IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 63 OF 2015

BETWEEN

KENNEDY ODHIAMBO OURU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Homa Bay

***(Majanja, J.) dated 30th April, 2015* in HC. CR. A. No. 72 of 2014)**

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JUDGMENT OF THE COURT

On a rain-soaked night of 28th to 29th August 2010, **VAM**, a thirteen-year old girl was asleep in the house she shared with her elderly and blind grandmother. She had latched the door from the inside, for their security. Alas, it was not enough.

At some unknown hour of that night she was awakened by a sound. Like young Samwel of the Old Testament she asked if her much elder companion had called her. The response she got was the strangling grasp of hands around her neck. Her grandmother, roused by the commotion, struggled and freed VAM from the vice-like grip of a male intruder who had entered into their house through the window he had broken. The man, determined and undeterred, grabbed VAM by the neck and dragged her out of the house, past the garden nearby, through a fence and out towards the hills.

Out there in the bushes, the man reached for and tore VAM's panties before felling her to the muddy ground where he pinned her, pulled out and inserted his penis into her vagina, painfully defiling her repeatedly. She could see the man clearly by moonlight and she recognized him as **Ken**, someone she knew well: he lived about 500 metres from her home.

As it dawned in the East, the man left VAM lying on the ground and ran off. She eventually rose and found her way back home. There, she met her cousin **DO** who was looking for her and she narrated her ordeal to him. The two found a dark blue hat/cap by the broken window as well as a metal bar that must have been used for the break in. VAM recognized the cap as one that Ken used to don in the village as was confirmed by other witnesses who testified.

VAM also recounted what had happened to her to her uncle **JO** (PW2) who had been visited by VAM's grandmother early on the morning of 29th August 2010 to report that VAM '*had got lost'*, taken by someone who had broken into the house. PW2 noted that VAM's clothes were wet and soiled with mud, and she was herself dirty and muddy all over. This same observation was made by **Paul Otieno Oyier** (PW3) a member of the local community policing and **MA** (PW4) a neighbour who also received a report of VAM's abduction/kidnapping and later learnt of her defilement. VAM tearfully recounted what had befallen her to PW3 and PW4 who both recognized the cap as belonging to **Kennedy Odhiambo Ouru**. PW3 went to the said Kennedy's mother who confirmed that both the cap and the metal rod belonged to her son. He then led the other villagers and they arrested the suspect. A report was thereafter made to the Rangwe Police Post and a vehicle was dispatched to collect the suspect who had in the meantime been kept in a toilet by the local chief for his safety as members of the public were baying for his blood, intent on lynching him.

At the Rangwe Police Post the suspect who is the appellant herein, was placed in custody. Investigations were conducted by Police Corporal **John Nyauke (PW5)** who recorded statements and collected the P3 Form filled after VAM was examined and treated. He then charged the appellant with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** before the Resident Magistrate's Court at Homa Bay.

After hearing the prosecution evidence as we have set it out, and the appellant's unsworn statement denying any knowledge of or involvement in the offence, the trial magistrate found the offence proved, convicted the appellant and sentenced him to serve 20 years in prison. The appellant was aggrieved by that decision and appealed to the High Court at Homa Bay (Majanja J). His appeal was found unmeritorious and dismissed in entirety, provoking the present appeal.

In his self-crafted memorandum of appeal the appellant is aggrieved that the learned Judge erred in law in failing to appreciate that his right to fair trial was infringed through denial of witness statements; holding that he did not ask for statements yet the trial court and the prosecution took advantage of his ignorance of the law to speed up the trial without informing him that he had a right to the statements; and that the age of the complainant was not proved nor the metal bar taken for dusting, presumably for fingerprints.

The appellant filed brief written submissions which he relied on without more at the virtual hearing of the appeal via video link due to the Covid-19 Pandemic. We have considered the said submissions.

The Republic also filed its written submissions. At the hearing the learned Principal Prosecution Counsel **Mr. Kakoi** maintained that the appellant was properly convicted and asked us to uphold the conviction. It was counsel's view that given the circumstances of the offence, including the fact that the appellant kidnapped VAM from right under the grandmother's nose exploiting the fact that the old woman was blind, there was nothing to mitigate the sentence, which was proper.

As this is a second appeal, our jurisdiction is statutorily limited to a consideration of matters of law only. See **section 361** of the **Criminal Procedure Code**. Moreover, the trial court having heard and observed the witnesses as they testified, and the first appellate court having conducted a re-hearing by re-evaluation of the evidence on record, we are bound to accord due deference to concurrent findings of fact by the two courts. We would eschew interference with such factual findings unless it is shown that they were based on no evidence, proceeded from a misapprehension of the evidence or are on the whole plainly wrong and unsupportable. See ***NJOROGE vs. REPUBLIC [1982] KLR 388.***

This Court has consistently held that the three ingredients that must be established before a conviction on a charge of defilement can be entered are the age of the complainant, penetration and positive identification of the assailant. See ***JOHN MUTUA MUNYWOKI vs. REPUBLIC eKLR***. It was the Republic's contention, and this seems to be plainly borne out by the record, that each of these elements was proved beyond reasonable doubt.

VAM testified that she was 13 years old and was a standard 6 pupil at [Particulars Withheld] Primary School. This was confirmed by her uncle, PW2 and there was no attempt to challenge their testimony regarding the complainant's age at the trial. We think that the belated questioning to the same at this stage is an after-thought and the age was sufficiently established.

On penetration, the testimony of VAM was cogent, consistent and categorical that the appellant penetrated her and defiled her three times on that fateful night. She gave an account of what she went through to the people she met immediately she made her way home, which goes to speak to consistency. More important is the medical evidence which showed vaginal swellings, tenderness and discharge as well as mobile spermatozoa which led **Eliud Ochola**, the clinical officer who examined VAM to conclude and record in the P3 that there was *overwhelming evidence of penetrative sexual intercourse and not protected*. This P3 Form was produced on his behalf by his colleague **Michael Ochola** (PW5) in line with **section 77** of the **Evidence Act**. Given the definition of '*penetration'* in the **Sexual Offices Act** as meaning the partial or complete insertion of the genital organs of a person into the genital organs of another person there is no doubt that there was penetration in the manner described by VAM.

The last ingredient is the identity of the assailant/perpetrator. VAM was clear that the appellant is the one who broke into her house and dragged her away by force into the bush. She testified to having addressed him by his name and asked him why he was strangling her. He was no stranger to her and she saw him well by moonlight during that long nocturnal ordeal. This was a case of recognition of a well-known neighbour and we do not think there was any possibility of error.

The visual recognition aside, there was the damning evidence of the appellant's cap/hat found at the window which the assailant had broken to gain access into VAM's house. Several witnesses identified the cap as the appellant's. There was also left at the scene a metal rod which the appellant's own mother identified as belonging to him in addition to the cap. These two items found at the house of the victim provide cogent corroborative evidence that indeed the appellant was the person who broke into the house, kidnapped and subsequently defiled VAM repeatedly. The presence of those two items provided overwhelming circumstantial evidence that pointed unerringly to the appellant as the kidnapper and defiler of VAM. Their presence at VAM's home was a fact peculiarly within the knowledge of the appellant and it behoved him in the natural course of human events, recognized by **sections 109** and **111** of the **Evidence Act**, to offer an explanation. He gave none.

We think that the two courts below fully discharged their respective mandates and we have no basis whatsoever upon which to interfere with the appellant's well-deserved conviction. His appeal against it therefore fails.

Turning now to sentence, the trial court in imposing 20 years imprisonment stated that it was the minimum sentence under the **Sexual Offences Act,** and this was confirmed by the learned Judge. The appellant had stated in mitigation that he was the eldest of five children and the bread winner as the mother was *'sick* and *unable'* and he was also a first offender. We are of the view that minimum sentences are patently unconstitutional in so far as they divest trial courts of the discretion in sentencing that achieves an individualized consideration of the particular facts and circumstances of each case. They treat all offenders as an undifferentiated whole which the Supreme Court loudly in instigated in ***FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC [2017] eKLR***. We thus hold that trial courts do have discretion to impose appropriate sentences which may well be for terms shorter than the minimum sentences set out in the **Sexual Offences Act**.

Turning to the case at bar, we are inclined to agree with **Mr. Kakoi** for the Republic that there was nothing mitigating in the conduct of the appellant. In fact, there were plenty of aggravating factors including the fact that the appellant exploited the blindness of VAM's grandmother to launch his stealthy attack. He was armed with a metal rod and he broke into the house through the window, itself a serious

offence, to access his victim whom he dragged by the neck out of the house and into the bushy hills. He used physical violence on her leaving her with injuries to the neck and head. He tore her clothes and defiled her for much of the night on the wet and muddy grounds. He treated her as if she were some animal to be stolen from a pen. His rapacious lust sated, he abandoned her, soiled and dirty, in the bushes. All of this shows he objectified and humiliated her, and stripped her of her dignity. He left her with not only physical but also psychological scars. There was no saving grace in his conduct.

We think upon a consideration of the case as a whole that the appellant's conduct amply deserved a severe sentence but the imposition of the minimum sentence is no longer tenable. In the result, we allow the appeal on sentence but to the slight extent of setting aside the **20 years** imprisonment and substituting it with a term of **18 years** imprisonment from the date the appellant was first sentenced.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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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