IN THE COURT OF APPEAL

AT NAIROBI

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

KISUMU CRIMINAL APPEAL NO. 84 OF 2016

BETWEEN

GEORGE OKOTH OBWORO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Migori (D.S. Majanja, J.)

dated 23rd September, 2014in Migori H.C.CR.A 18 of 2014

Formerly Kisii H.C.CR.A 72 of 2013)

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JUDGMENT OF THE COURT

1. The Appellant herein has proffered this second appeal challenging the sentence imposed on him by the trial Court for the offence of defilement. The role of this Court as the second appellate Court is as was set out in **Karani vs. R [2010] 1 KLR 73** where this Court pronounced itself as follows:-

> **"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

2. The concurrent findings of fact by the two courts below were that the victim herein is a 16 year old minor, LAO, who testified before the trial court as PW1. On 27th March, 2011 PW1's neighbour, one Milka Odero invited her over to another neighbour's home where she met the appellant who was in the company of four others including David Odhiambo, the home owner.

3. The six individuals convinced her to accompany the appellant to his home in Nyatike area to see his home and assured her that she would return to her home the following day. On arrival, she slept in the appellant's house where the appellant forcefully had sexual intercourse with her. The following day she informed the appellant that she wished to return to her home, but he declined and instead bound her hands and legs with rope to restrain her. She was held captive for a period of six weeks during which she remained bound and was repeatedly sexually assaulted by the appellant. It was only after she agreed to be his wife that he untied her.

4. On 6th May, 2011 when the appellant gave her some money to buy food while he and his wife were off to the shamba, LAO seized the opportunity to escape and return to her home. Subsequently, on 8th May, 2011, her father, PW2, who had previously made reports on her disappearance to the school she attended and to the area Chief, took her to the Chief's office who referred them to Migori Police Station.

5. The matter was later reported to Migori Police Station where the Investigating officer, one Corporal Ongoki, issued PW1 with a P3 form and referred her to Migori District Hospital for a medical examination and treatment if necessary. The clinical officer, one David Ondieki, PW3, reported that she had bruises on the right side of her face and rope marks on both her hands and legs. He further reported that in her genital areas, tests revealed pus cells indicating an infection with a sexually transmitted disease.

6. A warrant of arrest having been issued against the appellant addressed to the OCS Macalder Police Station, PW1 in the company of her father, led PW4 and the investigating officer to the appellant's home where she identified him.

7. He was arrested and later charged before the Senior Resident Magistrate's Court on 10th June, 2011 with the offence of defilement contrary to **Section 8(1)(4)** of the Sexual Offences Act, 2006. The particulars of the charge read as follows:-

> **"On the 27th day of March 2011 at Namba Kodero village in Migori County in the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of Lucy Akinyi Awuor a girl aged 16 years."**

8. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act, 2006. The particulars of the charge being as follows:-

> **"On the 27th day of March 2011 at Namba Kodero village in Migori County in the Republic of Kenya, intentionally committed an indecent act with Lucy Akinyi Awuor a girl aged 16 years, by fondling her breasts and buttocks."**

9. He denied the charges and trial proceeded with the prosecution calling the evidence of the 4 witnesses from which the learned trial Magistrate (S. M. Shitubi SPM), found that the prosecution had established a prima facie case against the appellant and placed him on his defence. During defence hearing, the appellant denied having committed the offence stating that he had been framed and that he did not know PW1. Further, that key witnesses had not been called to testify in court and that this was prejudicial to his case.

10. The trial magistrate in his judgment found that it was clear from evidence adduced before the trial court that the PW1 disappeared from home and that, in fact, a report was made to both the local administration and her school by her parents. Further, that PW1's evidence was corroborated by medical evidence adduced.

11. The learned magistrate was also not convinced by the appellant's defence on allegations that he did not know PW1 as the prosecution's evidence against him was consistent and overwhelming. In addition, it was the trial court's finding that the appellant was identified by PW1 who had been held in his home for a period of six weeks. Based on these findings and with consideration of the appellant's mitigation, the learned magistrate found the appellant guilty of the offence of defilement and sentenced him to 15 years imprisonment.

12. The appellant unsuccessfully argued an appeal against the conviction and sentence before the High Court. In a judgment delivered on 25th July, 2013 ***(D.S Majanja, J.)*** the first appellate court upheld the findings of the trial court and dismissed the appeal.

13. The appellant now comes before this Court on a second appeal. The appeal is on the issue of sentencing only and is premised on 6 grounds which may be condensed as follows: that he was the sole bread winner to his family and due to his arrest his children had since dropped out of school; that he was remorseful, reformed and rehabilitated following the term already served and; that his early release will enhance and promote reconciliation with the other parties.

14. During the plenary hearing before this Court by video link due to the prevailing Covid-19 pandemic, the appellant appeared in person. The appeal was canvassed through written submissions with oral highlights.

15. In a nutshell, the appellant urged the Court to consider that he had already served a substantial part of his sentence and that he was remorseful for his transgressions and had since reformed. He further, submitted that as at the time of his conviction and sentence he was the only breadwinner in his nuclear family and that his elderly parents also depended on him. He entreated the Court for leniency.

16. Opposing the appeal, the prosecution submitted urging the Court to consider that despite the fact that the appellant was remorseful, there were aggravating factors such as: the appellant had accomplices in committing the crime; he held PW1 captive by tying her legs and hands with a rope preventing her from returning to her home; had sex with PW1 against her will and; the appellant who was a married man, had intercourse with PW1 in the same house where he lived with his wife. It was maintained that there were no mitigating factors presented by the appellant which were compelling enough to warrant an interference with the sentencing; that the appellant who was a married man took advantage of an innocent girl. The prosecution urged the Court to dismiss the appeal.

17. From the foregoing and from the appellant's grounds of appeal, the entire appeal turns on the question as to whether this Court ought to interfere with the sentence as meted against the appellant by the trial court and as affirmed by the High Court.

18. In the case of **Joseph Wambua Mbuvi v. Republic** this court stated thus;-

> **"Sentencing is a question of fact and it is always at the discretion of the trial court. In this matter, the appellant does not contend the sentence meted was either illegal or unlawful. In Wanjema -v- Republic (1971) EA 493 this Court stated as follows regarding interference with sentencing:**
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> **'[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.'"**

19. The appeal as presented by the appellant does not demonstrate in what manner the trial Court erroneously exercised its discretion while meting out the sentence in order to allow this Court to interrogate the legality or otherwise of the exercise of discretion by the trial Court or the High Court on appeal. There has been no allegation that the Court relied on wrong principles of law or took into account immaterial

factors or that the Court considered factors which it ought not to have considered hence arriving at an erroneous sentence. All the appellant relies upon are mitigation canvassed as grounds of appeal which were never presented before the trial Court.

20. In the **Joyce Wambua Mbuvi Case** (supra) this Court had the occasion to deal with a similar issue where an appellant made mitigation statements as a basis of an appeal. The Court cited with approval the decision in the case of **MKM v. Republic (2018) eKLR** where this Court held as follows:-

> **"Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal."**

21. It is evident from the evidence presented before the Court during trial that there were aggravating circumstances to justify the sentence meted out. The manner in which PW1 was treated by the appellant, based on the findings of fact by both Courts below, as urged by the state was indisputably aggravating.

22. Further it is evident that if anything, the High Court accorded the appellant some measure of leniency on the issue of sentencing. This is evident from the trial Judge's pronunciation as follows:-

> **"19. The appellant has raised the issue of age of the complainant. Section 8 (4) of the Sexual Offences Act, 2006 provides that the minimum sentence when the child is 16 years old is 10 (*sic) years imprisonment.**
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> **20. The evidence before the court was that PW 1 in her evidence stated she was 16 years old. The birth certificate produced shows that she was born on 15th June 1995. While the medical report shows that she was**
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> **16 years old. Whereas according to the birth certificate PW 1 was 15 years old at the time the offence was committed. The learned magistrate did not make a finding on this issue and I am prepared to give the appellant the benefit of doubt on the age for purposes of the sentence. The sentence imposed was therefore within the law and is accordingly affirmed."**

23. Despite the learned Judge's finding that the age of PW1 was an issue that ought to have been considered by the trial court as evidence showed that she was 15 years old and not 16 years old as urged by the prosecution, he did not interfere with the sentencing although the appellant would have been liable to a more severe penalty. The learned Judge gave the appellant the advantage of the lesser sentence. We are not persuaded that the appellant should be twice lucky in view of the circumstances of this case.

24. From the foregoing, it is evident that this appeal is devoid of merit and the same is hereby dismissed.

Dated and delivered at Nairobi this 7th day of August, 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