment in respect defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2016.

2. The state has supported both the conviction and sentence

3. The appellant was convicted on the direct evidence of the complainant (Pw 1).

4. The defence of the appellant was that there was in existence a grudge between him and the complainant's family.

Findings on the grounds in respect of conviction

5. In this court the appellant has raised seven grounds in his petition of appeal and three grounds in his supplementary petition of appeal. In ground (a) the appellant has faulted the trial court for convicting him on contradictory evidence. In his submissions, Mr. Langat for the appellant submitted that the evidence of the complainant (Pw 1) contradicted that of her mother (Pw 2) as regards the report of the first forced sexual intercourse with the appellant. Pw 1 testified that she was going to the house of one F to take salt and that is when the appellant held her and did "*tabia mbaya*" (sexual intercourse) to her. She remembers that it was in April when the schools were closed. Before doing so he pulled her to the bush and then had forced sexual intercourse with her. She felt pain in the course of the sexual intercourse. The second time when he had forced sexual intercourse is when she was taking unga (flour) to J. She then went home told her mother.

6. Furthermore, according to her mother, she remembers that on 12th June 2017 in the morning hours; she was at home. She testified that the appellant got hold of the complainant and she became unwell. Pw 2 then took her to hospital because she feared that the complainant was sick and had syphilis. She also had bruises on her hands. It is clear from this evidence that both Pw 1 and Pw 2 were testifying in relation to different periods. Pw 1 testified in relation to when she was forced to have sexual intercourse with the appellant. Pw 2 was testifying in relation to the period when the HIV was fully blown and has a result she took the complainant to hospital. Pw 2 did not testify as to what the complainant told her.

7. According to the complainant she told her mother that she had had forced sexual intercourse. She did not teIl her mother that the appellant had had sexual intercourse with her. The evidence of the mother is that it is the doctor who told her that it was the appellant who had sexual intercourse with her daughter. It is true that this doctor was not called as a witness and therefore his evidence is inadmissible hearsay. The real issue is whether the complainant identified the appellant as the person who had forced sexual intercourse with her. The complainant knew the appellant as a neighbor. There was no mistaken identity in respect of the appellant. It seems to me that the complainant was infected with the HIV in April and by June it was fully blown, hence her being taken to hospital. In the circumstances, I find that there is no contradiction between the evidence of Pw 1 and Pw 2. I therefore find that this ground lacks merit and is hereby dismissed.

8. In a coalesced form grounds b, c, e and g the appellant has faulted the trial court for convicting him in the absence of proof beyond reasonable doubt. In this regard the sworn evidence of the complainant is that it is the appellant who defiled her. She was allowed to give sworn evidence following a successful *voire dire* examination. She was 12 years and was therefore a child of tender years. Her sworn evidence did not require corroboration. See ***Kibangeny arap Kolil v. Regina (1959) EA 92.*** Even if corroboration was required, there is corroboration in the evidence of the complainant's mother (Pw 2) and father (Pw 3) to whom the appellant confessed that he defiled the complainant. Furthermore, the trial court rightly found the complainant to be truthful in terms of section 124 of the Evidence Act (Cap 80) Laws of Kenya. And by virtue of these provision also corroboration was in law not required. I therefore find that the offence was proved beyond reasonable doubt.

9. Counsel for the appellant has also submitted that the age of the complainant was not proved. This he submits has led to a failure of justice. In this regard, the evidence of Felix Rotich (4), who was the clinical officer at Ololulunga county hospital is that he examined the complainant. Upon examination he found the following. There were no visible injuries to the labia and vagina. The hymen was slightly swollen. There were no physical external injuries. The pregnancy test was negative. The HIV test was positive. The suspect was HIV positive but the complainant's parents were HIV negative. Pw 4 then produced the P3 form of the complainant as exhibit 1 (a). The age of the defilement was three months old. The offence was committed in April 2017. Exhibit 1 (a) shows that the estimated age of the complainant is 12 years and it is signed by PW 4.

10. In view of the foregoing evidence, the submission by Mr. Langat that the age of the complainant was not assessed is not supported by the evidence. Moreover, the evidence of the complainant is that she is aged 12 years. Both her mother and her father testified that she was 12 years old. The clinical officer also produced the results of the parents of the complainant, which showed they were HIV negative. In the circumstances, I find that the age of the complainant was 12 years.

11. Counsel for the appellant also submitted that the appellant was not informed of his right to legal representation as required by article 50 (2) (g) and (h) of the 2010 Constitution of Kenya. It is true the appellant was not informed of his right to counsel. I find that this in itself did not make the trial unfair. The proceedings show that when the trial started, the appellant after being given the witness statements told the trial court: *"I understand kipsigis I am ready."* He cross examined all witnesses except the clinical officer (Pw 4). When he was put on his defence, the appellant initially elected to give evidence, but subsequently changed and decided to make unsworn statement. He also told the trial court that he had no witnesses to call for his defence.

12. Thereafter the trial court adjourned the defence hearing to another date (5th February 2018), upon the application of the appellant. I find that the appellant changed his trial strategy both in terms of how to defend himself and being trial ready. I therefore find that the appellant was not prejudiced in any way as a result of not having counsel for his defence. I am guided in this regard by the Court of Appeal decision in ***Nicholas Misiko Alfayo Alias Muchele Webela v Republic, Criminal Appeal No. 357 of 2011 (Eldoret),*** in which that court found a violation of the fair trial rights of the appellant; in that he had not been supplied with witness statements. That notwithstanding, the appellant therein cross examined all the prosecution witnesses and following the closure of the prosecution case he did not apply for an adjournment. Instead he told the court that he was ready to proceed with his defence. That court held that the appellant was not prejudiced by the failure to supply him with witness statements. It is clear that not every violation of a fair trial right has the effect of vitiating the trial. Prejudice or failure of justice must be demonstrated. In the instant appeal, the appellant is convicted of defilement just like in the foregoing decision of the Court of Appeal.

13. Furthermore, ***in David Njoroge Macharia v Republic (2011) Eklr the Court of Appeal*** after considering many local and international cases including international instruments the court concluded that the right to legal representation in capital robbery cases was a fair trial right. However, that court dismissed the appeal, since it was governed by the repealed 1963 Constitution; whose provisions were not similar to the 2010 Constitution of Kenya.

14. Mr. Langat further submitted that the appellant was not released on bail pending his trial in terms of article 49 (1) (h) of the Constitution of Kenya. This he contends violated the rights of the appellant. He has therefore urged this court to declare the trial a nullity. I have perused the entire record of the proceedings. I find that there is no indication as to whether the appellant ever applied for bail or not. I am therefore not in a position to make any finding as to whether there was a violation or not. Any attempt to do so would be asking this court to trespass on foreign territory namely speculation. Moreover, the grant or refusal of bail is not automatic,

15. As a first appeal court, I have re-assessed the entire evidence. As a result, I find that the appellant was convicted on sound evidence. I therefore confirm his conviction.

<u>Findings on the grounds in respect of sentence</u>.

16. Finally, counsel has submitted that the sentence is manifestly excessive. Counsel has rightly pointed out that sentencing is a matter for the discretion of the trial court. He has further submitted that the trial court did not take into account the mitigation of the appellant. I find from the sentencing notes that the trial court did not take into account that the appellant was a first offender. Furthermore, that court failed to take into account that the appellant had been in remand custody for slightly over one year in terms section 333 of the Criminal Procedure Code (Cap 75) Laws of Kenya. These are errors of law that entitles this court to interfere. After considering the mitigation and aggravating factors, I agree with counsel for the appellant that the sentence is manifestly excessive. I therefore reduce it to the minimum prescribed sentence of twenty years imprisonment, which now he has to serve.

17. Judgement dated and signed at Narok and delivered in open court this 13th day of February, 2019 in the presence of Mr. Langat for the appellant and Mr. Omwega for the respondent.

J. M. BWONWONGA

JUDGE

13/02/2019