IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), OKWENGU & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 70 OF 2014

BETWEEN

EMMANUEL ONYANGO ODIDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Busia (Muchemi, J.) dated 13th December, 2011

in

H.C.CR. A No. 52 of 2011)

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JUDGMENT OF THE COURT

Section 361(1) of the **Criminal Procedure Code** circumscribes our jurisdiction as a second appellate court in appeals arising from criminal trials to matters of law.

As such, we are bound by the concurrent findings of fact by the two courts below unless we are satisfied that they considered matters of fact that should not have been considered, or failed to consider matters that they should have considered, or looking at the evidence in totality, that they were plainly wrong. See **Karani vs. Republic** [2010] 1 KLR 73. It is this jurisdiction that the appellant has invoked by his appeal which challenges the judgment of the High Court (Muchemi, J.) dated 13th December, 2011 in H.C.CR.A. No. 52 of 2011.

The concurrent findings of fact by the two courts below were that on 29th May, 2009 at around 7:00a.m. the appellant locked himself and PW1inside his house leaving the latter's younger brother, PW2, outside; that at the material time PW1 was 10 years old; that he defiled PW1 and threatened her with death to stop her from disclosing what he had done to her; that three days later, the appellant went further to entice PW1 with Kshs.100 to maintain her silence; that on the same day, the events that transpired on 29th May,2009 came to light when her mother, PW3, enquired about the source of the money; and that subsequently the appellant was arrested and charged with the offence of defilement under **Section 8(1) & (2)** of the Sexual Offences Act, amongst other charges.

In his defence, the appellant denied the charges against him and maintained that on the material day he was not at home, but had travelled to Eldoret on 27th May, 2009 to see his grandson and only returned on 3rd June, 2016; and that, the charges were falsely preferred against him on account of an ongoing land dispute between PW1's family and himself.

In the end, the trial court, after evaluating the evidence by both sides, convicted the appellant for the offence of defilement and sentenced him to 30 years imprisonment. He then preferred an appeal to the High Court which by the impugned judgment upheld his conviction but enhanced his sentence to life imprisonment citing **Section 8(2)** of the Sexual Offences Act.

Unrelenting, the appellant has now filed this second appeal which is anchored mainly on three grounds namely, that the learned Judge erred by, failing to re-evaluate the evidence and therefore arrived at a wrong decision; enhancing the sentence from 30 years to life imprisonment without warning the appellant of the likelihood of such enhancement prior to proceeding with the appeal; and confirming a conviction against the weight of evidence.

While acknowledging that there is no prescribed mode of re-evaluation of evidence, the appellant nevertheless took issue with the manner in

which the High Court undertook its mandate as the first appellate court; in that, he believed that the learned Judge did not consider his *alibi* defence as well as the land dispute between PW1's family and himself which actuated what he considered were trumped up charges against him.

Citing this Court's decision in **J.J.W vs. Republic** [2013] eKLR, the appellant faulted the learned Judge for not warning him in advance of the likelihood of enhancement his sentence should his first appeal be unsuccessful.

He invited us to exercise our discretion along the lines outlined in the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. R** [2017] eKLR (the **Francis Muruatetu** case) and to consider reducing the period of his sentence. In doing so, he asked us to take into account that he is a first offender and is remorseful for his actions; that he is 80 years old and is suffering from a terminal illness.

Opposing the appeal, Mr. Kakoi, Principal Prosecution Counsel appearing for the respondent, submitted that the elements of defilement under the Sexual Offences Act were established beyond any reasonable doubt, namely that the act of penetration by the appellant of PW1, who was 10 years old, established the offence of defilement.

Counsel however conceded that enhancement of the sentence by the learned Judge was erroneous and unlawful since the respondent had neither filed a cross appeal to that effect nor applied for enhancement of the sentence. Without any of these, the appellant was ambushed by the High Court's decision to enhance the sentence to life imprisonment.

From the record, it is apparent that the learned Judge not only re-evaluated the evidence on record before her but also considered the appellant's defence.

The learned Judge, for example noted, like the trial court, that despite PW1 being a minor her evidence with regard to the chain of events was consistent; that it was further corroborated by PW2 (then 5 years old), who saw her get into the appellant's house with the appellant close behind and later leave the house while crying, as well as medical evidence which revealed that her hymen was missing and that she was infected with gonorrhoea, which the appellant was also found to be suffering from. What is more, both courts below found PW1 & PW2 to be credible witnesses.

It is in light of the above evidence that both courts below weighed the *alibi* defence by the appellant and concurred that the prosecution's evidence placed the appellant at the scene displacing the *alibi* defence. We find that conclusion correct from consideration of the evidence of identification.

Similarly, we cannot fault the two courts below for finding that there was no evidence to substantiate the grudge alluded to by the appellant between PW1's family and himself over a parcel of land. In the result, we have arrived at the conclusion that the appellant's conviction was safe.

Granted **Section 354(3)** of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of a sentence imposed by a trial court. Nevertheless, as a matter of practice before a court can do so, an appellant is required to be given advance notice of such consequence depending on the outcome of an appeal.

The notice can be in the form of a cross appeal by the State or an application to enhance the sentence. But in the absence of those, the court should caution the appellant prior to commencement of the hearing. The caution is intended to ensure the appellant is not only aware of the consequences that would befall him or her but also provides an opportunity for him or her to make an informed choice on the course of action to take. In **EGK vs. Republic,** [2018] eKLR this Court observed that:

> **"….we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant".**

In the instant appeal, there was no cross-appeal by the respondent for such enhancement or caution to the appellant by the learned Judge.

Since the enhancement of the appellant's sentence was improper and done without jurisdiction, we have no hesitation in setting it aside.

Going by what we have said above, applying the guiding principles set out by the Supreme Court in the **Francis Muruatetu** case, and considering the fact that the trial court had already taken into account the appellant's mitigation, we are inclined to exercise our discretion by reinstating the trial court's sentence of 30 years' imprisonment.

For the afore stated reasons, the appeal on conviction fails and is dismissed. However, the appeal on sentence succeeds to the extent that the appellant shall serve 30 years imprisonment from the date of his conviction by trial court.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR