REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 136 OF 2021

MARTIN WANYAMA WEKESA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. G. Ollimo, RM, dated 9th August 2019 in the Principal Magistrate's Court at Kimilili in Criminal Case S.0. No. XXXX of 2018, Republic v Martin Wanyama Wekesa)

JUDGEMENT

The appellant has appealed against his conviction and sentence of fifteen years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.

In this court the appellant has raised four grounds of appeal in his petition of appeal.

In grounds 1 and 2 the appellant has stated that the evidence adduced by the prosecution was not sufficient to lead to his conviction for it was based on the testimony of a single witness.

The evidence of the complainant (Pw 1-name withheld) was that she was aged 17 years old, having been born on 2nd February 2001. In the trial court she identified her birth certificate which was produced as prosecution exhibit 1. She further testified that the appellant brainwashed her and convinced her to quit school. She also testified that on 12/3/2018 when she had gone to the river to fetch water the appellant followed her.

Furthermore, the appellant told her to follow him. She first went home to drop the water and immediately left. The appellant promised to marry her and that is why she went to his home. The appellant threatened her if she declined her request. She agreed to live with him at Kambini. While she was in the home of the appellant they used to have unprotected sex as a result of which she lost her virginity. The appellant used to lock her in his house for he thought that her parents would go to look for her. After three weeks the appellant took her to her cousin Priscilla whose house was at Misikhu area. She was later arrested and taken to Misikhu Ap camp, where she found the appellant. Later the complainant was taken to Kimilili hospital and was examined; a matter in respect of which she identified the P3 form which was later produced as exhibit 3.

The complainant was examined by Catherine Akiru (Pw 3), a clinical officer at Kimilili sub-county hospital. Upon examination she made the following findings. The complainant was 17 years old. Her hymen was missing. The pregnancy was negative. Urinalysis was negative. VDLR was negative. PITC was negative. Pw 3 concluded that she had penetrative sex which led to the missing hymen. Pw 3 then produced the P3 form as exhibit 3.

In addition to the foregoing witnesses the prosecution called SNW (Pw 2), who is the father of the complainant. She identified the birth certificate of her daughter which was later produced as exhibit 1. On 22/3/2018 Pw 2 noticed that his daughter was not at her study table in her room. He continued to testify that her daughter had never gone missing from home. Pw 2 made a report of her missing daughter to the community policing officers and the assistant chief; and the latter reported to the village elders. On 10/4/2018 Pw 2 managed to trace the complainant who was then doing laundry work. Upon interrogation by her father the complainant told him that she was married by the appellant. He arrested her daughter and took her to Kimilili police station and later to Kimilili hospital.

The appellant was re-arrested by No. 100383 PC (W) Gladys Kagwiria (Pw 4) from the AP police camp and charged him with defilement.

Upon being placed on his defence, the appellant (Dw 1) testified on oath and denied the charge. Dw 1 testified as follows. He is a boda boda boda operator and was arrested at Misikhu stage and taken to the AP camp. He found the complainant at that camp. He was surprised when he was asked as to why he was co-habiting with the complainant in a rental house. He also testified that when the complainant was arrested the police retrieved an ID card of the man who had been co-habiting with the complainant.

I have re-assessed the entire evidence as a first appeal court. As a result, I find the prosecution evidence to be credible that the appellant had sexual intercourse with the complainant; whom he had taken and lived with her for about three weeks in Misikhu area. I further find as credible the medical evidence of Catherine Akiru (Pw 3), a clinical officer that the complainant had penetrative sexual intercourse which was evidenced by a missing hymen. I therefore find as credible that sexual penetration was proved by both the evidence of the complainant and the medical evidence of Pw 3. The contention of the appellant that penetration was not proved is without basis and is hereby dismissed.

Furthermore, I find as lacking in merit the submission of the appellant that there were inconsistencies in the prosecution case because those inconsistencies namely that the appellant locked her in his house and that he did not lock her in his house do not go to the root of the case.

I also find as credible the evidence of Pw 2 that her daughter went missing and as a result, he made a report to the assistant chief and the community policing officers.

I find as incredible the sworn evidence of the defence that he knew the complainant for the first time when he was arrested and yet he admitted that he never had any differences with her. The question one may ask as did the trial court is as to why would the complainant then gave incriminating evidence against him.

I further find that section 124 of the Evidence Act (Cap 80) permits a trial court to convict an accused if the evidence of the complainant is credible notwithstanding that it is not corroborated. I therefore reject the submission of the appellant that it was unsafe to convict him only on the evidence of the complainant alone.

In ground 3 the appellant has faulted the trial court for convicting him when the prosecution failed to call potential witnesses to testify and for failing to give any explanation for that failure. The evidence of the prosecution through the complainant was that the brother and sister of the appellant were at their home and they saw her there. She testified that they were witnesses in the instant appeal. They were not called to testify at trial. These witnesses should have been called to testify. I have therefore drawn and an adverse inference in accordance with the principle set out in Bukenya v Uganda (1972) EA 549. However, I find that their evidence does not go the root of the appeal. And for that reason the appellant’s submission in that regard fails and is hereby dismissed.

In ground 4 the appellant has faulted the trial court for disbelieving his evidence without justification. In this regard, I find that the trial court disbelieved the evidence of the appellant because it was incredible. This was the justification for the rejection of the defence evidence. I therefore reject the appellant’s submission in that regard.

In the premises, I find that the prosecution proved their case beyond reasonable doubt. I therefore confirm the conviction of the appellant.

The sentence imposed was merited and I hereby dismiss it.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE ON THIS 25TH DAY OF FEBRUARY 2022.

J M BWONWONG’A

JUDGE

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant: Present in prison

Ms Mukangu for the respondent