REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 128 OF 2017

KIMULI MUNYAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the conviction and sentence of ***Hon. Gilbert Shikwe (Senior Resident Magistrate)*** *in* ***Kithimani Principal Magistrate's Court Criminal Case number 52 of 2016 (S.O.)*** *delivered on 12th September, 2017*

JUDGEMENT

1. The Appellant herein **KIMULI MUNYAO** had been charged before the Principal Magistrate's Court Kithimani with an offence of Sexual Assault contrary to Section 5(1)(a)(1)(2) of the Sexual offences Act No.3 of 2006. The particulars were that on the 9th day of October, 2016 in Kithimani location, Yatta Sub – County unlawful used his fingers to penetrate the vagina of *M M* a child aged 4 years. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars being that on the 9th day of October, 2016 in Kithimani Location, Yatta Sub-county within Machakos County, intentionally touched the vagina of *M M* a child aged 4 years with his fingers.

2. The Appellant was taken through a full trial and eventually convicted on the principal charge of sexual assault and sentenced to ten (10) years imprisonment. He was aggrieved by the said conviction and sentence and raised the following grounds of appeal namely:-

> ***(a) That the Honourable trial magistrate erred in matters of law and fact by holding that the case against him was proved beyond reasonable doubt whereas the evidence did not prove penile penetration of the complainant's genitalia.***
>
> ***(b) That the Honouralbe trial magistrate erred in matters of law and fact by failing to find that he had not been positively identified as the perpetrator of the crime.***
>
> ***(c) That the Honourable court erred in matters of law and fact by failing to find that the medical examination report was tainted by inconsistencies.***
>
> ***(d) That the honourable trial magistrate erred in matters of law and fact by fact by failing to find that the prosecution's case was tainted by contradictions.***

3. This being a first appeal, the duty of this court is to re-evaluate and re-assess the evidence afresh and come to its own independent conclusion bearing in mind that it had no opportunity of seeing or hearing the witnesses testify but to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32).**

4. ***M M*** **(PW.1)** was the complainant then aged about 4 years and who testified and stated that she was at the house of the Appellant when he got hold of her and removed her clothes and inserted his finger into her vagina three times. She later informed her mother who escorted her to hospital.

5. **R K PW.2** was the complainant's brother aged about 10 years old and in class four. He stated that he had accompanied the complainant to the Appellant's house where the Appellant held the complainant on his hands and started touching her while directing him to attend to some other chores.

6. **B N (PW.3)** was the Complainant's mother. She stated that she had left the children at home and left to visit a bereaved family and on returning back she received the report that her daughter had been sexually assaulted. She examined her and noticed some bruises on the vagina. She took her to Matuu Level Four hospital where the doctor confirmed the injuries. She produced the child's health immunization card as an exhibit No.1.

7. **Benjamin Maingi (PW.4)** was the clinical Officer attached to Matuu Hospital. He examined the complainant and noticed that she could not walk well. He confirmed that there were bruises on the labia majora as there were fresh scratch marks but the hymen was intact. He also confirmed that there was minimal bleeding. He formed the opinion that there had been sexual assault. He produced the P.3 form as exhibit No.2.

8. **Police Constable Matilda Wanjeru (PW.5)** was the investigating officer. She stated that upon receipt of the complaint, she issued a P.3 form and escorted the complainant to Matuu Level four Hospital where she was examined and bruises on her private parts confirmed. She thereafter charged the Appellant with the offence.

9. The trial court established that the Appellant had a case to answer and duly put him on his defence. The Appellant tendered an unsworn statement. His case is that he reported from a funeral on 7/10/2016 when his nieces visited him and requested for groundnuts which he duly gave them and he went on about his business only to be confronted by members of public the following day who apprehended him and handed him over to the police. He stated that he did not know the charges.

10. Parties agreed to canvass the appeal by way of written submissions. The Appellant through his submissions dated 19/4/2018 sought to amend his earlier grounds of appeal against conviction and proceeded to submit only on the sentence imposed by the trial court. The Appellant submitted that he is deeply remorseful and seeks for leniency since he is a first offender and has since gone through rehabilitation and has acquired several skills. He sought for a reduction of the sentence to a lesser term or a non-custodial sentence.

11. Mr. Machogu Learned Counsel for the Respondent submitted that the Appellant has not raised sufficient reasons that can warrant this court to interfere with the discretion exercised by the trial court. It was further submitted that the Appellant was sentenced to serve the minimum sentence provided by law and which the trial court found sufficient after taking into account the age of the victim and the seriousness of the offence. It was finally submitted that the issue of sentencing is the discretion of the trial court and can only be interfered with if the same is not legal or is harsh and excessive as to amount to a miscarriage of justice. The cases of **SHADRACK KIPCHOGE KOGO =*VS*= REPUBLIC and MACHARIA =VS= REPUBLIC [2003] 2 EA 539** were cited in support of the submissions.

12. I have considered the evidence presented before the trial court as well as the submissions of the parties herein. I find the following issues necessary for determination namely:-

(i) Whether the Respondent's case had been proved beyond the required standard of proof.

(ii) Whether the sentence imposed by the trial court was lawful and justified.

13. As regards the first issue, the evidence of the five prosecution witnesses appear to me that the same was well corroborated. Starting with the complainant, she stated that the Appellant got hold of her and proceeded to remove her clothes and inserted his finger on her vagina three times. The complainant was in the company of her brother Ricki Kioko who also witnessed the incident. The Complainant's mother Beatrice Nyakeo took her to Matuu Level Four Hospital where the Clinical Officer Benjamin Maingi examined her and confirmed that there were fresh scratch marks and bruises on the complainant's labia majora with minimal bleeding and he confirmed that there was a sexual assault upon the complainant. He produced the P.3 form as exhibit. The said Clinical Officer noticed that the complainant could not walk well. The learned trial magistrate did conduct a voire dire examination on the complainant and allowed her to tender unsworn evidence. The complainant was quite categorical that it was the Appellant who had inserted his finger into her vagina three times. She duly pointed the Appellant in court as per the court record. The trial magistrate stated in his judgment that he had no reason to doubt the complainant's account of what transpired. Indeed pursuant to the provisions of Section 124 of the evidence Act the learned trial magistrate was satisfied that the victim was telling the truth. I need to add that it was highly unlikely for the complainant and her mother to frame up the Appellant who was a relative unless indeed the incident took place. It did not transpire from the proceedings that there was bad blood between the complainant's parents and the Appellant who was a brother in-law to the complainant's mother and an uncle to the complainant. I am satisfied by the evidence adduced by the Respondent that indeed the Appellant committed the offence herein. The Appellant's defence was a mere denial and did not shake that of the prosecution which is quite overwhelming against him. Hence I find the prosecution's case had been proved against the Appellant beyond any reasonable doubt. In any event the Appellant in his submissions has indicated that he does not dispute the conviction but only wishes to mitigate on the issue of sentence and which therefore leaves no doubt that he had been properly convicted by the trial court.

14. As regards the second issue, it is noted that the Appellant was convicted on the main charge of sexual assault contrary to Section 5(1) (2) of the Sexual offences Act. The same provides as follows:-

5(1) Any person who unlawfully-

(a) Penetrates the genital organ of another person with-

(i) Any part of the body of another or that person; or

(ii) .....

(iii) .....

is guilty of an offence termed sexual assault.

5(2) *A person guilty of an offence under this Section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.*

The Appellant was sentenced to imprisonment for ten years by the trial court and he now seeks this court to interfere with the same and reduce it or order for a non-custodial sentence. It is trite that sentencing is the discretion of the trial court and that an appellate court can only interfere with the same if it is demonstrated that the sentence imposed is not legal or is harsh and excessive as to amount to a miscarriage of justice or that the trial court had acted upon wrong principles.

15. As noted from the offence with which the Appellant had been charged, the minimum sentence is ten (10) years imprisonment and which may be enhanced to life imprisonment. The victim was aged 4 years old and still very vulnerable. The Appellant's mitigation was duly considered by the trial court and which finally found that the sentence of ten years was appropriate in the circumstances. I find the trial court duly considered all the circumstances of the offence as well as the Appellant's mitigation and therefore I am unable to find any impropriety in the said court imposing the sentence of ten years imprisonment. In any case the same is the minimum possible in law pursuant to the offence with which the Appellant had been charged. I am satisfied that the sentence imposed was lawful and merited in the circumstances.

16. In the result, I find the Appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence of the trial court is hereby upheld.

Orders accordingly.

Dated and delivered at Machakos this **15th** day of **October, 2018.**

D. K. KEMEI

JUDGE