REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.7 OF 2018

AMANI KAGOHU KATANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Miss. Sombo for the DPP

Appellant in person

JUDGEMENT

The Appellant was charged with the offence of attempted defilement contrary to Section 9(1) as ready with section 9(2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence alleged that the Appellant attempted to defile K.B a minor aged 13 years by grabbing and straggling her down. These particulars were read to the Appellant and explained to him in a language he understood (Kiswahili) and a plea of not guilty was entered. After a full trial process, the accused was found guilty, convicted and sentenced to ten years imprisonment.

Being aggrieved by the trial court's finding, the Appellant displayed his dissatisfaction by filing this appeal citing five grounds. The grounds are that the conviction of 10 years imprisonment is bad in law, that he was convicted on the basis of trumped up charges, that essential prosecution witnesses were not called, that his arrest did not have any connection with the offence and that his reliable defence was ignored by the Learned Magistrate.

This being a first appeal the guiding principles in **Okeno v Republic EA 32** point out that this court is entitled to evaluate the evidence of the trial court as a whole and make up its own findings. When the question turns on the manner and demeanor the appellate court must be guided by the impression made by the trial court by virtue of its advantage of observing and seeking witnesses. These principles were as earlier followed in the case of **(Pandya v Republic 1957 EA 336)**.

The Law, Analysis and determination

Whether the Appellant was arrested in connection to the alleged attempted defilement.

The Appellant's contention is that the learned trial magistrate failed to consider that his arrest was not well established to have had any connection with the present case. In his view, this prejudiced him. The Counsel for the Respondent opposed this contention. It referred to the evidence of PW1 who stated that after the incident she reported the matter to Bamba Police Station and the Appellant was later arrested as he had run away after the fact. I have noted that this evidence was corroborated by PW2 and PW3. PW1 also state that the Appellant started by trying to seduce her and when the minor declined the advances, he then resorted to applying force.

The Learned Trial Magistrate in her judgement made a finding that the evidence of the prosecution witnesses as regard whether Appellant attempted to defile the complainant particularly that of PW1, Pw2 and PW3 was consistent and corroborative. I'm in agreement with the Respondents that this evidence is also corroborated by the evidence of injuries sustained by the complainant e.g. injuries on the elbow and leg during the struggle as adduced by PW4, Dr. Hashim Suleiman. In view of the foregoing evidence, the argument canvassed by the Appellant that he was not arrested in connection with the offence of attempted defilement cannot hold water. The same also answers to the Appellant's contention that he was not positively identified as the perpetrator of the offence preferred against him. This a matter of recognition as opposed to identification of a stranger since the Appellant was known to the mother of the Complainant before the offence was committed. Hence the argument by the Appellant that the police ought to have conducted a parade can not be able to impeach the totality of the prosecution evidence on record.

Whether essential prosecution witnesses who were not called prejudiced the appellant case

The Appellant's contention is that the trial court failed consider that some essential witnesses some as the person who took the cattle to the owner and the owner of the cattle as well as the investigating officer were not called to testify as part of prosecution witnesses hence the finding of the court was bad in law. This issue was correctly addressed by the trial court at page 33 lines 3 to 8 as referred to by the Respondent herein. The Learned Trial Magistrate while relying on the case of **Daniel Moseti Muremi vs R, CRA. No. 8 of 2014** stated as follows:

> ***"In applying the said principle in this case, I find that failure by the prosecution to call investigating officer will not invalidate this trial."***

This is because going by Section 143 of the Evidence Act Cap, 80 the law envisages that no particular number of witnesses in the absence of any provision of the law to the contrary is required for proof of any facts. In **Adem Dahir Nuno v Republic (2015) eKLR,** as correctly cited by the counsel for the Respondent, the court addressed the issue of the failure by the investigating officer to testifying as follows:

> ***"The Appellant has complained that the investigating officer was not called to testify in court. Even if this was true, in my view the failure of an investigating officer to testify in court is not fatal to a conviction. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction."***

In the instant case, it was on the basis of consistent and corroborative evidence of the prosecution witnesses as stated by in the trial court judgement at page 33 lines 10 and 11. Thus, in view of the foregoing case law and the totality of the evidence on record, this court finds that the there was ample proof to sustain a conviction of the Appellant on charges of attempted defilement. The Appellant's contention on this limb fails.

Whether the defence raised by the Appellant was not taken into account.

The Appellant did not offer any defence whatsoever when the matter came up for defence hearing on the 26th of March 2015. On page 28 of the trial proceeding, the Appellant elected to remain silent, he told the court that he did not have any witnesses and prayed for the case closed.

Whether the sentence on ten years imprisonment was bad in law

On whether the sentence of ten years imprisonment was bad in law, I'm in agreement with the prosecution's position that the prescribed sentence for the offence of Attempted defilement in terms of Section 9(2) of the Sexual Offences Act is a minimum of ten years imprisonment. Furthermore, the Sentencing Policy Guidelines under clause 7.17 stipulate that where the law provides for mandatory minimum sentences, the court is bound by those provisions and must not impose a sentence lower than what is prescribed. Thus, in my view the Learned Trial Magistrate was only dispensing his duty and had no option to mete out any other sentence. This owes to the fact that mandatory minimum sentences do not allow judges to take into account aggravating and mitigating circumstances of each individual case.

However, the Supreme Court of Kenya in **Francis Karioko Muruatetu v Republic, (2017) eKLR 145193 (SC)**, seems to be taking a new trajectory when it comes to sentencing in the Kenyan Criminal Justice System. In that case the highest court of the land observed as under:

> ***"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

The Appex Court in arriving to the foregoing principle cited with approval the Indian Case of **Mithu v State of Runjab (1980) A.I.R 1978. 22, 30** as well as the Kenyan Court of Appeal decision of **Godfrey Mutiso v Republic (2010) eKLR 69838 (HC)**. In the former case, the Supreme Court of India held that a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and unjust. And in the latter decision, the Honorable Judges of Appeal asserted obita that the process of sentencing a person is part of the trial and this is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It was also opined that the court in such circumstances is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases and the Court's view was that the same compromises the principle of fair trial. In my view, Courts may now have the requisite jurisdiction to mete sentences on the bases of individual circumstances of each case. The appellant appeal against sentence is to be premised on the principles in the case of **Ogola s/o Owora vs R [1954] 24 EACA 70,** where the court held that ***"an appellate court has a power to interfere with any sentence imposed by the trial court if it is evident that the trial court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or low as to amount to a miscarriage of justice."***

On my own independent consideration of the evidence and the findings of the lower court with regard to conviction and the nature of the offence committed by the appellant the sentence passed was lawful and I find no grounds to interfere with it at this stage.

Accordingly, the appeal on both conviction and sentence is ordered to be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF NOVEMBER 2019.

R. NYAKUNDI

JUDGE