



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 186 OF 2014

BETWEEN

ENOCK OKARI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii, (Muriithi, J.) dated 22nd July, 2014

in

HCCRA NO. 73 OF 2012)

JUDGMENT OF THE COURT

[1] **Enock Okari** (the appellant herein), was tried and convicted by the Senior Resident Magistrate's Court at Kilgoris for the offence of rape contrary to **section 3(1)(a)** of the **Sexual Offences Act** No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. He appealed to the High Court against his conviction and sentence. His appeal against conviction was dismissed, but the appeal against sentence was allowed. Consequently, the sentence was reduced to fifteen (15) years imprisonment.

[2] The appellant is now before us in this second appeal. He has filed a memorandum of appeal, as well as supplementary grounds. In brief, the appellant contends that the learned judge erred: in affirming the decision of the lower court as the evidence adduced against him was not sufficient to establish the charge; and that the sentence imposed by the learned judge was still harsh given the minimum sentence provided of ten (10) years.

[3] The appeal was opposed, and **Mr. Ketoo** prosecuting counsel appeared for the State. In his written submissions, counsel urged the Court to dismiss the appeal. He argued that the alleged failure by the prosecution to supply the appellant with witness statements was a mere afterthought as the appellant actively participated in the trial, understood the evidence, and cross examined witnesses. He submitted that assuming there was breach of **Article 50(j)** of the Constitution in failure to supply the appellant with witness statements, on the authority of **Albanus Mwasia Mutua vs Republic**, Criminal Appeal No. 120 of 2004, the appellant would only be entitled to a claim in damages and not acquittal of the criminal charges.

[4] Mr. Ketoo submitted that there was sufficient evidence adduced by the prosecution that proved the charge against the appellant. Counsel drew the Court's attention to **section 124** of the **Evidence Act** that allows the court in Sexual Offences to act on the evidence of the complainant even without corroboration. Counsel pointed out that in the case of the appellant, the evidence of the complainant was consistent with the evidence of Vincent Ombui who responded to the alarm raised by the complainant and found the complainant holding on to the appellant shouting that the appellant had just raped her. There was also consistency in the evidence of Dickson Nenguseyo, a clinical officer, who examined the complainant and found evidence of a struggle as well as epithel cells confirming that there had just been sexual contact.

[5] As regards the sentence, Mr. Ketoo urged the Court that it should not interfere with the sentence imposed on the appellant, as it was a lawful sentence and had in fact been reduced by the High Court. He therefore urged the Court to dismiss the appeal in its entirety.

[6] We have considered this appeal and the arguments made. This being a second appeal under **section 361** of the **Criminal Procedure Code**, our mandate is limited to considering issues of law only, and in this regard severity of sentence is a matter of fact, and only becomes a matter of law if the appeal concerns the legality of the sentence.

[7] The appellant contended that his rights to a fair trial was violated, this is a matter of law that we are obliged to consider. Under Article 50(2)(j) of the Constitution, an accused person has a right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The charge sheet against the appellant indicated that the witnesses to be called included the alleged victim JO and others who were to be stated. The record shows that the charge sheet was explained to the appellant and he pleaded not guilty to the charge. During the trial, the appellant did not at any stage request for statements of witnesses, but indicated that he was ready to proceed with the trial. The record shows that the appellant cross examined witnesses during the trial. There is no evidence that the appellant was denied access to the statements or that he was prejudiced by not having such statements. Nor did the appellant raise any complaints regarding access to statements in the High Court. We therefore agree with Mr. Ketoo that this ground of appeal is an afterthought. It is accordingly rejected.

[8] It is evident that the learned judge analyzed and re-evaluated the evidence. Both the trial court and the first appellate court believed and accepted the evidence of the complainant that the appellant sexually assaulted her. The evidence of VO who arrived at the scene shortly after the complainant raised an alarm, was consistent with the complainant's evidence. The evidence of the clinical officer provided material corroboration regarding penetration, and the complainant's evidence that she had been raped. The appellant was at the scene when the complainant alleged at the first opportunity that he had just raped her. He was therefore positively identified as the rapist. In the circumstances, we are satisfied that there was sufficient evidence to establish the charge against the appellant.

[9] As regards the issue of sentencing, the appellant was sentenced to twenty (20) years imprisonment which was reduced by the learned judge of the first appellate court to fifteen (15) years. Under **section 3(3)** of the **Sexual Offences Act**, the minimum sentence for the offence of rape is ten (10) years and the maximum sentence life imprisonment. The sentence of fifteen (15) years was therefore a legal sentence and this Court has no jurisdiction to address the severity of sentence.

[10] The upshot of the above is that we find no substance in this appeal and do dismiss it in its entirety.

DATED and delivered at Kisumu this 31st day of January, 2019.

E. M. GITHINJI

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JUDGE OF PPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR