REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 31 OF 2016

WYCLIFFE OMBASO CHWEYA.....APPELLANT

-vs-

THE REPUBLIC.....RESPONDENT

(Being an appeal against the Judgement of Hon. J. Macharia – PM Keroka dated and delivered

on the 17th day of April 2013 in the original Keroka Principal Magistrate's Court Criminal Case No. 496 of 2012)

JUDGEMENT

On **17th April 2013** the appellant was **sentenced to fifteen (15) years imprisonment** for the offence of **defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act.**

The particulars of the charge were that on diverse dates between 8th and 11th April 2012 in Masaba South District within Kisii County he intentionally caused his penis to penetrate the vagina of RKM a child aged 16 years.

Being aggrieved he filed this appeal against the conviction and the sentence. The gist of the appeal is that his right to a fair trial was violated and that the charge against him was not proved beyond reasonable doubt. The appeal was canvassed both through written submissions and orally.

Through his written submissions, the appellant asserted that the offence was not proved beyond reasonable doubt and the evidence adduced cannot sustain the charge. He contended that the complainant's testimony was full of untruths and wondered how she could have been seven weeks pregnant yet her evidence was that she left his house a day after she went there. He also wondered why it was alleged her whereabouts were unknown yet his house was barely 100 metres from her home. He contended that that was a distance where someone could have seen that the complainant was in his house and that the complainant's mother lied she did not know him.

On the right to a fair trial he submitted that he was not supplied with witness statements and that his application for a retrial was rejected. He urged this court to also note that the clinical officer who filled the complainant's P3 Form was based at Kijauri but not at Masimba where the complainant was treated. He urged this court to consider his fate noting that he has been in custody since the year 2012.

The appeal was vehemently opposed with learned prosecution counsel submitting that the charge was proved beyond reasonable doubt. She urged this court to affirm the conviction but left the sentence to the court in view of the decision of the Supreme Court on the constitutionality of mandatory minimum sentences.

As the first appellate court, I have considered and re-evaluated the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence. What the prosecution required to prove in the case against the appellant was firstly; **that the complainant was a child and her age for purposes of the sentence. Secondly, that there was penetration and thirdly that the appellant was the perpetrator.**

The complainant testified that she was born in 1996 hence sixteen years old when this offence was committed. This was confirmed by her mother PB (Pw III) as well as by Dr. Joel Ongaro (Pw1). I am satisfied therefore that **her age was proved beyond reasonable doubt** as was stated in the case of **Nahayo Syprian v Republic [2017] eKLR: -**

> ***"The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptisimal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court.".***

On the issue of **penetration,** the complainant testified that she left her home on 8th April 2012 at about 3pm after disagreeing with her mother for going home late. She stated that she went to the accused's home about 100 metres away and spent the night with him. She stated that they were friends and they had been having sex. After spending the night with him and having sex she went back home the next day. However, her mother told the court that the complainant was missing for three days. This was also the testimony of Paul Nyamache (Pw II), an Assistant Chief whose help the complainant's mother had sought in tracing her. The Assistant Chief told the court that when the complainant returned home he questioned her and she opened up and told him that she was with the appellant whereupon he referred her to the doctor for examination. The matter was at the same time reported to Ramasha Police Station and the accused was arrested.

Dr. Joel Ongaro (Pw1) confirmed that he examined the complainant on 13th April 2012 and completed her P3 Form. He stated that her vagina and cervix were okay but the hymen was broken. His most significant however was that there was penetration and ejaculation. He also noted that she was pregnant.

The evidence of a victim of a sexual offence does not require corroboration but in this case there is more than sufficient evidence to corroborate that of the complainant. Her mother (PwIII) and the Assistant Chief (PwII) confirmed that she went missing from home for three days. They also corroborated her evidence that upon her return she disclosed that she had been with the appellant. Dr. Ongaro (Pw1) testified that when he examined her genitalia there was trace (meaning presence) of sperm. In the P3 Form he noted that there was penetration and ejaculation. The complainant testified that she had sex with the appellant during the period she had run away from home and that explains the presence of sperm in her genitalia. **I am satisfied therefore that penetration was proved beyond reasonable doubt.**

I am also **satisfied that the identity of the appellant as the perpetrator of the offence was proved beyond reasonable doubt.** The complainant knew the appellant well as they had been having relations for a long time albeit against the law as she was a child. Indeed, the complainant was already seven weeks pregnant which confirms they had been having relations for some time. The contention that the appellant's house was only 100metres away yet this had not been detected does not offer any rebuttal to the prosecution's case. I believed the complainant and as I have stated even though the law does not require corroboration in these kind of offences, her evidence was corroborated by other material evidence.

On the issue of fair trial, the record indicates that on 7th May 2012 the appellant sought and obtained an order to be supplied with witness statements and that on 5th June 2012 the appellant indicated his preparedness to proceed with the trial without raising the issue of statements an indication that either the same were supplied or that he waived his right to the same. It is only much later on 24th August 2012 that he brought up the issue again. I consider this to be mischievous as he should not have indicated he was ready to proceed if he did not have the statements. My finding based on the record is that it is not correct that his right to a fair trial was violated. The appeal on conviction has no merit and it is dismissed and the conviction affirmed.

On the sentence, the courts are now moving away from mandatory minimum sentences the same having been declared unconstitutional by the Supreme Court in **Francis Muratetu & another v Republic [2017] eKLR**. As the appellant is entitled to equal protection of the law, I can now sentence him based on the peculiar circumstances of his case, his antecedents and mitigation. **Accordingly, the sentence of imprisonment for 15 years is substituted with one for ten (10) years** noting that he was a first offender and also that he had been in remand custody for a whole year before he was sentenced. The sentence shall run from the date of conviction by the lower court. The appeal is otherwise dismissed.

Signed, dated and delivered in Nyamira this 21st day of November 2019.

E. N. MAINA

JUDGE