REPUBLIC OF KENYA

CRIMINAL APPEAL NO. 80 OF 2017

B E T W E E N:

STEPHEN MWANTHI KABANZU ....APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Being an Appeal from the Decision of Hon G.K. Kimanga Resident Magistrate on 14th July 2017 in Criminal Case No 2 of 2016)

J U D G M E N T

1. The Appellant before the Court filed his Petition of Appeal on 2nd October 2017. The Petition states that it is an appeal against both the conviction and sentence passes by the Magistrate in the PM's Court in Taveta on 14th July 2017 in ***Criminal Case No 2 of 2016***. In the circumstances, the time for filing an appeal had lapsed. The Appellant also filed a Notice of Motion application for leave to lodge the Appeal out of time. The leave was granted by Hon Lady Justice J. Kamau on 2nd November 2017.

2. The Grounds of Appeal that accompany the Petition state:

> 1. *I pleaded not guilty to the charges*
>
> 2. *PW5 who is said that he is the one who caught the complainant at my house and was summoned as key eye witness never appeared before Court for cross*-examination
>
> 3. Rose Masila who caught the accused never appeared before court for cross-examination to prove before court the reason for the arrest.
>
> 4. The doctor who appeared before court proved that there were no injuries found in the inner parts of the complainant.
>
> 5. Your honour ! am the bread sole winner of my family after my parents demise
>
> 6. Supplementary grounds of appeals to follow when and if furnished with a certified true copy of the proceedings of this case.
>
> 7. In the view of circumstance of this case, the custodial sentence of 20 years is harsh severe and manifest excessive punishment.
>
> 8. Your honour I beg your honourable court to reduce the conviction give option of fine or order retrial or whichever your honourable court may deem fit.

9. That in the event of my humble appeal may if finds merits. I would wish to be allowed to be present during the hearing of my appeal.

3. On 2nd November 2017 Hon Lady Justice J. Kamau granted the Appellant leave to file his appeal out of time. It was deemed to have been duly filed on that day. The Appeal was admitted for hearing pursuant to Section 352 of the Criminal Procedure Code by the Learned Judge on 15th November 2017. The Appellant was then granted leave to file written submissions on 6th February 2018 and Further submissions on 7th March 2018. The Respondent was directed to file its written submissions in response on 28th February 2018. The Matter was thereafter listed for hearing during service week between 5th and 9th March 2018 but that did not take place.

4. TheAppellant also applied to amend his Grounds of Appeal. The Amended Grounds are:

(1) That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that the appellant was not assigned an advocate by the state as required by the law since I am a layman in law

(2) That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that the BURDEN OF PROOF WAS NOT DISCHARGED BEYOND REASONABLE DOUBT

(3) That the learned him trial magistrate erred in both law and fact in not considering that I the appellant was a first offender hence deserved an alternative sentence.

(4) That the learned trial magistrate erred in both law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit out to have been given to me.

5. The Appellant was Charged with:

(1) *Defilement contrary to Section 8(1) as Read with Section 8(3) of the Sexual Offences Act No. 3 of 2006*. The Particulars of the Offence are that *STEPHEN MWANTHI KABANZU: On the 17th day of September 2016 at around 1200 hrs at Kaza Moyo Village within Taita-Taveta County, unlawfully and intentionally you caused your penis to penetrate the vagina of Mwajuma Paul a child aged 14 years*

(2) The Alternative Charge was: Committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The Particulars of that Offence are that STEPHEN MWANTHI KABANZU On the 17th day of September 2016 at around 1200 hours at Kazamoyo Village within Taita Taveta County unlawfully and intentionally penetrated the vagina of Mwajuma Paul a child aged 14 years with your penis.

(3) The Second Count on the Charge Sheet was "Infringing a Child's Right to Parental Care Contrary to Section 6(1) as read with Section 20 of the Children's Act No. 8 of 2001. The Particulars of that Offence were STEPHEN MWANTHI KABAZU: On diverse dates between 10th August 2016 and 21st September 2016 at Kaza Moyo Village within Taita Taveta County, Willfully denied Mwajuma Paul a child aged 14 years the right to live with and be cared for by her parents by harbouring the said Mwajuma Paul in your house.

6. In his Written Submissions the Appellant argues that he did not receive a fair trial because he was not assigned an advocate and therefore the trial was in breach of ***Article 50(2) CoK 2010***. He also argues that there were contradictions in the Prosecution evidence and the Court of Appeal said that "contradicted evidence is unreliable ***Augustino Njoroge vs R CA No 185/82***. The inconsistencies he identifies and lists are:

(i) The Complainant says she was told to stay as his brother's wife (by the husband) but she said she did not know Mutia and PW-3 said that when they came to take the child, we found her with the children, you were not there.

(ii) PW-3's evidence where he said he was going to play with Stephen and heard someone call Mwajuma was inconsistent. It does not support the charge

(iii) That Mwajuma said on an earlier occasion that she was living with Mutia

(iv) There were no bruises and no spermatozoa found

(v) People can frame others for sexual offences ***Maina v Republic*** ***1970 EA CA 370***.

7. The Appellant argues that "it is really dangerous because to convict on evidence of a woman or girl alone. It is dangerous because human experience has shown that girls and woman sometimes tell an entire false story which is very easy to falsify. The Appellant states that no medical checks were done on him to show he was the assailant as required by the authority of ***Anthony Kauri Ndungu v R Appeal No 132 of 2008*** (2013). He also complains that Bernard and mamake Kibuba did not appear before the Court. He feels the evidence for the Defence created a reasonable doubt which was not taken into account.

8. The Appellant also claims that his sentence was too harsh bearing in mind he is a layman. The Appellant has also file supplemental submissions where he claims the age of the Child was not proved. The Appellant complains that he did not undergo any medical assessment to confirm that he was the one that infected the child with a sexually transmitted disease. He denies that defilement was proved. He also argues that the Court should have inquired into the identity of the person who called out Mwajuma's name.

9. The Written Submissions filed on behalf of the Respondent were filed on 27th February 2018. The Respondent argues that:

(1) The minor was 14 years old at the time of the offence and the age of the minor was confirmed at the time of the trial as 15 years. This was provided by the oral evidence of PW-1 and PW-3

(2) The medical evidence produced proved conclusively that an act of defilement had occurred – the hymen was broken, she had a sexually transmitted disease and she was seen to have had intercourse habitually.

(3) The complainant was found in the Appellant's home when she was rescued

(4) The Assistant Chief PW-5 confirmed that the Complainant had gone missing on a previous occasion and was found in the Appellant's home. She was said to be the brother's wife but said that only the Appellant had intercourse with her.

(5) The Defence comprised an unsworn statement.

(6) The sentence is in keeping with the sentencing regime set out in ***Section 8(3)*** of the Sexual Offences Act

10. The Appellant also complains that he was not provided with an Advocate as provided under ***Article 48***. It is well established that at present, that is a progressive right (***Criminal Appeal No 2 of 2014 Nairobi***). By the same token the Appellant did not apply for an advocate.

11. The Appellant was found guilty with both Counts I and II. The alternative charge was abandoned. The Appellant was Sentenced to 20 years imprisonment on Court 1 and one year only for Count 2 with both sentences to run concurrently.

12. The Appeal challenges the conviction for the first count but not the second count. This Court is hearing the first Appeal in this matter and therefore the duty on the Court is to re-consider and re-evaluate the evidence presented before the lower court, with the handicap of not having heard the witnesses first hand.

13. The facts of the two counts are inextricably linked however the offences are not of the same type, nor necessarily in the same sequence of events, although one could have been used to commit the other. Therefore, dealing first with the second charge – which is not disputed, the complainant a child aged 14 who was reported to be missing. The age of the child is proved by her own evidence and corroborated by the evidence of her parent and the medical report which records her age. The Child was found about a month later. The Child was found in premises that were owned and occupied by the Appellant and members of his family. That is not denied. The fact that the Premises were the home of the Appellant was put into evidence by PW-5 the assistant chief for the area. That was not denied. PW-5 said that in the course of her investigation the Parents said the Child was kidnapped on her way to the river. She also said that she had dealt with a similar incident a month prior. At that time when the Parents complained they were told – by the Accused that the Complainant had married his brother Mutia. Mutia was summoned and did not attend. He was away and not resident in the premises. On the second occasion the Appellant again took the Child and held her captive in his home. PW-5 told the Court that the conclusion of her investigations was that Stephen had hidden the Complainant under the bed and had sex with her on several occasions. The Complainant was found by chance when someone heard her name being called out by Children in the Appellant's household. Therefore, prior to the commission of the offences that the Accused was charged with and convicted, the same child was abducted and was again found in his home. He was warned by the Sub-Chief as to the criminality of his conduct and he proceeded to do the same again, but this time with additional offences and assaults on the Child.

14. Moving onto the first count. It is clear from the foregoing that the Complainant, a child was found hidden in the home of the Appellant. That has not been denied. What is denied is that she is a child. That has been proved to the satisfaction of the Court by a number of sources including the Child and her medical records. Next the Court must consider whether there was defilement. Again the oral evidence of the Child was that she was defiled. The Trial Court conducted a voire dire and found she could understand the implications of sworn testimony and was allowed to give sworn evidence. Nevertheless, in view of her age, that evidence could be considered circumstantial. It is corroborated by the medical evidence that the complainant was defiled. That was demonstrated by the medical indicators, namely the absence of the hymen and the presence of a sexually transmitted infection. The Court then must satisfy itself of the identity of the complainant's attacker. The Complainant gave evidence that it was the Appellant. The Appellant had shown his interest in the Complainant by way of her earlier abduction and confinement in his home. That of itself would be circumstantial but it is corroborated by the evidence of the Complainant. The Appellant attempted to place blame on his brother but that brother was nowhere in the vicinity. Further, the Complainant had been kept hidden for a number of days and the medical report records that intercourse had become habitual, which is consistent with her captivity by her abductor who was the Appellant.

15. The arguments now put forward are that (1) there was no seminal fluid and (2) all women and girls lie. In the circumstances of this case, that comment is more than offensive. In any event none of the defences now being put forward were raised at the time of the trial. They are a mere afterthought.

16. In the circumstances, the Appeal against conviction must fail. In relation to sentence, the Appellant has not put forward any grounds for interfering with the sentence. In fact, the sentence for Count 1 is within the norm for defilement. However, in relation to the Second Count which is in effect the abduction and imprisonment of a child, the Learned Trial Magistrate handed down a sentence of twelve months. No reasons are given for such a lenient sentence. In the circumstances of the case, that sentence is considered unduly lenient and not consistent with the seriousness of the offence. Therefore, the sentence for the second count is replaced with a sentence of 5 years. Both sentences to run consecutively. This Court deems that is appropriate in the circumstances of this case, because the two offences are different in nature but equally serious.

17. Conviction to be entered into the Sexual Offences Register.

18. Leave to Appeal within 14 days.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered dated and signed at Voi this the 11TH day of November 2019

In the Presence of:

Court Assistant: Josephat Mavu

Appellant in Person

Respondent: Ms Mukangu