REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPLICATION (APPEAL) NO.22 OF 2018

DAVID KIBET SANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the Hon. B. Kipyegon –(SRM)

in Kericho CM Cr. Case No.29 of 2017 delivered on 23rd March 2018)

JUDGMENT

1. This matter has been brought to this court as a Miscellaneous Criminal application, but is actually an appeal arising from Kericho CM Criminal Case No.29 of 2017, wherein the appellant was charged with defilement and in the alternative with committing an indecent act, and convicted of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment.

2. The particulars of the charge for which the appellant was convicted were that on 22nd May 2017 at [particulars withheld] sub-location in Bureti Sub-County within Kericho County unlawfully and intentionally caused his penis to penetrate the vagina of CC a child aged 13 years.

3. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

1) That he pleaded not guilty.

2) That the trial magistrate erred in law and fact by convicting him to serve 20 years imprisonment without considering that the evidence adduced by prosecution side was not enough to base conviction and sentence.

3) That the trial magistrate erred in law and fact by relying on the evidence of PW1, PW2 and PW3 without considering that the appellant was sick all through the trial.

4) That the trial magistrate erred in law and fact by determining that the case of defilement was proved beyond reasonable doubt without considering that the appellant did not ask questions during cross-examination as his low tone was not well sounding.

5) That the trial magistrate erred in law and fact by passing harsh sentence without considering that the appellant was suffering from TB and had sustained injuries from his neighbour who arrested him for nothing.

4. At the hearing of the appeal, the appellant urged this court to release him from custody as his health had greatly deteriorated. learned Prosecuting Counsel Ms. Keli opposed the appeal and stated that the proceedings before the trial court were conducted within the law; that the charge was proved to the standards required; that ill health was not a ground for release of a convict; that the sentence imposed by the trial court was the minimum provided by law; and that the appellant did not either raise the issue of assault by neighbours nor did he mitigate at the trial, though he had an opportunity to do so. Counsel concluded by submitting that the appellant cross-examined all prosecution witnesses, and cannot thus claim to be unable to proceed with the trial due to illness.

5. This being a first appeal, I have to evaluate all the evidence on record and come to my own independent inferences and conclusions – see **Okeno -vs- Republic [1972] EA 32.**

6. I have perused the proceedings and the judgment of the trial court. I note that the trial court file and all other documents refer to David

Kibet Sang, but the covering file refers to David Kibet Cheruiyot. I presume that the two names refer to one and the same person.

7. I will start by agreeing with the submissions of learned Prosecuting Counsel that ill health, *per se* is not a ground for a convict not to be imprisoned. However, each case has to be considered on its own merits. Sometimes the prison authorities might not be able to provide specialized medical treatment required; or the nature of ailment might not be consonant with keeping the convict with other prisoners. In my view, in such cases the court may consider alternative punishment to imprisonment. In our present case, I note that the prison Resident Clinical Officer, Rose Ateko (Sgt) has filed a report dated 7/3/2019 stating that the appellant's health continued to deteriorate. However, the report does not state that he is a danger to other prisoners, nor does it give further details of his ailment. This medical report cannot thus be a ground for consideration with regard to review of sentence. In any case, the Sexual Offences Act provides for minimum sentences where a trial and appellate court has no choice but to impose such minimum sentence. The sentence cannot be disturbed.

8. Having considered the evidence on record, however, in my view the conviction was unsafe considering that the prosecution were required to prove their case against the appellant beyond any reasonable doubt. The only evidence against the appellant is that of the complainant who testified as PW2, and is said to be mentally unstable. She was supported by PW7 RC who said that she took her to the appellant's house. However, this witness did not say why the complainant was found in her house 3 days after she took her from home. She also did not say why she did not report the incident to anyone. There is also no evidence that she was the person who informed the relatives of the victim (PW2) about the incident. I also note that the investigating officer Cpl. Janet Tarus (PW5) stated that a minor – witness, feared to record a statement, and PW7 was actually called to testify after the testimony of the investigating officer. In all probability therefore, PW7 was the witness who initially feared to record a statement. She cannot thus be believed to be a truthful and reliable witness.

9. In addition to the above, the Clinical Officer PW6 George Ouma on examining the victim (PW2) found no sign of recent sexual intercourse. Though the hymen was broken, this was not shown to be a recent occurrence. In my view also, there are various reasons why the hymen can be broken. Even if it was through sexual activity, it cannot thus be associated with the alleged recent incident and by the appellant. The age of the complainant was also not proved as no-one said when she was born. The P3 form merely, estimated the age according to unverified information which was not proof of age, which being an essential ingredient of the offence of defilement, where a victim should be less than 18 years old, the failure of the prosecution to establish the age of the victim (complainant) was fatal to their case, and the conviction cannot be sustained.

10. The learned magistrate also mis-directed himself by shifting the burden of proof on the appellant contrary to section 107 of the Evidence Act (cap.80). This shift was obvious under paragraph 19 and 20 of the judgment. In those paragraphs the learned magistrate stated that the accused had nothing to offer in reply to the prosecution evidence, and giving a plausible reply to the other co-existing cogent incriminating circumstances, while the record showed that he cross-examined all prosecution witnesses and tendered his defence that the case was a frame up.

11. In my view, therefore the conviction herein against the appellant is not safe and cannot be sustained. I thus allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 16th day of October 2019.

George Dulu

JUDGE