IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 188 OF 2018

BETWEEN

JACKSON CHERUIYOT KIRUI.................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the Judgement of the High Court of Kenya at Kitale, (Chemitei, J.) dated 20th September, 2017

in

HCCRA NO. 37 OF 2015)

****

JUDGMENT OF THE COURT

Background

1. This is a second appeal arising from the judgment of the High Court at Kitale, (**Chemitei, J.**). The appeal originates from a judgment of the Chief Magistrate's Court at Kitale where **Jackson Cheruiyot Kirui**, (the appellant) was tried and convicted for the offence of rape contrary to ***section 3(3) of the Sexual Offences Act No. 3 of 2006***. The particulars of the offence were that on 12th February, 2014 at Zea village within Trans-Nzoia County, the appellant intentionally and unlawfully caused his penis to penetrate into the anus of the complainant, **MN (name withheld)** without her consent.

2. The prosecution called a total of seven (7) witnesses while the appellant gave an unsworn statement and did not call any witnesses.

3. The complainant testified that at about 6.00 pm on 12th February, 2014, she was sent by her mother, **PMW (P)** to bring back the cows from their grazing fields. On her way to the grazing field, she met the appellant who approached her and told her that he had a message for her father. He then pushed her, causing her to fall on her stomach, and then lay on top of her and inserted his penis into her anus. It was the complainant's further testimony that a man passed by and found the appellant raping her and that the appellant retained her pant. The complainant further testified that her father, **HW (H**) and **Francis Mutubi Anjachi** (**Francis**) went to the grazing ground but the appellant had since left the scene; that she had known the appellant prior to the occurrence of the defilement as they were neighbours and that the complainant used to engage in construction duties as a casual labourer.

4. Francis who was present when the complainant was sent to get the cows, shortly thereafter left for his home and on the way, he passed through the grazing ground where he found the appellant inserting his penis into the complainant's anus while her head was covered with a jacket**. Francis** raised alarm and the appellant got off the complainant and kicked **Francis** on the forehead then escaped. Shortly thereafter, the complainant's father, **H** arrived at the scene. **Francis** and **H** went to the appellant's home together with some members of the public where they found the appellant, his mother and wife. They found the appellant in possession of the complainant's pant. The appellant was taken to Kitale Police Station.

5. PC Caleb Yator (**PC Yator**) took the complainant's statement on 13th February 2014 at Kitale Police Station; issued the P3 form and preferred the charge against the appellant. **Linus Ligare** (**Linus**), a clinical officer based at Kitale District Hospital examined the complainant and found that her anal oriphix was torn leading him to conclude that she was sodomised. **PC Michael Muchiri (PC Muchiri)**, from Child Protection Unit Kitale who took over the investigation from **PC Yator,** produced the complainant's birth clinic card which indicated that the complainant was born on 5th June, 1994. **Christopher W. Muliro** (**Christopher**), a psychiatrist based at Kitale District

Hospital produced a mental assessment report in respect of the complainant dated 5th August, 2014 in which he concluded that she had moderate mental concentration as she had suffered measles and cerebral palsy. In his opinion, the complainant was not fit to testify but on cross examination, he indicated the complainant could recall what was done to her.

6. In his defence, the appellant testified that on the material day, he was engaged in construction work from morning until about 3.00 pm; that thereafter, he went to a trading center to shop and went to his home at about 5.00 pm; that on arrival, he found a crowd of people, including the complainant's father who accused him of sodomising the complainant. He denied the charges and claimed that the complainant's parents asked him for money in order to drop the case against him. He further claimed that the complainant's parents had taken advantage of the complainant's condition to extort money from people.

7. The trial magistrate found that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty as charged and convicted him pursuant to ***section 215 of the Penal Code***. The trial magistrate sentenced the appellant to serve the minimum mandatory sentence of 10 years imprisonment. In sentencing, the court considered the victim impact report which indicated that, ***"the victim was traumatized and that the nature of the offence is serious and dehumanizing on PW1 who is mentally challenged."*** The trial magistrate noted that the accused had been in custody since 25th February, 2014; that he had a young family; and that he was on medication for a chronic ailment.

8. Aggrieved by that decision, the appellant appealed to the High Court on grounds that the trial magistrate erred in both law and fact; as the appellant was not taken for medical examination to prove the case beyond reasonable doubt; that the appellant's constitutional rights were infringed as he was held in police custody for more than 24 hours; that there was no crucial investigation carried out by the police; by relying on the guidance of family witnesses; and by not assigning any cogent reasons why the appellant's defence was rejected and the basis of such disregard.

9. The learned Judge of the High Court heard the first appeal and concluded that the evidence was sufficient to prove the charge against the appellant. Accordingly, the learned judge found no merit in the appeal and dismissed it.

10. Undeterred, the appellant preferred an appeal to this Court. The appellant filed "Mitigating Grounds of Appeal" in which he mitigates the sentence meted out to him by the trial court on grounds that he was in remand for one (1) year and has served 3 and half years of the sentence; that he has a health problem which was captured in the probation report; that he is on medication for a chronic ailment; that he has a young family which depends on him; that during his entire period in prison he has completed training in carpentry and has been awarded a grade III certificate; that he is remorseful and reformed having completed spiritual courses and having been awarded a diploma, a certificate in health programs among others; that he was a driver and hence was therefore a productive member of society and was responsible for the upkeep of his siblings. The appellant also filed written submissions supporting his mitigation.

<u>Submissions</u>

11. When the appeal came before us for hearing, the appellant who appeared in person, abandoned his appeal against conviction and confirmed that his appeal is only against sentence. The appellant urged this Court to set him free as he is the breadwinner of his family and is remorseful.

12. Ms. R. N. Karanja, Prosecution Counsel, appeared for the respondent and opposed the appeal contending that the sentence that was meted out was a minimum mandatory sentence.

<u>Determination</u>

13. We have considered the record, the submissions and the applicable law. Since this is a second appeal, our mandate is limited under ***Section 361 of the Criminal Procedure Code*** to consideration of matters of law only. **(See *Chemagong v Republic [1984] KLR 213* and *Rueben Karari s/o Karanja v Republic [1950] 17 EACA 146).***

14. The appellant herein was charged for the offence of rape contrary to ***section 3(3) of the Sexual Offences Act*** and upon conviction was sentenced to 10 years imprisonment, being the minimum mandatory sentence prescribed by law.

15. In this respect, ***Section 3(2) of the Sexual Offences Act*** provides that a person guilty of the offence of rape:

> ***"…is liable upon conviction to <u>imprisonment for a term which shall not be less than ten years</u> but which may be enhanced to imprisonment for life."***

It is clear that ***Section 3(2) of the Sexual Offences Act*** provides for a minimum sentence for the offence of rape but also gives discretion to the court to enhance the sentence to life imprisonment. From the record, it is clear that upon the appellant's conviction, the trial court took into consideration the appellant's mitigation in sentencing him and upon its discretion elected to mete out the minimum mandatory sentence for the offence. However judicial authority show that the court has jurisdiction to pass a sentence less than the minimum sentence ***(See Dismas Wafula Kilwaki v Republic Criminal Appeal No. 129 of 2014 (Kisumu).***

16. It is apparent from the appellant's submissions that the appeal herein concerns the severity of the sentence; which is a matter of fact and not a question of law. In this regard, ***Section 361(1) of the Criminal Procedure Code*** provides that: -

> ***"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-***

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence." (Emphasis added)

17. From the above, it is clear that severity of sentence is a question of fact and is not a matter for consideration on a second appeal. In this respect, this Court in the case of ***Paul Tanui v Republic (2010) eKLR***, found that:-

> ***"Second appeals to this Court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361(1) (a) of the Criminal Procedure Code. It is clear that an appeal against the severity of sentence as opposed to the legality of the sentence is not maintainable."***

18. Accordingly, we find that pursuant to ***Section 361(1) (a) of the Criminal Procedure Code***, we have no jurisdiction to interfere with the lawful sentence of the courts below. It is evident that in imposing the mandatory minimum sentence, the trial court properly exercised its discretion having taken into account all the circumstances including the appellant's mitigation and the victim impact report. In the circumstances of this case, the sentence of ten (10) years imprisonment although a minimum sentence was deserved. The appeal against conviction and sentence is dismissed.

Dated and Delivered at Eldoret this 17th day of October, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

..

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR