REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.9 OF 2019

BERNARD KIPNGETICH……..……..……..……..……..APPELLANT

VERSUS

REPUBLIC……..……..……..…….RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. Mokua (CM) in Kericho CMCR No.9 of 2017 delivered on 13/2/2019)

JUDGEMENT

1. The Appellant was convicted with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences to fifteen (15) years imprisonment.

2. The particulars of the charge were that on 14/8/2017 in Kipkelion East Sub-County within Kericho County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of VC, a child aged 16 years.

3. The prosecution evidence in summary was that on 12/8/2017 the complainant a girl aged 16 years old left her home to go to Londiani where her father was staying. Instead, she decided to go to the Appellant's house who was her boyfriend and stayed with him for two days and during that period she had sex with him.

4. The Appellant was apprehended on the 3rd day and the

complainant was taken to Kericho District Hospital where she was examined and her age was assessed and she was found to be 16 years of age.

5. The medical officer produced the P3 form and confirmed that the complainant had been defiled.

6. The Appellant in his defence merely told the court how he was arrested.

7. The trial court found the Appellant guilty as charged and convicted him with the offence of defilement and sentenced him to 15 years imprisonment.

8. The Appellant has now appealed to this court on the following grounds;

i) THAT the prosecution evidence upon which the trial court relied to convict the Appellant was not watertight.

ii) THAT the prosecution evidence did not implicate the Appellant in connection with the offence.

iii) THAT the trial court did not take into consideration the defence by the Appellant.

9. The parties filed written submissions which I have duly considered. The Appellant submitted in writing through his counsel as follows;

i) THAT the trial court erred in convicting the Appellant on "a plea of guilty" that was equivocal. This submission is not relevant as the Appellant in this case did not plead guilty.

ii) The learned counsel for the Appellant also submitted that elements of the offence were not complete because severe and mandatory sentence was not brought to the attention of the Appellant. Again I do not see the relevance of this submission in the current appeal.

iii) It was also submitted that the trial court did not take into account the mitigation by the Appellant and especially the fact that he was a first offender.

iv) It was also submitted that the Appellant was not accorded his right to legal representation and finally that the sentence meted was excessive.

10. The Respondent opposed the appeal and submitted as follows;

i) THAT the Appellant did not plead guilty to the charge but participated actively in the trial.

ii) THAT the Appellant had an opportunity to engage an Advocate but chose not to do so and therefore his rights under Article 50(2) (g) and (h) of the constitution were not violated.

iii) THAT the sentence meted was lawful as the law provides for a sentence of not less than 15 years for the offence committed.

iv) THAT the prosecution evidence was consistent and corroborative and was based on direct evidence and the same was overwhelming rendering the conviction sage.

11. This being a first appeal the duty of the first appellate court is to re-evaluate the evidence and arrive at its own conclusion as to whether or not to support the findings of the Trial Court.

12. In the case of **Okeno vs. Republic [1972] EA 32**,the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

13. The issues for determination in this appeal are as follows;

i) Whether penetration proved.

ii) Whether the Appellant was positively identified.

iii) Whether the age of the complainant was proved.

iv) Whether the sentence was excessive.

14. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as: -

"the partial or complete insertion of the genital organs of one person into the genital organs of another person".

15. I find that the prosecution proved that there was penetration. The complainant said she stayed with the Appellant for 2 nights during which period they engaged in consensual sexual intercourse. The medical evidence corroborated the complainant's testimony.

16. On the issue of identification, I find that the Appellant was positively identified by the complainant. The evidence of the complainant's father that the complainant went missing from home and was found at the home of the Appellant who is their neighbour is corroborative of that of complainant.

17. The proviso of **section 124** of **the Evidence Act** allows the court to convict the offender on the testimony of a single witness if for reasons to be recorded, the court found the witness truthful, though witness be a minor.

18. On the issue of the Complainant's age, I find that under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years.

19. The age of the complainant was proved by production of the age assessment report which confirmed that the complainant was 16 years at the time the Appellant had sexual intercourse with her.

20. I find that the consent by the complainant is irrelevant since she was a child.

21. I also find that the sentence meted is not excessive. I find that the appeal herein lacks in merit and I accordingly dismiss it and I uphold both the conviction and sentence.

Delivered, signed and dated at Kericho this 22nd day of January 2021.

A. N. ONGERI

JUDGE