REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 214 OF 2013

(From original conviction and sentence in Criminal Case No. 266 of 2007 of the Chief Magistrate's Court at Nakuru- Hon. H.O. Baraza [R.M] dated 08/04/2010)

JONATHAN KIPKEMOI CHEPKWONY..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

1. The Appellant was charged before the lower court with the offence of defilement of a girl contrary to Section 8(1) as read together with Section 8(3) of the Sexual Offences Act 2006 *(No. 3 of 2006)* for which he was convicted and sentenced to 20 years imprisonment.

2. He has appealed to this court against both conviction and sentence. However from his grounds of appeal and submissions made in support of the appeal, it is apparent that he is primarily aggrieved with the sentence of 20 years meted out against him. He asked the court to reduce the sentence which he considers very lengthy for the reasons that he is the sole provider of his ten children, and that he is sickly and does not receive proper medical treatment in prison.

3. On her part, the Prosecution Counsel opposed the appeal and submitted that the sentence of 20 years was appropriate for the offence with which the Appellant had been charged and convicted.

3. Notwithstanding that there were no grounds raised against the conviction, this court must discharge its duty to re-evaluate and analyse the evidence before the trial court and satisfy itself that the charges against the Appellant were proved beyond reasonable doubt. In doing so regard should be heard to the fact that the Appellate Court did not have the opportunity to see the witnesses testify and should therefore not interfere with findings of fact by the trial court without sufficient cause.

4. The Prosecution alleged that on 5th December 2012, the Appellant had carnal knowledge of E.C a child aged 12 years. The complainant, PW1, a child of 12 year testified that on 5th December 2012, at around 2.00pm she was going home from her friend and classmate, Chepngetich's house. She was using a shortcut through the farms where she encountered the Appellant whom she knew well prior to the incident as her neighbour. He greeted her, held her right hand and pulled her towards him and into a nearby thicket.

5. The complainant tried to scream and struggle with Appellant but stopped when he threated to kill her and bit her right hand (the court was shown a scar on her right hand). The complainant narrated to the court that the Appellant pinned her to the ground and ***"did is [sic] thing for some time. He removed my***

pant and did what he did. He did not remove his clothes. He did the act there."

6. The witness touched her crotch but said that she could not describe the act. She said that the Appellant did it from 2.00pm to 6.30pm. She was not injured at all nor did she bleed. After he was done, the complainant went to a neighbour's place where she stayed until the following morning. She was found by her parents who took her to Olenguruone Police Station where she received treatment and later reported the matter to Kiptagich Police Station.

7. PW2 and PW3 recalled that on 5th December 2012, at around 5.00pm they received information that their daughter, PW1, was being defiled by the Appellant. Together with one Kirui, they proceeded to the scene, a place called *[particulars withheld]* near a river, where they found the Appellant. The witnesses observed that the grass around the scene had been disturbed. PW2 stated that on seeing them, the Appellant instructed PW1 to run into the maize plantation, and she complied. With the aid of members of the public, they arrested the Appellant who was very resistant and confined him in a store overnight and handed him to the Police the following day.

8. The complainant was found the following morning and taken to Olenguruone District Hospital for treatment. She was later examined by PW5 who observed that her hymen was broken and that there were lacerations on her vagina but she was not bleeding. He also observed that her face was swollen. He estimated the injuries to be a day old. He explained that the laboratory tests did not detect any spermatozoa because the complainant had been brought after 24 hours. The PW3 form was produced as exhibit 1.

9. The investigating officer PW4 also received the Appellant at Olenguruone Police Station from the arresting officers attached at Kiptangich Police Station. He interrogated the Appellant who admitted to PW4 that he was drunk when he committed the offence. He did not visit the scene of the crime but decided to charge the Appellant on the strength of the medical evidence and the statement of the complainant.

10. When put on his defence, the Appellant gave a brief unsworn statement. He denied having committed the offence and stated that he was at his place of work at Kiptagich Factory until 6.00pm. He stated the charges had been fabricated by the complainant's parents because he owed PW3 money.

11. The trial court found that there was evidence that the Appellant had been defiled the complainant was not straightforward due to the inconsistencies in her testimony with that of PW2 and PW3. The complainant testified that after the Appellant was done, she went to a neighbour's place where she was found the following morning. However PW2 and PW3 testified that she ran into the maize plantation on the instructions of the Appellant upon seeing the crowd. I also note that when asked, she could also not describe the act that was done to her.

12. Nonetheless the magistrate was satisfied that the evidence established that she was defiled by the Appellant. Referring to the evidence of PW5 and the P3 Form the court found that lacerations on the complainant's vagina and the perforation of her hymen were proof of penetration. On the identification of the Appellant, the court considered the evidence of PW2 and PW3 who knew the Appellant well before the material day. Their testimony placed the Appellant at the scene where the complainant was defiled. They arrived at the scene shortly after the offence was committed and observed that the grass was disturbed. PW2 also testified that on seeing them the Appellant instructed the complainant to hide into the maize plantation. The court did not believe the Appellant's defence that he was framed.

13. I find that the court properly analysed the evidence and arrived at a correct conclusion that the Prosecution was able to prove beyond reasonable doubt that the Appellant defiled the complainant.

14. Turning to the question of sentence, which is the main concern of the Appellant, I am guided by principles set out in In **OGALO S/O OWOURA V R (1954) 21 EACA 270** the principle was stated that-

“the Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence. The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle or overlooked some material factor, or the sentence is manifestly excessive in view of the circumstances of the case.”

15. For offences under the Sexual Offences Act, 2006, the minimum sentence to be meted out against an accused is determined by the age of the complainant. This question of fact was established by the evidence of the witnesses. During the *voire dire* examination, the witness told the court that at the time of the hearing she was 14 years old in standard seven. This was also the evidence of PW3, her mother. Therefore the Appellant was liable to be sentenced under Section 8(3) of the Sexual Offences Act which provides for a minimum sentence of 20 years on conviction for the offence of defilement of a child between the age of 12 and 15 years.

16. In addition the court considered that the Appellant was a first offender. It also considered the Appellant's mitigation which was similar to the grounds of appeal raised herein; that he is the sole bread winner of ten children, he is sickly and is an orphan. It then proceeded to sentence him to the minimum sentence of 20 years prescribed by law.

17. Accordingly, I find that the appeal herein has no merit and dismiss it in its entirety. I uphold the conviction and sentence of the lower court.

18. It is so ordered.

Dated, signed and delivered at Nakuru this 10th day of October 2014

M. J. ANYARA EMUKULE

JUDGE