REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CRIMINAL APPEAL NO. 56 OF 2019

WELDON KIRING.....APPELLANT

VERSUS

REPUBLIC through ODPP.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM dated 22nd March, 2019 at the Principal Magistrate's Court at Kilgoris in Sexual Offence Case No. 40 of 2018)

JUDGMENT

1. The appellant was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 15/9/2018 in Transmara West Sub-County, within Narok County in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of ECT, a child aged 10 years.

2. He was tried and convicted and sentenced to serve 20 years imprisonment.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal. He raised grounds;

i. That the learned trial magistrate erred both in law and fact in convicting the appellant to serve 20 years imprisonment by failing to consider and appreciate that the prosecution was riddled with contradictions.

ii. That the learned trial magistrate erred both in law and fact by failing to accord the appellant the right of a fair trial.

iii. That the trial learned magistrate erred both in law and fact by failing to explain to the appellant the right of legal representation.

iv. That the trial learned magistrate faulted both in law and fact by failing to consider and appreciate that the evidence on record when carefully evaluated and analysed was not enough to sustain a conviction.

v. That the learned trial magistrate misdirected himself in both law and fact by failing to consider the prosecution case was a scheme hatched out to fix the appellant on what he was not complexity(sic).

vi. That the learned trial magistrate erred both in law and fact by failing to objectively address the applicant's mitigation as well as the defence preferred thereby meting a harsh sentence.

vii. That the learned trial magistrate erred both in law and fact by relying on unsatisfactory evidence of age which was not proved beyond reasonable doubt which was extremely unsafe.

viii. That the learned trial magistrate faulted both in law and fact when he miserably based the conviction on a proud make up evidence which was blatantly conspired by the prosecution to fix the appellant to a hideous crime in question.

ix. That the learned trial magistrate once again faulted both in law and fact when he maliciously accepted unreasonable and highly doubtful evidence adduced in court by the prosecution to sustain a conviction.

4. The appellant in canvassing the appeal relied on his written submissions. The gist of his submissions is that the conviction was erroneous as it was based on insufficient evidence. The age of the complainant was not proved and this was unsafe. He urges that his mitigation was not considered leading to a harsh sentence.

5. In response **Mr. Otieno for the State** submitted that the appellant was identified as one of the two persons who chased the complainant when she was with PW 2. The two assailants caught up with her and defiled her. She knew the appellant and there was enough moonlight to enable her see the appellant. Her evidence was corroborated by PW 2.

6. It is urged that PW 2 also knew the appellant and identified him. PW 2 was able to escape leaving the appellant and another with the complainant.

7. It is further submitted that PW 6 confirmed that there was penetration of the victim.

8. On sentence, it is submitted that the trial magistrate exercised discretion in meting out the sentence of 20 years imprisonment. The victim was a child.

9. This being a 1st appellate court I am enjoined in law to make an evaluation of the evidence and to make my independent findings. I am mindful that I never saw neither heard the witnesses and I give due allowance in that regard (**Okeno –Vs- Republic [1972]EA 32**).

10. A brief summary of the evidence will go a long way in aiding this process.

11. PW 1 EC who stated she was 10 years old was taken through a *"voire dire"* examination and the court found her competent to be sworn. Her evidence is that she was on her way home while in company of her sister F when she was chased by the appellant and his friends. One Gilbert got hold of her. The sister managed to escape.

12. The appellant joined Gilbert, held PW 1's mouth, stepped on her leg and both the appellant and Gilbert defiled her in turns. They both penetrated her. They tore her clothes/skirt and removed her underwear. They disappeared after. The father to PW 1 came to the scene. Matter was reported to police and PW 1 was taken to Lolgorian hospital where she was treated.

13. PW 2 stated that she was present with PW 1 when the appellant and Gilbert chased them. The assailants got hold of PW 1 but PW 2 managed to run away home and report the incident to their father.

14. PW 6 produced a P3 form filled upon examination of the victim (PW 1). The findings were that the victim had been defiled.

15. The appellant gave an unsworn statement and called no witness. He stated he knew nothing about the matter. The father to the complainant used to feed him after circumcision. The appellant thought the father wanted him (appellant) to pay him the debt.

16. Of determination in this appeal is whether based on the evidence the conviction was safe. Am also to determine whether the sentence was harsh and excessive.

17. PW 1 and PW 2 have testified that they were chased by two persons, the appellant and another known as Gilbert. The two were known to PW 1 and PW 2. PW 2 managed to escape leaving PW 1 captive of the appellant and another. PW 1 states she was defiled by the two. The medical report produced confirms defilement. There is evidence of a torn skirt that was produced in court. There is credible evidence that PW 1 was defiled.

18. Was the appellant involved in the commission of the offence? There is the evidence of PW 1 and PW 2 who testify that they knew the appellant and his accomplice before. There was moonlight. In his judgment at page 18, the learned trial magistrate stated;

> *"The next issue for determination is whether accused herein was properly identified. The minor stated that she knew accused person and his accomplice Gilbert before and that she was able to see them very well as there was moonlight …..…"*

19. It is clear from the record that the trial magistrate addressed the issue of identification of the appellant and was satisfied that there was positive identification. I find no ground to fault his finding.

20. In our instant appeal, we have evidence of recognition of the appellant. The victim spent some considerable time with her assailants, persons she knew before. The way to approach evidence of visual identification was succinctly stated by ***Widgery, C.J in R –Vs- Turnbull [1976]3 ALL ER 549 at page 552*** where he said;

> *"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

21. I have evaluated the evidence on record and I reach the finding that the conditions existent at the time of the commission of the offence were favourable for a positive identification, indeed recognition of the appellant and his accomplice.

22. Thus I find no reason to interfere with the finding of the trial court in so far as the conviction is concerned.

23. As regards sentence, the appellant was sentenced to 20 years imprisonment. **Section 10** of the **Sexual Offences Act** provides;

> **S 10** *"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be*

enhanced to imprisonment for life."

24. Noting the age of the victim and the provision of **Section 10** of the **Sexual Offences Act** which provides for a sentence that may be enhanced to life imprisonment, I find the sentence meted out lawful and appropriate.

25. With the result that the appeal herein is dismissed.

Dated and delivered at Kisii this 4th day of December 2019.

A.K NDUNG'U

JUDGE