REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 65 OF 2016

BETWEEN

SAMUEL MAINA KARANJA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

(An appeal from the original conviction an dsentence in the Principal Magistarte's Court

at Kangema Cr. Case No. 760 of 2015 delivered by Hon. D.M.Kivuti,SRM on 1st August, 2016).

1. This is a judgment in respect to the appeal as preferred by the Appellant herein against the conviction and sentence pronounced in the judgment of the learned Principal Magistrate at Kangema in criminal case no. 760 of 2015 delivered on 01.08.2016 vide a Petition of Appeal dated 08.08.2016 and later amended and filed on 23.07.2018 on the following grounds;

a. That the learned trial magistrate erred in law and fact in convicting the Appellant while the evidence on record was marred with inconsistencies, contradictions and uncorroborated hence miscarriage of justice.

b. That the learned trial magistrate erred in law and fact in engaging in extraneous matters and allowing his personal views and emotions into the proceedings and personalizing issues.

c. That the learned trial magistrate erred in law and fact in considering hypothetical evidence and proceeded to convict the Appellant in the absence of compelling evidence from the prosecution hence the miscarriage.

d. That the learned magistrate erred in law and fact in refusing to re-call the complainant for further cross-examination and deviated from the evidence adduced by the complainant as backed by her testimony in evidence in chief and cross-examination and introduced extraneous facts and assumptions.

e. That the learned trial Magistrate erred in law and in fact shifting the burden of proof to the Appellant and completely misunderstood the case that was before him, misconceived the issues and as a result came to a wrong decision hence miscarriage of justice.

Submissions

2. The Appellant submitted that the evidence adduced by the complainant did not establish the crucial ingredients of the offence of defilement particularly in respect to penetration. He pointed to the complainant's (PW1) evidence that he is not the one who broke her virginity while the main reason given by the medical officer in arriving at the conclusion of defilement was the absence of the hymen. That the breaking of the hymen must have happened when the virginity was broken which she expressly stated was done by him. Furthermore, the prosecution did not did not call any evidence to demonstrate that the Appellant and the complainant actually engaged in sexual intercourse. He thus fouled the trial magistrate for relying on hypothetical evidence in the testimony by PW1 that the Appellant used to have sexual activity with her almost daily basis.

3. The Appellants also faulted the prosecution for failing to call the complainants grandmother who he believes was a core witness in the case. He asserted that the evidence on record pointed to an organized marriage as opposed to a case of defilement. In this respect he

submitted that PW1 deliberately concealed her age from the complaint when they first met but disclosed much later into the relation. As such, he argued, he could not be faulted for having cohabited with PW1. He explained PW1was brought to his home by her grandmother and after a discussion with her she agreed to stay with him as a wife. That the complainant was not known to him and they had never met before.

4. That Appellant also submitted that the trial Court relied on extraneous issues in arriving at its impugned verdict by venturing into the alleged participation of the Appellant in the attempted Female Genital Mutilation on the complainant which was unrelated to the charges herein.

5. The Appellant also contends that the refusal by the Court to recall the complaint for further cross-examination was a violation his rights to a fair hearing. He added that the trial Court erred in shifting the burden of proof on him for convicting him on basis that he failed to tender a defence.

6. Finally, the Appellant contended that the sentence imposed on him was excessive and harsh because the reasons given for sentencing him to forty years imprisonment was that he destroyed the life of a young girl, while he pleads that he was just a victim of circumstances. He argued that his intention was to marry in the arranged marriage and settle down with his family. He pleaded with the Court to allow the appeal.

7. Learned State Counsel, Mr. Mutinda for the respondednt submitted that both the conviction and the sentence were well within the law. That the ingredients of the offence were proved to the required threshold. Furthermore, the Appellant had admitted to sexual engagement with a minor of 13 years who had no capacity to consent to marry at that age. He submitted that the age of the minor was properly established by way of a Birth Certificate. Counsel urged the Court to decline the misconceived defence of failing to inquire into the minor's age as ignorance of the law is not a defence. That in any case, the Appellant knew the minor was a school going child. Counsel asserted that the conviction was safe and invited the Court to find it to be so and dismiss the appeal.

Summary of evidence

8. The prosecution called four witnesses. **PW1 CW** was the complainant then aged 13 and was schooling at [Particulars withheld] Primary School in class 6. She narrated that she was taken to the Appellant's home by her grandmother. She had gone to her grandmother's home to visit as she always did during the school holidays. That her grandmother had asked her to get married to the Appellant and she agreed. She claimed to have stayed at the Appellant's home for two weeks during which period she alleged to have engaged in sexual activities with him nearly every day. She admitted to have not informed the Appellant of her age when they met but that she did inform him later. She later learnt that the Appellant and her grandmother were friends. She stated that she was rescued from the Appellant's home by her parents in the company of a police.

9. **PW3, Mwangi Robert** a Clinical Officer filled the P3 Form for the PW1 and made observations that her clitoris had a wound and her hymen was missing. That the PW1 had complained of being circumcised by her grandmother and of having been defiled by the Appellant.

10. **PW3, GWW** the mother to PW1 testified that PW1 was troublesome and had disappeared from her home and taken refuge at her grandmother's (the mother to PW3) house. That initially her grandmother had tried to conceal that the PW1 was at her home but later admitted. That she was supposed to continue with school from her grandmother's place but was yet to find one. That after a while the grandmother informed PW3 that PW1 had disappeared from her home and had been married to the Appellant. PW3 alerted her husband and they went to the police station to record a statement. They were accompanied by police officers to arrest the Appellant. She testified that PW1 informed her that her grandmother circumcised her after which she married her off to the Appellant.

11. **PW4 Dekow Nunoh** was the investigating officer. He summed up the evidence of the prosecution witnesses and preferred that charges against the Appellant.

12. The Appellant was put on his defence after the trial Court made a finding that a *prima facie* case had been established. In his unsworn defence he stated that he could not defend himself because the charges against him were erroneous. He stated that he did not understand the meaning of penetration and indecent act. He could also not recall where he was on the date of the offence.

Analysis and determination.

13. I have accordingly considered the evidence on record and the respective rival submissions. This is a case in which the victim PW 1 found herself in the situation due to an arranged early marriage by her grandmother and the grandmother to the Appellant. As at the time, she was a standard six pupil aged 13 years. There is therefore, no doubt as attested by the victim and further confirmed by the Appellant in this appeal that the two used to have sexual intercourse on a daily basis for the two weeks they cohabited as a husband and wife.

14. In the Appellant's submissions filed by his counsel, Mr Gori on 23rd June, 2018, the Appellant seems to be advancing the defence that he did know the age of the complainant when he took her as his wife. The complainant on the other hand in her evidence in chief testified that she did not initially inform the Appellant that she was a minor; only disclosing the same too late into their relationship.

15. Under Section 8 (5) of the Sexual Offences Act No. 3 of 2006 such a defence is available in the following words;

> "5. ***It is a defence to a charge under this section if -***
>
> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***

(b) the accused reasonably believed that the child was over the age of eighteen years".

16. In that respect it was paramount that the Appellant demonstrated that PW 1 deceived him into believing she was under the age of 18 as at the time he committed the offence. Conversely, the Appellant was required to demonstrate that he believed that PW 1 was a child below the age of 18 years when he committed the offence.

17. In the instant case, the only statement made by the Appellant is that PW1 did not inform him that she was aged 13 years. The fact is that he did not take any step toward establishing the age of PW1. It is trite on record that PW1 fled to her grandmother's home without notice. It was not until her mother PW3 insisted to PW1's grandmother that PW1 was in her house that she conceded to the same. She insisted that PW1 was in her house so that she could get her a school. When PW3 visited her mother's home she found out that PW1 had already been married off to the Appellant. Interestingly, the marriage had been arranged between PW1's grandmother and the Appellant grandmother.

18. It is clear that the Appellant could not play ignorance of the age of PW1. He agreed to take into marriage a child he ought to have known was in school. This is discerned from the fact that he did not enquire from either PW1 or PW3, both as to her age (PW1) and status in school. I would conclude in the circumstances that the defence as provided under Section 8 (5) is and was not available to the Appellant. He could not just sit and await to be brought a wife who by all means was a child and purport not to enquire as to her age and whether she was in school.

19. The Appellant's counsel too submitted that penetration was not established because PW1 disclosed that the Appellant is not the person who broke her virginity. That may be true but one undeniable fact is that for the period of two weeks he cohabited with PW1 he had sexual intercourse with her on daily. Therefore, the evidence of PW2 a Clinical Officer who filled the P3 Form was properly admitted in evidence to demonstrate the existences of penetration. In addition, PW2 testified that upon examining PW1 he confirmed that there was an attempt of female genital mutilation on PW1. This gives credence to PW1's evidence that her grandmother subjected her to female genital mutilation before she married her off to the Appellant. I therefore hold that penetration was established required by the law.

20. As regards proof of PW1's age, the same was established through the production of a Birth certificate (Exhibit 2) which showed that she was born on 27th January, 2002. Her age was therefore, properly established at 13 years as at the date of the offence.

21. Needless to state is that the prosecution discharged its burden in proofing the three elements of the offence of defilement beyond a reasonable doubt. In his brief sworn defence the Appellant stated that he could not defend himself as the offence was erroneous. He went ahead to state that he did not know what penetration meant. He also stated that he did not understand what indecent act entails. Clearly, the defence did not constitute any plausible evidence that was capable of dislodging the prosecution case. Just as the learned trial magistrate in the Court below believed in the testimony of the prosecution witness so is this Court. I accordingly hold and find that the Appellant was properly convicted for the main offence in Count 1.

22. As regards sentence, Section 8(3) of the Sexual Offences Act a person who commits an offence with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years. The Appellant was sentenced to the minimum penalty under the law. The trial Court however, made a mistake in proceeding to convict in the alternative count after convicting in the 1st Count. It is trite law that once the accused is convicted in the main count no finding on the alternative count should be made. Otherwise, the same is tantamount to double jeopardy against the accused person.

23. It is the current jurisprudence that a minimum mandatory sentence is unconstitutional. The rationale is that providing a minimum mandatory sentence denies a trial Court the discretion to impose an objective penalty based on the circumstances of the case and the mitigation an accused person offers. That is not to say that a minimum mandatory sentence cannot be imposed. But in doing so, the Court must give reasons why it confirms such a sentence. At the same time, the Court may enhance the mandatory minimum sentence if aggravating factors exist. See the decision of Court of Appeal in **Evans Wanjala Wanyonyi vs Republic (2019) EKLR** in which the Court delivered itself as follows;

> ***"On the enhanced 20 year term of imprisonment meted upon the Appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the Appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and inJared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
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> > *'In this case, the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra****), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial Court.'*

24. The aggravated factor in this case is that the Appellant defiled a girl who in school. He also did not care to know her age and whether her parents had sanctioned the relationship. I however, note that the Appellant looks relatively young but of mature age which could have concerned his grandmother that he was not getting married. He could have therefore, found himself in the circumstances for the sake of settling down in marriage. For this reason it is my view that the sentence of 20 years imprisonment was harsh and excessive. I set the same aside and substituted it with a sentence of 10 years imprisonment. The sentence shall start running from the date of arrest, 19th August, 2015.

25. In the upshot, the appeal against conviction fails but partly succeeds on sentences as delivered above**.** It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 12TH DAY OF SEPTEMBER, 2019.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;-

1. Mr. Chege h/b for Mr. Gori for the Appellant.

2. Mr. Mutinda for the Respondent.