REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 22 OF 2018

CALVIN KARIUKI……. APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. W. Juma, CM, delivered on 23/7/208 in Narok Chief Magistrate's Court in Criminal SOA Case No. 29 of 2017, R v. Calvin Kariuki)

JUDGEMENT

1. 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 (4) of the Sexual Offences Act No. 3 of 2006 and two years' imprisonment for the offence of assault contrary to section to 251 of the Penal Code; which sentences were ordered to run concurrently.

2. Ms. Omwega, counsel for the respondent has supported the conviction but he left the issue of sentence to the court to decide.

3. In this court the appellant through his counsel, Mr. Kilele has raised ten grounds in his petition of appeal.

4. In a coalesced form the appellant has in grounds 1, 3, 6 and 8 faulted the trial court for convicting him in the absence of proof beyond reasonable doubt. In this regard, the evidence of A.L.N (the initials of the complainant's name- PW 2) was that on 16/4/2017 at 10.00 am she escaped her home with her friend Nyambura to Park View Hotel. They danced up to 4.00 pm. Nyambura left her at 7.00 pm. Kentockay (the appellant) with his friends arrived at 7.00 pm. At 8.00 pm the complainant decided to go to her home, but was prevented from doing by the appellant. The appellant then held her hand and took her to a place called ODM where they drank alcohol.

5. The appellant held her and took her to his house, where he forced her to take alcohol. He then told her to climb to a bed and she did so out of drunkenness. The appellant then had sexual intercourse with her. Her mother (PW 3) went to that house, which was not locked. She pushed the door open and found the appellant on top of her; having sexual intercourse with her.

6. Pw 2 further testified that her mother knew the appellant's place because she used to escape and used to sleep there at times. Her mother ordered the appellant off Pw 2. As a result, the appellant then ran off naked and sat on a stool. The appellant then called the mother of the complainant a dog. The aunt of the appellant arrived at the scene. She pulled her mother and beat her and tore her clothes. As a result, the mother of Pw 2 was injured. Pw 2 was arrested and taken to the police station and kept for two weeks and was thereafter taken to hospital. Her P3 was completed and was produced as exhibit 1 and her treatment notes were produced as exhibit 2. Her top dress was shiny and was produced as exhibit 4 and her child card was produced as exhibit 3. Her black bra was torn and was produced as exhibit 5. The appellant used a condom when he had sex with the complainant. When he ran out he removed it. It was put in evidence as exhibit 6A and its wrapper exhibit 6B. This was the second time she was having sex with the appellant. While under cross examination, she testified that she knew the appellant as Kentockay. She also testified that she was taken to the police station for running away from the appellant's home.

7. L.R. (the initials of her name) is the mother of Pw 2. L.R. testified as PW 3. She testified as follows. On 16/4/2017 she went to the church and returned home at 6.00 pm. She did not find the complainant at home. She learned that the complainant was at the appellant's house. She was led there by one Musaimo. At that house she heard the voice of her daughter. Pw 3 then pushed open the door and found the appellant on top of the complainant. Pw 3 then slapped the appellant and pushed him as he was not moving. This was the third time PW 3 found her daughter in that house. She found him having sex with her. The appellant was semi-naked. Musaimo held the appellant and he struggled with him and managed to free himself and ran out.

8. The appellant went to a stool and sat there abusing the complainant's mother. The eyes of Pw 2 were blood shot and she shouted at her that she was not her mother.

9. The relatives of the appellant came to assist him. He was given a trouser. The appellant then beat Pw 3 and injured her left hand and the left ribs. The appellant also tore her top and her bra. Pw 3 then picked the condom the appellant had used and wrapped it in papers.

10. Pw 3 identified the following exhibits. Her P3 form exhibit 2A. Her treatment noted exhibit 2B. The P3 of her daughter exhibit 1A. Treatment notes of her daughter exhibit 1B. Torn blouse of Pw 3, exhibit 4. Torn bra, exhibit 5. The condom and wrapper, exhibit 6A and 6B.

11. Pw 3 further testified that Pw 1 was born on 16/7/2001. Pw 3 also testified that this was the second time she was seeing the appellant.

12. While under cross examination, Pw 3 testified that her daughter told her that the appellant was Kentocky and that she knew him. She further testified that she caught the appellant red-handed.

13. Benjamin Tum (Pw 1) was the clinical officer, who examined both the complainant and her mother. The findings of Pw 1 in respect of the complainant were as follows. Head, neck, thorax, abdomen, upper and lower limbs were all normal. The hymen was broken, long standing. She did not have any discharge. The high vaginal was done, no spermatozoa. Hepatitis B was negative. VDRL was negative. HIV test was negative. Urinalysis was done, there was nothing abnormal. The complainant told Pw 1 that they had sexual intercourse with the appellant for one year. The mother of the complainant told Pw 1 that she found the appellant and the complainant naked in the house of the appellant and were having sexual intercourse.

14. Pw 1 then produced the P3 of the complainant as exhibit 1, her clinical notes exhibit 1B and her lab results exhibit 1C.

15. In addition to completing the report of Pw 1, Pw 2 also examined the complainant in count 2 namely L. R. (PW 3). His findings were as follows. She was 48 years old. She was sober. She complained of pain in the chest and back and had a tender anterior chest. She also complained of pain in the upper limb and left lower limb. A blunt object could have been used. Pw 2 then produced the following in respect of Pw 3. The P3 form, exhibit 2A. Treatment notes exhibit 2B.

16. GM (Pw 4), is a sister to Pw 3. On 16/4/2017 at 9.00 pm she accompanied Pw 3 to Nyawira Road at Majengo area. Upon opening the door, she found a boy on top of her daughter. Pw 3 slapped the boy and asked him what he was doing to her daughter. The boy went out and climbed on a stone fence. He started using abusive words to Pw 3. Someone took clothes to the boy, who then came and beat Pw 3. L. R. called for a taxi, which came. Upon seeing the taxi, the boy ran away. Pw 4 identified the boy as the appellant. They then took the complainant to the police station. While under cross examination, Pw 3 testified that a condom was found on the bed, which Pw 3 took. Pw 4 was able to see and identify the appellant due to security lights that were outside the house. Pw 4 was able to see the appellant as he ran out of the house.

17. No. XXX PC Henry Jeffa (Pw 5), was the investigating officer. Pw 5 testified that the mother of the complainant took a condom to the police station exhibit 6A in a wrapper exhibit 6B. The appellant had called the mother of the complainant a dog. He also produced an immunization card as exhibit 3.

18. In his sworn evidence, the appellant denied the offences and set up the defence of alibi. It was his evidence that on 16/4/2017, the appellant was at his father's shop which shows Nigerian movies and football. He also denied that he is Calvin Kariuki. He testified that his names are Kennedy Kariuki Njuguna. He also testified that he hit the complainant's mother because he was defending one Calvin, who was his friend. He also testified that he only pushed the complainant's mother, who had slapped him. He also denied that his name was Keitucky. He produced the investigating diary as exhibit D 1, which showed that a person by the name Calvin Kariuki alias Turkey was charged with defilement and assault.

19. While under cross examination, he denied knowing the complainant. He also denied having any grudge against her. He also testified that he usually responds as Calvin Kariuki and that it those who fabricated the case against him to prove his name. He also denied that Turkey and Kentucky are his names.

20. In support of his alibi defence, the appellant called his father namely Charles Njuguna (DW 2). Dw 2 testified that on 16/4/2017, he was at home as he was feeling sick, leaving the appellant to run the business. The appellant returned home after business was closed.

21. This is a first appeal. As a first appeal court, I have independently re-assessed the entire evidence. I have also considered the submissions of both counsel. As a result, I find as follows. The trial court saw and heard the prosecution and defence witnesses testify. There is evidence upon which that court based its findings. It believed the evidence of the complainant that she was defiled by the appellant. The appellant was caught red handed by the mother of the complainant in the act of sexual intercourse with her daughter. The condom and its wrapper which the appellant was used were produced as exhibit 6A and 6B. This explains the absence of spermatozoa and a broken hymen, long standing. I find as persuasive the case of ***David Mwangirwa v Republic [2017] EKLR*** that hymen may be broken due to several causes namely insertion into the vagina of any object capable of tearing it like tampons, masturbation, injury and medical examination. Additionally, that court pointed out that rupture of the hymen may occur when the girl engages in vigorous physical activity like horseback riding, bicycle riding, gymnastics and there can also be a natural tearing of the hymen. Finally, that court also pointed that scientific and medical evidence has proved that some girls are not even born with hymen. Based on that authority counsel submitted that a broken hymen, long standing such as the position in the instant appeal did not amount to proof of defilement. That case is distinguishable from the instant appeal in that the mother of the complainant caught the appellant in the very act of sexual intercourse. The evidence of the complainant was that she had had sexual intercourse with the appellant for one year. Her evidence is corroborated by that of her mother, L. R. (Pw 3). I find there is ample evidence in support of the magisterial findings that the complainant was penetrated and that her age was 16 years. The immunization card, exhibit 3 showed that she was born on 16th July 2001.

22. In the premises, I find no merit in grounds 1,3, 6 and 8 which I hereby dismiss.

23. Mr. Kilele submitted that the appellant is not Calvin Kariuki. He submitted that the appellant is Kennedy Kariuki Njuguna. I find from the evidence of the complainant that she had known the appellant for one year. She could not be mistaken in respect of the identity of the appellant. There is additional identification of the appellant by the mother of the complainant. Moreover, Mr. Omwega for the respondent

rightly submitted that when plea was taken, the appellant did not raise an objection that he was not Calvin Kariuki. As a result, I find that Calvin Kariuki is one and the same person as Kentucky, who is the appellant and was positively identified by those two witnesses. I therefore dismiss this submission, for lacking in merit.

24. Counsel for the appellant submitted that under section 8 (5) (A) (B) of the Sexual Offences Act, it is a defence for an accused on charge of defilement if it is proved that the child deceived the accused person into believing that he or she was over the age of 18 years at the time the alleged commission of the offence and the accused reasonably believed that the child was over 18 years. This submission is without evidentiary basis for the defence of the appellant was that of an alibi and that he was framed. It is a requirement of the law that submissions must be based on the evidence adduced in court and not theories or speculation. I therefore find no merit in this submission, which is hereby dismissed for lacking in merit.

25. The appeal of the appellant in respect of conviction fails and is hereby dismissed.

26. In sentencing the appellant, the trial court did not take into account that the decision in ***Francis Muruatetu & Another v Republic [2017] EKLR,*** changed the law by granting to trial courts the discretion to impose an appropriate sentence and that they are not bound to impose the minimum prescribed sentence. This was an error of law, which entitles this court to interfere with the discretion exercised by the trial court.

27. I have taken into account that the appellant is a first offender and has been in custody for about three years'.

28. In the circumstances, after considering the circumstances of the case including the mitigating and aggravating factors, I find the sentence imposed is manifestly excessive. The sentence imposed is hereby quashed and in its place I impose a sentence of five years' imprisonment, which will begin to run from the date of this judgement.

Judgement signed, dated and delivered in open court at Narok this 22nd day of January, 2020 in the presence of Mr. Kilele for the appellant and Ms. Nyaroita and Ms. Torosi for the respondent.

J. M. Bwonwong'a

Judge

22/1/2020