REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 45 OF 2014

REMMY CHERUIYOT KIRUI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from against both the conviction and the sentence of Senior Principal Magistrate

Hon. H. M. Nyaga delivered on 12th of December, 2014 in Molo Criminal Case No. 1094 of 2008.)

JUDGMENT

1. The Appellant, Remmy Cheruiyot Kirui, was arraigned before the Molo Chief Magistrate's Court charged with a single count of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars contained in the charge sheet were that on the 20th day of July, 2008 in Molo District within the Rift Valley Province, the Appellant unlawfully inserted his genital organ into the genital organ of YC, a girl aged 8 years.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the place, time and victim are the same as that in the main charge.

3. The Appellant pleaded not guilty and the cases proceeded to a full trial. The Prosecution called four witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer and placed him on his defence. He gave an unsworn statement. At the conclusion of the trial, the Learned Trial Magistrate was persuaded that a case had been made out beyond reasonable doubt on the main charge and convicted the Appellant. He also sentenced the Appellant to life imprisonment as by law provided.

4. The Appellant is dissatisfied by both the conviction and sentence and has appealed to this Court. He has listed the following grounds of appeal quoted verbatim from his Petition of Appeal:

1) "That the learned Hon. trial magistrate erred in law and fact when he convicted me in reliance of the medical evidence which was not inclusive and credible.

2) That the pundit magistrate failed to observe that Section 36(1) of the Sexual Offences was not adhered.

3) That the pundit magistrate failed to appreciate the fact that their existed a grudge between me and PW2.

4) That the learned magistrate failed to observe that most essential prosecution witness was not called a Mr. Mwithi hence contravening Section 144(1) & 150 of the CPC

5) That the Hon. trail magistrate erred in law when he relied on PW1 and 2 evidence that was contradicting and not collaborating.

6) That the Hon. trial magistrate erred in law and fact when he convicted me in absence of sufficient evidence.

7) That it was burden of proof shifted to me contrary to provisions of law in Section 107 and 109 of the Evidence Act.

8) *That the Hon. magistrate erred in law when he rejected my truthful defense without any cogent reason Contrary to Section 169(1) of the CPC*."

5. The Appellant also filed Amended Grounds of Appeal as follows:

1) "That the trial magistrate erred in law and fact relying on the evidence of PW1 and PW2 which was inconsistent and contradictory to each other.

2) That the trial magistrate erred in law and fact by failing to note that the most crucial witness in the present case did not testify.

3) That the trial magistrate erred in law and fact by dis-regarding the evidence of the Appellant that was strong and unshaken by the prosecution side.

4) *That the trial magistrate erred in law and fact by failing to note that the evident delays in the commencement of the prosecution's case.*"

6. Before the Trial Court, the following evidence emerged. The Complainant testified that she was eleven years old at the time of the hearing and was a student at [Particulars Withheld] Primary School. She told the Court that on 20/07/2008, she was alone at. Her mother had gone to church. She was at home cooking. The Appellant, a neighbour, went to their house looking for a mobile phone charger. She asked him to check for it on the cupboard. He went to plugged his phone in. The Complainant testified that the Appellant next called her to where he was and asked her to undress. He proceeded to remove her dress and her biker shorts. He then raped her on the chair. The Complainant told the Court that her mother, GK, came in as the sexual encounter was going on. The mother screamed and grabbed an axe to attack the Appellant. The Appellant fled. The Complainant testified that this was the second time the Appellant had defiled her.

7. The Complainant's mother, GK, testified as PW2. She testified from a hospital bed since she was gravely ill and could not go to Court. She corroborated the Complainant's narrative about how she found the Appellant having sex with the Complainant on 20/07/2008. She came home from church to find the Appellant in the act. She said that the Complainant was bent over and the Appellant was behind her standing; he was having sex with her from behind. She raised alarm and the Appellant fled. She then took the Complainant to the Hospital and then to the Police.

8. At the Hospital, the Complainant and her mother were attended to by a Clinical Officer by the name, Kirui. He had been transferred to Maralal and then could not be traced by the time of the trial. Consequently, another Clinical Officer, Nancy Keiyo, testified on his behalf. Ms. Keiyo testified that she had worked with Mr. Kirui for more than two years and that he was conversant with his handwriting and signature. She confirmed that she had the P3 Form which Mr. Kirui had filled upon examining the Complainant. She produced the form as Exhibit 1. The Form showed that the Complainant had no bruises to her private parts but had erythema (redness) of the vagina. Additionally, the hymen was raptured and there were numerous pus cells seen. Ms. Keiyo's opinion was that defilement had taken place.

9. The final Prosecution witness was the Investigating Officer, PC Omar Mohamed formerly of Olenguruone Police Station. He confirmed that he was on duty on 20/07/2008 when the Complainant and her mother reported the defilement. He issued them with a P3 Form. On 22/07/2008, he went with other colleagues to Nakuru to arrest the Appellant. They had received a tip off that he had fled there and they tracked him there.

10. In his defence, the Appellant gave an account of how he was arrested. He then claimed that the Complainant's mother had framed him because he had refused to have an affair with her. He claimed that he was at work that day.

11. This being a first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

12. The trial in the Court below was straight-forward. The Complainant gave forthright and candid testimony. The testimony remained unshaken in cross-examination. The Learned Trial Magistrate who heard and saw the witness believed her to be telling the truth. He also believed PW2 – the mother of the Complainant – who found the Appellant in the act. Indeed, this is one of the rare cases of defilement where there is corroboration: both the Complainant and her mother gave first hand evidence on the defilement.

13. The Prosecution was required to establish three elements beyond reasonable doubt:

i. Penetration as defined in the Sexual Offences Act;

ii. That it was the Appellant who caused the penetration; and

iii. Age of the Complainant.

14. The oral testimony by the Complainant and her mother as well as the medical evidence adduced were categorical that there was penetration. There is no need to belabor the issue. The oral testimony and the medical evidence are mutually reinforcing.

15. The age of the Complainant was established by the oral testimony of the Complainant and her mother. Both stated that the Complainant was eight years old at the time of the incident. The P3 Form filled by the Clinical Officer also approximated the age to eight years old.

16. The only real questions in the trial was whether the penetration was caused by the Appellant. In my view, the evidence was quite strong and it permitted little doubt that the Appellant committed the act as alleged by YC. As aforesaid, YC gave very straightforward testimony. It was clear and it was uncontroverted. It was supported by the testimony of her mother. In both cases, the evidence was one of recognition as opposed to mere identification. Both the Complainant and her mother knew the Appellant as a neighbour before. They gave a first report to the Police identifying the Appellant as the assailant. The assailant fled from the village to Nakuru forcing the Police to track him down there.

17. What about the defence theory that all the evidence was fabricated to frame the Appellant because he had refused to have a sexual relationship with the Complainant's mother" In short, that theory is too fantastical and implausible as to have no inherent possibility that it could be true. It raises no reasonable doubts at all to displace the compelling evidence in favour of the Prosecution case. In short, there was ample evidence to convict.

18. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

19. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015****], which holds that the mandatory death sentence is unconstitutional for*

depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

20. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

21. In the present case, the Appellant mitigated that he has a family and that the children depend on him as the sole bread winner. It is also a factor that while, the victim was a child of tender years and she will likely be scarred for life by this traumatic sexual assault, the defilement did not involve use of sadistic or gratuitous violence on the victim. Therefore in the circumstances of this case, life imprisonment would be disproportionate. Considering the mitigating and aggravating factors, I am of the view that a sentence of thirty years imprisonment would properly serve the sentencing objectives in this case.

22. **The upshot of all this is that the Appellant's appeal against conviction fails. However, the appeal against the sentence is hereby allowed. Accordingly I set aside the sentence of life imprisonment and substitute therefor a sentence of thirty (30) years imprisonment with effect from the date of sentence by the Trial Court.**

23. Orders accordingly.

Dated and Delivered at Nakuru this 19th December, 2019.

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JOEL NGUGI

JUDGE