REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 165 OF 2018

DAVID OMUSULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by F. Makoyo, SRM, dated 14th February, 2018 in Butere Magistrates Court Criminal Case No. 30 of 2017)

JUDGMENT

1. The appellant was charged and convicted with the offence of rape of a person with mental disability contrary to Section 3 (1) (a) and (b) of Sexual Offences Act No. 3 of 2006. The appellant also faced an alternative charge of indecent act with an adult contrary to Section 11 A of the Sexual Offences Act aforesaid.

2. The appellant pleaded not guilty to the charge. The prosecution called five witnesses whose testimony satisfied the court which convicted him on the main charge alone and sentenced him to ten (10) years in prison.

3. Being dissatisfied with both the conviction and sentence, the appellant has filed this appeal, on the grounds:-

1. THAT the honourable court takes in mind that the duly lodged and filed petition of appeal is based on the application as proved in Misc. Appeal No. 53 of 2018 on 23rd October, 2018.

2. THAT the learned trial Magistrate grossly erred in law and fact in presiding over a trial that seriously offended Section 198 (1) and (2) of the C.P.C.

3. THAT the learned trial magistrate grossly erred in law and facts while convicting the appellant herein in a trial that did not meet the threshold and standards of a fair hearing as set under Article 50 (2), (c), (g), (h), (i) and (m) of the Kenyan Constitution.

4. THAT the learned trial magistrate grossly erred in law and facts by conviction the appellant herein without making a finding that the charge sheet was incurably defective charge sheet contrary to Section 214 (1) and 134 of C.P.C.

5. THAT the learned trial Magistrate grossly erred in law and fact in pressing over a trial without considering my application that I was not subjected to medical corresponding investigation as laid under Section 36 (1), (2) and (6) of the Sexual Offences Act No. 3 of 2006.

6. THAT the learned trial Magistrate grossly erred in law and fact in finding penetration proved even in the wake of flimsy and inadequate evidence to that effect.

7. THAT the learned trial Magistrate grossly erred in law and fact in rejecting my plausible defence without proper evaluation.

8. THAT the learned trial magistrate grossly erred in law and facts in relying on prosecution evidence which was uncorroborated for fetched, flimsy and suspicious and ended up convicting me which seriously prejudiced the appellant herein.

9. THAT the learned trial magistrate grossly erred in law and facts by failing to consider other options of the sentence including Community Service Order.

4. The appeal is opposed by the prosecution. The appellant filed submissions dated 28.8.19 while the prosecution made oral submissions in court.

5. In his submissions the appellant states that his constitutional rights to a fair trial under Article 50 (2) of the Constitution were breached since he was not given an advocate to represent him. The appellant also states that the charge was defective in the sense that he was charged under Section 7 (1) as read with Section 3 (1) (a) (b) of the Sexual Offences Act, yet Section 7 (1) does not exist under the Sexual Offences Act according to him. The appellant further submitted that he was not subjected to medical examination and that element of penetration was not proved. The appellant referred court to the case of **MICHAEL ODHIAMBO –VS- REPUBLIC HCCRA NO. 280 OF 2014 NAKURU** where the court stated that the rapture of the hymen was not conclusive to prove defilement.

6. The prosecution submitted that there was no evidence that the appellant's constitutional rights were violated. He was provided with witness statements. On the issue of defective charge the prosecution submitted that the appellant was charged with a known offence. On the issue of lack of medical examination the prosecution submitted that under S. 36 (1) there is no compulsion on the trial court to order medical examination of the accused person. It is upto the court to determine the need for such examination.

7. This being the first appeal this court is obligated to carefully re-examine and re-evaluate the evidence tendered in the trial court and to reach its own finding on the matter. Accordingly therefore, a review of evidence is necessary.

8. To begin with PW2 was the complainant. She was said to be mentally challenged. PW2 gave evidence stating that they lived at the market. She knew the accused person by name. The accused person had done bad manners to her. On clarification she said bad manners is rape. The accused had gone to their house and asked for water. She gave him water. She was with Abu, PW3 in the house. After drinking water the accused asked her to step out of the house. Outside they talked and the accused took her to the bathroom and removed her clothes, raped her and gave her Sh. 10/=. She then took a bath. Accused warned her against telling anybody about the incident. That was the first time accused ever did that to her. She was crying because the experience was painful. The complainant did not tell PW3 about what had happened.

The PW2 testimony is corroborated by PW3 who was with the complainant. PW3 is a boy aged 9. The court conducted a *Voire Dire* and established that the boy did not understand the nature of an oath but understood the need to tell the truth. He gave a sworn testimony, stating that he knew the accused who had come for water. After he was given water he went into the bathroom with complainant. Accused later on came out of the bathroom and told him not to tell anybody what had happened. But he told his grandmother PW1 who is also the mother of the complainant.

9. PW4 was a clinical officer at Butere County Hospital. He had prepared a P3 form after relying on treatment notes prepared by his colleague **Faris Achango** who he had worked with and whose signature and handwriting he knew. He had examined the complainant on 4.10.2017. The complainant was mentally challenged but explained that she had been sexually assaulted by a neighbour on 2.10.17 at Shirotsa Sub-location. She had bruises on the vagina and the hymen was freshly broken. Pus cells were found in her urine specimen and red blood cells in the high vaginal swab. The witness made a finding of defilement and produced the treatment notes as P.Exhibit No. 2, the PRC as P.Exhibit and P3 form as exhibit 3. The witness did not know who defiled the complainant.

10. PW5 was the investigations officer who testified that she received the complainant and her mother. She testified that the defilement took place inside a bathroom. On cross-examination PW5 stated that the accused was violent at the time of arrest. The accused was not taken for examination because several days had passed after the alleged rape.

11. PW1 was the mother of the complainant. She produced the complainant's Birth Certificate. Her testimony corroborated that of PW2. Her daughter has special needs. She reported the matter to the police.

12. In his testimony the accused said that he is a tomato seller. On 2.10.2017 he was at work as usual and returned home at 6 p.m. He denied the offence. He stated that there is no medical evidence that he had committed the offence.

The Determination

13. A review of the evidence provides a consistent story from PW2, PW3, PW1, PW4 and PW5. That consistency was not broken by the testimony of the appellant. The appellant merely denied the narrative that he committed the crime. So it was still for the prosecution to prove the case.

14. In this case, what was required to be proved was element of rape, and secondly, who committed the rape. The medical evidence shows beyond reasonable doubt that penetration was proved and that the complainant was indeed defiled.

15. As to who did that the testimonies of PW2, PW3 are relevant. PW3 is a boy aged 9 who understood the need to tell the truth. His testimony corroborated that of PW2. Both of them were at the scene of the crime. PW1 testimony shows what was reported to her by both PW2 and PW3 and the same is consistent. PW2 and PW3 come across to this court as people whose evidence was credible and could be depended on. This court accepts their evidence as truth.

16. I have carefully considered the grounds of appeal. There is no evidence that the appellant's constitutional right to fair trial was abrogated. There is no evidence of defective charge sheet. Further, there was no need to subject the appellant to medical examination since the appellant was identified by the complainant by name and recognition as someone she knew. PW3 also recognized the appellant by name as someone he knew. It is the finding of this court that the learned trial Magistrate was in order to disregard the defence of the appellant because the same was a mere defence. It is the finding of this court that the prosecution proved its case as required by law.

17. On sentencing the minimum punishment for the offence is ten (10) years, and that is what the trial court granted. I have no reason to

interfere with that sentence.

18. The result is that the appeal herein is dismissed for lack of merit. Conviction and sentence to stay.

Right of appeal within 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

State Counsel – Mr. Ongegi

Appellant -

Court Assistant – Mr. Erick