IN THE COURT OF APPEAL OF KENYA
AT ELDORET

CRIMINAL APPEAL 126 OF2007

JAMES NYAMWEYA…………………..……………… APPELLANT

AND

REPUBLIC ……………………………………..……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (Ochieng, J) dated 26th September, 2007

In

H.C. Cr. A. No. 24 of 2006)

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JUDGMENT OF THE COURT

On 7th December, 2004, the appellant herein **JAMES NYAMWEYA**, was arraigned before the Senior Principal Magistrate's Court at Kitale charged with defilement of a girl contrary to ***section 145 (1)*** of the Penal Code. It was alleged that on the 27th November, 2004 at KN Estate in Trans Nzoia District of the Rift Valley Province the appellant had carnal knowledge of JA, a girl under the age of sixteen years. Alternatively, the appellant was charged with indecent assault on a female contrary to ***section 144 (1)*** of the Penal Code. The particulars of the offence being that on the 27th day of November, 2004 at [KN] in Trans Nzoia District within Rift Valley Province had indecently assaulted [JA], a girl under the age of sixteen years by touching her private parts.

The appellant was charged on the second count of grievous harm contrary to ***section 234*** of the Penal Code in that on 27th day of November, 2004 at [KN] Estate in Trans Nzoia District within Rift Valley Province he unlawfully did grievous harm to [JA].

The trial of the appellant proceeded before the learned Principal Magistrate (Mrs. M. C. Chepseba) who convicted him on both counts but as regards the first count the learned trial Magistrate was of the view that the offence proved was attempted defilement rather than actual defilement. In concluding her judgment delivered on 23rd February, 2005 the learned trial Magistrate said:-

"***On the issue of corroboration of the girls/minor evidence, this court found her evidence to be credible and consistent. She was corroborated by her sister PW II and medical doctor PW III although the P3 form was not conclusive on the aspect of defilement or***

penetration to be precise , the doctor indicates in the P3 form that initial treatment cards had been misplaced. However, there is strong indication in the P3 form that the grievous injuries she received was as a result of the assault before and during the forced or attempted forced penetration. However she had no visible injuries to her external genitalia although a yellowish discharge was present in her vagina swab. No laboratory results were indicated to court though worthy to note too, she was examined for defilement about 1 week after and there was no medical record for this clinical officer filing P3 form 5 months later to refer to. Clearly he was not the initial medical officer who treated her. Since the Evidence Act was amended Vide Act No. 5/2003 there is no need for corroboration if the court believes the minor and I believe her.

Looking at the accused's defence. He denied being present on the date of alleged offences claiming that he had gone visiting his grandmother in [G] village and only retuned (sic) on 28/11/2004. He was arrested on 3/12/2004 for this offence which he denies. I do not believe his defence and Alibi. This young 8 years old could not have cooked up a story against him. There is glaring proof of the defilement or attempted defilement and grievous harm and it must have been caused by a male adult on 27/11/2004 which male the young girls confirmed was him. She identified him physically and by name and she had seen him at the neighbours for 1 year before then and on this day he even spoke to her and her younger siblings tricking them with guavas before locking the younger children in a pit latrine and dragging her to their sitting room, tied her hands and proceeded to undress her innerwear and his and defiled and assaulted her in the sitting room. These events were so explicit to have been just cooked or framed on him. His defence is dismissed. He did not even call any corroboration at all.

I still find the prosecution case proved beyond reasonable doubt. The accused is convicted for the offence of attempted defilement and grievous harm as charged under section 215 of the C.P.C."

After the appellant asked for leniency in his mitigation the learned trial Magistrate proceeded to sentence the appellant as follows:-

"***(1) First count of attempted defilement. He will serve 40 years imprisonment with hard labour.***

(2) Second count of grievous harm to serve life imprisonment

(3) Sentence to run concurrently."

Being aggrieved by the foregoing the appellant filed an appeal to the High Court and in a judgment delivered on 24th September, 2007, Ochieng, J dismissed the appellant's appeal by stating as follows in concluding his judgment:-

"***From the totality of the evidence on record, I agree with the finding by the learned trial Magistrate, that the identification of the appellant was very clear.***

The trial court, which had the advantage of observing the demenour of the complainant found her to have been a credible witness. I find no reason to fault that assessment.

And as regards the defence case, the trial court did not believe the appellant's alibi.

In that regard, I do share the view expressed by the learned State Counsel, that the alibi was displaced by the overwhelming evidence adduced by the prosecution.

In the result I find that the appellant's conviction was safe, and it is therefore upheld.

As regards the sentence, the offence of attempted defilement carries a sentence of life imprisonment with hard labour, whilst the offence of causing grievous harm attracts a life imprisonment. The learned State Counsel felt that the sentences imposed on the appellant were excessive as the appellant was a first offender.

There is an unwritten rule that ordinarily a first offender should not be given the maximum prescribed penalty. However, there is also a clear rule that an appellate court ought not to interfere with the sentence unless it is shown to have been wrong. A sentence would be wrong if it is not provided for, or if in passing it , the trial court is shown to have taken into account extraneous factors, or to have failed to take into account relevant factors such as the mitigation.

In this case, the appellant did not submit that the trial court had taken into account extraneous factors or had disregarded the mitigation. Even if he had so asserted, I would not have agreed with him, because the court noted that the appellant was remorseful.

In the same vein, the trial court noted that the young girl had been injured heartlessly and viciously, occasioning her grievous harm. The trial court also observed that the complainant was physically and psychologically traumatized for life. It is for those reasons that the sentences were meted out.

In my considered opinion, a person who attempts to defile a girl deserves punishment. And if such person does so to a young girl, such as the complainant herein, he should expect stiff punishment.

And if in the process of attempting to defile the young girl, the offender ties up her hands, then punches or slaps her when she cries out in pain, at being mercilessly violated, he should expect little sympathy from the court.

In a nutshell, even though ordinarily a first offender would not be given the maximum sentence, I find that the circumstances prevailing in this case, did call for the kind of sentences imposed. I therefore find no basis in law or fact, for interfering with the sentences.

In conclusion, the appeal is dismissed in its entirety. I uphold both conviction and sentence."

Still dissatisfied with the foregoing the appellant now comes to this Court by way of second and final appeal. This is the appeal that came up for hearing before us on 22nd September, 2009. The appellant appeared in person while the state was represented by Mr. J.K. Chirchir (Senior State Counsel). In his short address to the Court the appellant simply asked us to reduce the sentence.

Mr. Chirchir on his part conceded that the sentence was harsh and excessive. He further submitted that the appellant had been convicted under ***section 145*** of the Penal Code which section provided for a maximum sentence of 14 years.

As already indicated at the commencement of this judgment the offence is alleged to have been committed on 27th November, 2004. By virtue of the Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003 which came to commencement on 25th July, 2003) ***section 145*** of the Penal Code provides:-

"**(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.**

(2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life:

Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was above the age of sixteen years or was his wife."

In view of the foregoing we do not agree with Mr. Chirchir that the maximum sentence was 14 years. Clearly the law provided for life sentence for those convicted of either defilement or attempted defilement of girls under the age of sixteen years, until it was repealed by the Sexual Offences Act of 2006 which came into effect on 21st July, 2006. As regards the applicable law there can be no doubt that the appellant was convicted and sentenced under the appropriate provision of the law. The facts of this case, as can be observed from the findings of the two courts below are rather sad and disturbing. The appellant lured a young girl (the complainant) aged 8 years and attempted to defile her for about ten minutes and in the process of tying her hands injured her. As noted by superior court the complainant was "*injured heartlessly and viciously occasioning her grievous harm."*

Under ***section 361*** of the Criminal Procedure Code only issues of law may be raised and considered in a second appeal – here we are dealing with a second appeal. This Court has stated on numerous occasions that it will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on misapprehension of law or no tribunal properly directing itself to the evidence would make such findings – see **M'RIUNGU V. R [1983] KLR 455**. In the present appeal there are concurrent findings by the two courts below that the appellant was guilty of attempted defilement of the young girl aged 8 years and that he also caused grievous harm to her. We have considered the record of appeal and we have no reason to interfere with those concurrent findings of the two courts below. Accordingly the appeal against conviction is dismissed.

What has, however, caused us anxious moments is the issue of sentence. For attempted defilement the appellant was sentenced to 40 years imprisonment with hard labour while on the second count of grievous harm the appellant was sentenced to life imprisonment. There is the question of whether a first offender should be sentenced to the maximum sentence. Where the law provides that the offender shall be liable to life imprisonment it does not mean that the court has no discretion to impose a sentence less than life imprisonment – see **OPOYA V. UGANDA [1967] E.A. 752**. What does life imprisonment mean? This Court has recently dealt with this issue in **FRED MICHAEL BWAYO V. REPUBLIC** – Criminal Appeal No. 130 of 2007 (unreported) in which it was stated as follows:-

"***There is, of course, a whole debate about what*** "life imprisonment" ***is about although it is less of a debate where the sentence is a minimum one as in the Sexual Offences Act. The prisoner will simply spend the whole of his/her natural life in prison. There is no prospect of release in the future, no matter how distant. A life imprisonment and then a release while still alive would be a contradiction, and the released prisoner would be deemed to be on license while on release – see*** R. V. Foy (1962) WLR 609***. It would also be an absurdity to sentence one to life imprisonment to run consecutively with a number of years thereafter. In Kenya by an amendment inserted in 1986 to section 46 (1) (ii) of the Prisons Act (Cap 90), there is no remission for a prisoner sentenced to life imprisonment.***

The challenge is the substitution of a number of years imprisonment for life imprisonment where, as in this case, the law allows for discretion. As far as our limited research goes, there are variations in approach in different countries of the world. A few examples will suffice: In Uganda, life imprisonment is taken to mean 20 years maximum,

although the debate continues after a recent constitutional court decision that it should mean "**the whole of a person's life"**. In Australia it would be between 10 to 20 years followed by parole depending on the degree of the offence. In Argentina it is between 13 to 25 years while in Belgium it is 10 to 16 years pending parole. In England and Wales, the term is indeterminate but until the year 2002, the Home Secretary reserved the right to set the minimum length before that power was reposed on the courts; while in Congo (DRC) the maximum penalty is 30 years imprisonment. Generally in many countries there will be a number of years followed by parole."

What about the sentence of 40 years imprisonment on the appellant whose age was assessed as 26 years as at 11th March, 2009 according to the medical report from Moi Teaching & Referral Hospital? This Court has had occasion to deal with similar situations in the recent past. For example, in **LAZARO KUNDU SIMIYU V. REPUBLIC** – Criminal Appeal No. 8 of 2007 (unreported) the appellant who had been convicted of attempted defilement was sentenced to 20 years imprisonment with hard labour which sentence was reduced to 10 years imprisonment with hard labour. In **FRED MICHAEL BWAYO V. R (**supra) the appellant had been convicted of defilement of a young girl and was sentenced to 20 years imprisonment with hard labour which sentence was upon appeal to this Court, substituted with a sentence of 15 years with hard labour.

In view of the foregoing we think that this Court is entitled to interfere with the "***lawfulness***" of the sentence imposed on the appellant. We accordingly substitute the sentence of 40 years imprisonment with hard labour with one of 15 years imprisonment with hard labour for the offence of attempted defilement. We also substitute the sentence of life imprisonment with that of 15 years imprisonment for the offence of causing grievous harm. Both sentences to run concurrently and to be served as from the date the appellant was convicted and sentenced by the trial court i.e. 23rd February, 2005. To that extent only shall we interfere. The appeal is otherwise dismissed.

Dated and delivered at ELDORET this 23rd day of October, 2009

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. S. AGANYANYA

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>.