REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 23 OF 2015

PETER LESILE JILLO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal on conviction and sentence from the judgement delivered on 9/2/2015 by Hon. E. A. Mbicha (RM) at Kajiado Chief Magistrate's Court in Criminal Case No. 873 of 2014)

JUDGEMENT

Peter Lesile Jilo hereinafter referred as the appellant has appealed against sentence for the offence of rape contrary to Section 3 (1) (a) (b) of the Sexual Offences Act No. 3 of 2006. As per the particulars of the offence the appellant on the 24th May 2014 at [Particulars withheld] village Mashuru District the appellant had carnal knowledge of the complainant hereinafter referred to **L E L**. where he intentionally and unlawfully caused his penis to penetrate the vagina of **L E L** by use of force.

Upon conviction the Resident Magistrate sentenced appellant to ten (10) years imprisonment.

Being dissatisfied with the judgement of the lower court on sentence, the appellant had appealed based on the following ground:

- **The appeal was against sentence only.**

He buttress the ground on sentence. The appellant mitigated thus:

- **That he is a Tanzanian national who seeks leniency.**
- **That he is deeply remorseful, repentant and regret his action.**
- **That he is a total orphan and prior to his arrest and subsequent conviction, the appellant have suffered from not receiving support.**
- **That as a Tanzanian, no family and relatives know his whereabouts hence request for a transfer to the home country to continue serving the remainder of the sentence.**
- **That he has reformed and rehabilitated through the Prison Correctional Programmes.**
- **That the honourable court to treat the period he has served as enough punishment to either reduce the sentence or set it aside altogether.**

The appellant has heavily relied on his mitigation and rehabilitation he has undergone while serving sentence to approach the appellate court for leniency. It should be noted that though conviction is not an issue in this appeal, on the basis of the constitution and the law, I am enjoined to reappraise the record and satisfy myself to the trial court findings in conviction.

As a first appellate court, I am entitled to consider the evidence of the trial court as a whole and any other materials which guided the court to arrive at the decision on conviction against the appellant. That task of appraisal and evaluation is to carefully weigh the matter in order to draw my own conclusions without disregarding the judgement of the trial court. This duty is of great importance where some of the appellants go through a trial without legal representation. This court has also taken judicial notice that most of our citizens are not knowledgeable in matters of legal procedure and their basis rights alternate to in criminal proceedings.

The principle of law which has duty of the first appellate court is anchored is found in various celebrated cases i.e. ***S. M. Ruwala v Republic [1957] EA 570, Okello v Republic [1972] EA 32***.

What was the case appellant faced at the trial court?

To obtain a conviction in rape, the prosecution is charged with the burden to prove the following elements:

(a) That there is carnal knowledge where penetration occurred.

(b) That the carnal knowledge by the accused is unlawful and intentional.

(c) That the complainant who is a female did not consent to the act of sexual intercourse.

These elements have been exemplified from the testimony tendered by the prosecution witnesses. The case for the prosecution rested on the evidence of (5) five witnesses. **PW1** – testified that she was at home on the 24/6/2014 with her children when the appellant while armed with a sword and a toy gun entered her house. She further stated that on appellant inquiring and confirming that her husband was not around, purposed to ask for directions to one **Peter's** house. According to PW1's further testimony, appellant could later return, force the door open; pointing a toy gun pistol at her and threatened to kill her and the children including raping all of them. That in a little while, only the appellant to undress himself and had sexual intercourse in front of her children leaving soon thereafter.

The complainant left for a neighbour's house PW2 where she made her first report on the rape incident by the appellant. PW2 testified that he took action by tracing the footsteps of the suspect and the same time telephoned the Assistant Chief who visited the scene with PW4. PW4 told the trial court that on receipt of the details from PW1 and PW2 he commenced a search of the appellant. He further testified that together with his officers they went to the house of appellant and recovered a knife and a toy pistol. In the same operation appellant was arrested. He also carried an identification parade in which PW1 positively identified the appellant has the person who was in her house and committed the rape against her.

PW5 the investigating officer narrated on the nature of investigations he conducted culminating in preferring a charge of rape against the appellant. It was also the testimony of PW5 that the complainant (PW1) was sent to the hospital. She was examined, treated by PW2 a Clinical Officer Mashuru Health Centre.

The clinical officer's evidence was that he examined the complainant (PW1) and found laceration on the labia manora, laceration on the vaginal walls. In her opinion, the findings were indicative of forceful penetration of the genitalia. The P3 form was completed and admitted in evidence under Section 77 of the Evidence Act as exhibit 3.

The appellant gave unsworn testimony and denied ever raping the complainant. He denied being in possession of a knife and toy pistol alleged to have been recovered from his house by PW4. The appellant nevertheless admitted being found with "*njora*" – equivalent to a sword. According to the appellant defence, this offence was a fabrication by somebody who pointed at him as the perpetrator because of an existing grudge they had with the person. He denied that he was at the house of the complainant on the material day since he had only been in the area for only two weeks.

The learned trial magistrate upon considering the evidence by the prosecution witnesses and the defence found that the complainant was raped. He further established that the house of the complainant had sources of light from the solar system; that the complainant was able to identify the appellant. She described the appellant to PW2 and PW4. It was also established by the learned trial magistrate that PW4 went to the house of the appellant. In the appellant's house they recovered a knife and a toy pistol. The appellant was duly arrested. The trial magistrate also considered the evidence on identification and affirmed that the identity of the appellant was not mistaken. He drew the inference from PW1's testimony and identification parade conducted by PW4 soon after the offence was committed.

I have carefully perused the lower court and subjected the evidence into first scrutiny and evaluation as placed before the trial court. The evidence availed demonstrated that PW1 the complainant was 24/5/2014 sexually assaulted in her house. As at the time the complainant who is married, her husband was away from home. In fact the record is clear that before the acts of sexual intercourse the appellant inquired the whereabouts of the husband. The complainant informed PW2 immediately after the ordeal.

According to PW2 the complainant on arriving at his home was shaken and crying and reported on how she was attacked and raped by the appellant. The complainant was examined by a Clinical Officer at Mashuru Health Centre (PW3). The medical evidence adduced on her findings when she examined the complainant corroborates PW1's testimony on sexual intercourse to have taken place. The lacerations to the labia manora and to the vaginal walls is all cogent evidence that complainant was forcibly sexually assaulted. The injuries are also capable of displacing any suggestion or presumption that complainant consented to the act of sexual intercourse with the appellant.

On identification, (PW1) saw the appellant twice. PW1 told the trial court that the first time appellant came into the house inquired on whether the husband was around and left. In a short while he came back and forced the door open with threats on the complainant and children. There was sufficient light from solar in the house which complainant describes maider her see the complainant well. PW4 conducted an identification parade to test the complainant earlier assertion and whether she had identified the person in her house. In the identification parade, the complainant positively picked and identified the appellant from a parade consisting of nine members. That evidence was admitted by the trial court in support of the prosecution case in placing the appellant at the scene.

I have no hesitation in appraising the evidence in coming to the conclusion that the conditions in the scene of the crime were favourable for positive identification to take place. The case at the trial court was in line with the set guidelines laid down in ***Republic v Turnbull [1976] 63 Cr. Appeal 132***. I find no reason to fault the findings of the trial magistrate in that aspect on identification.

The appellant defence that he was not at the scene of the crime and that his identification was a mistake by virtue that somebody else point at him holds no water. The evidence at the trial court was cogent and credible. The court correctly relying on the evidence and materials placed before it arrived at logical conclusion that the prosecution established their case beyond reasonable doubt against the appellant.

I accordingly find no reason to disturb the findings of the learned trial magistrate in regard to the offence of rape against the appellant. The act by the appellant was intentional and unlawful where he forcibly committed acts of sexual intercourse with the complainant without her consent.

For the above reasons, conviction by the trial court is hereby affirmed. The ingredients of the offence of rape as provided for under Section 3 (1) (b) (c) do exist and were proved by way of evidence by the prosecution against the appellant.

The main ground of this appeal was on sentence. Under Section 3 of the Sexual Offences Act it provides as follows:

> **"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."**

I have considered the submission by the appellant mainly focusing on mitigation and that he has since reformed and regretted his actions against the complainant. The objection to this appeal in reply by the Senior Prosecution Counsel has also been taken into account. It was the contention by the learned Senior Prosecution Counsel that the trial court properly evaluated the evidence on the matter regarding sentence. Learned counsel further submitted that under Section 3 of the Sexual Offences Act, dealing with penalty for the offence of rape, the trial magistrate has no discretion. He submitted that the court should take notice that the minimum sentence prescribed for the offence of rape is ten (10) years with an upper limit of life imprisonment.

Relying on the case of ***Samuel Ngaruiya Muchina v Republic [2015] eKLR*** on the proposition regarding minimum sentences under the Sexual Offences Act, which does not give discretion to the trial courts in sentencing upon conviction, learned counsel contended that the appeal by the appellant lacks merit and ought to be dismissed.

The sole issue which concerns the appellant is whether the sentence of ten (10) years imposed by the lower court can be reduced or set aside altogether.

It is trite law that the scope of an appellate court to interfere with sentence(s) imposed by a trial court is majorly limited unless on very clear legal principles. The principles upon which such justification can be exercised to review or alter a sentence of a trial court have been firmsly settled.

The rationale behinds these principles being the fact that sentencing is mainly a matter of discretion by the trial court which has all these factors to balance before arriving at an appropriate sentence. In the celebrated case of ***Ogolla S/O Owuor [1954] EACA 270*** the Court of Appeal of East Africa held thus:

> **"The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors. To this we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case"**

See also the case of ***Republic v Shershowsky [1912] CCA 28 TLR 263***.

Dealing with the same scenario the Court of Appeal in ***Shadrack Kipkoech Kogo v Republic CA 253 of 2003 at Eldoret*** stated as follows:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factors, that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."**

Also in the case of ***Kenneth Kimani Kamunyu v Republic [2006] eKLR***:

> **"The appellate court can only interfere with the sentence if it is illegal or unlawful."**

The mandatory maximum sentence(s) under the Sexual Offences Act has occasioned discomfort among judges of the superior courts. For instance, during the Judicial Judges' Colloquium, it was felt that time has come for parliament to reconsider the wisdom of mandatory penalties because they limit trial judges from considering the individual circumstances of specific cases more particularly youth offenders.

According to the date in parliament during the discussion on the bill leading to enactment of the Sexual Offences Act, the rationale then was to narrow judicial discretion and courts what was viewed as disparate and limit sentences for sex offenders.

There is need for an audit to establish whether mandatory minimum sentences under the Sexual Offences Act have promoted the objectives of sentencing and protecting the public act as a deterrence and sending a clear message to the would be offenders.

Section 382 of the Criminal Procedure Code provides:

> **"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed, or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings, before or during the trial or in any inquiry or other proceedings under his coat, unless the error or omission or irregularity has occasioned a failure of justice."**

Let me come to the issues under consideration as canvassed by the appellant. The appellant was charged under Section 3 (1) (a) (b) (c) of the Sexual Offences Act. The penalty section is provided for under Section 3 (1) (3) of the Act. The maximum sentence the court can give the accused like the appellant herein would be life imprisonment. The appellant got away with a minimum of ten (10) years imprisonment.

What the court imposed was a minimum sentence for the offence of rape. The appellant contends that the sentence is harsh and excessive. Secondly he invokes this court to factor in mitigation in view he has reformed and regrets committing the offence. The prosecution argues that the correctness of appellant sentence is not an issue as the court passed a lawful sentence under the law.

In the instant case, the appellant have not challenged the findings on conviction. In the case of rape which the appellant face, the minimum punishment is ten (10) years imprisonment, mandatory a requirement of Section 3 (3) of the Act.

This issue arose in India where the Supreme Court in the case of ***State of Jamaica & Kashmir v Vinay Nanda, Ar [2001] SC 611*** the court held as under:

> **"Where the mandate of law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided for under the statute. The mitigating circumstances in a case if established; would authorize the court to pass such a sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment.**

Similarly in ***State of Panjab v Prem Sagar & Others [2008] 7 SCC 550*** the court observed thus:

> **"To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question."**

I also make reference to the case of ***State of Madhya Pradesh v Santosh Kinnar Ar [2006] SC 2648***. The Supreme Court held that:

> **"In order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record adequate and special reasons in the judgement and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and not a strait jackal formula can be indicated."**

I have heavily quoted authorities from India because we share a common law jurisprudential history. The weight twin relationship has been exemplified by the many statutes in Kenya whose traceability can be located to the Republic of India.

I am also persuaded that under the constitution and the law, a minimum sentence can be interfered with by an appellate court where adequate and special reasons exist to be recorded for the interest of justice. I take judicial notice we have not yet legislated on what would constitute exceptional circumstances which would render a court to interfere with the minimum sentence. This case by the appellant does not fit in any of the criteria discussed in the authorities cited and principles evidenced therein.

DECISION

In the instant appeal, the legal principles in ***Ogolla S/O Owuor case*** are applicable. The appellant has not shown that the trial magistrate acted upon a wrong principle. Secondly, the sentence of ten (10) years is manifestly excessive or it is illegal for this court to interfere.

Having said so, I find no sufficient reasons to interfere with the sentence of ten (10) years imposed by the trial court. In the result, the appellant's appeal on sentence is lost. The judgement of the lower court dated 9/2/2015 is hereby affirmed.

Dated, delivered in open court at Kajiado on 7th day of October, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant

Appellant present