REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 71 OF 2019

BENSON GITAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable N. Wairimu in Eldoret

Chief Magistrate's court Criminal Case No. 2624 of 2012 dated 10th April, 2019)

JUDGMENT

BENSON GITAHI, the appellant herein, was charged in the lower court with a main 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 of this offence are that between 12th day of June 2012 and 15th day of June 2012 at [Particulars Withheld] Estate in Wareng district, within Rift Valley province, the appellant intentionally and unlawfully caused his genital organ (Penis) to penetrate into the genital organ (vagina) of *MS*, a girl aged 15 years.

To the said main count there is a preferred alternative count of Indecent Act, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that between the 12th day of June 2012 and 15th day of June 2012 at [Particulars Withheld] Estate in Wareng district of the Rift Valley province, the appellant intentionally touched the genital organ (vagina) of *MS*, a girl aged 15 years with his penis.

The prosecution case is that the complainant who gave evidence as PW-1 was born on 21st January 1996. In June 2012 she was aged 16 years. She was living with her parents at [Particulars Withheld] Estate, in Wareng District and schooling at [Particulars Withheld] Girls Secondary school in form 3. On 6th June 2012 she was sent away from school to go for school fees. She was home till 12th June 2012 when the parents were able to secure the school fees. She commenced her journey back to school then, but upon arrival at Eldoret town she called her boyfriend of 4 years, who is the appellant herein. The appellant used to take her to school but on this particular day she told him that she did not wish to get back to school but to go to his house. The appellant did not disapprove of her wish and took her to his house in Langas. She was there upto 15/6/2012 and they used to make love. On this day her uncle, who is the PW-3 in this case, had ferried a customer at Kaptagat using a taxi. He lives in Langas and is a taxi operator in Eldoret Town. The customer knew PW-3 and also PW-1. He told PW-3 that he had seen PW-1 near where he was staying. PW-3 called PW-2 and passed to him the report. PW-2 called the school matron to find out whether PW-1 was in school. The matron confirmed she was not. PW-2 told his wife about it and they commenced a search. PW-3 went to his customer's house and was shown where the complainant had been seen. He went and peeped inside. He saw the school uniforms on a chair. He alerted people about it. Police were called. PW-2, PW-3 and PW-5 knocked on the door at about 8.00 p.m. The house was opened and the complainant who was half naked was therein with the appellant. They were both arrested and taken to Langas police station. The complainant was held as a child in need of care and protection while the appellant was charged with the offences in the charge sheet.

The complainant was examined on 15/6/2012 by Dr. Florence Jaguga at Moi Teaching and Referral hospital. The doctor found that she had multiple healed hymenal tears. There was also a whitish discharge from genitalia. High vaginal swab laboratory examination revealed presence of pus cells, urinalysis revealed motile and pus cells. No spermatozoa were seen. She was HIV negative, pregnant negative and syphilis negative. The doctor concluded that there was physical evidence of penetration of the vagina.

Upon closure of the prosecution case the trial court found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant gave sworn defence in which he stated that the complainant's father and his father had a long standing disagreement and it is out of it that he was fixed. He alleged all witnesses were family members and the charges were fabricated. The trial court evaluated the evidence and found that there was adequate evidence to the effect that the complainant was defiled; and the appellant was the defiler. The appellant was hence convicted and sentenced to serve 20 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

(1) The charges under which the judgment was based were incurably defective.

(2) The appellant was not accorded a fair trial.

(3) The prosecution case was not proved beyond reasonable doubt.

(4) The prosecution case was not corroborated.

(5) The appellant's defence was not weighed.

(6) Before hearing PW-4 and PW-5 provisions of Section 200 of the CPC were not complied with.

(7) The medical evidence did not indict the appellant.

(8) The complainant was the author of all the happenings and no defilement took place.

The appeal was canvassed by way of oral submissions by both sides.

I have re-evaluated the evidence on record, judgment passed, sentence, grounds of appeal and submissions by each side.

The ingredients of defilement under *Section 8(1)* of the *Sexual Offences Act No. 3 of 2006*, are:-

(1) The victim must be a child, below the age of 18.

(2) There must be penetration of the genital organ of the victim by the genital organ of the culprit or the suspect. Of importance to note here is that even the slightest penetration would suffice and ejaculation is not an ingredient for the said offence.

The evidence of PW-1 which was not sufficiently challenged by the appellant is to the effect that she was a girlfriend of the appellant for about four years. This indicates clearly that the appellant knew the complainant well, and was aware she was a student. She was even in school uniform when he took her to his house. At the time he was an adult who was working as a conductor in a matatu for Langas. Though he had imputed during the trial that he was a child, the probation report dated 2/5/2019 shows that he was aged 33 years then. In the year 2012 he was about 26 years old. Complainant said for the 3 days she stayed with the appellant they made love. The simple understanding of this is that they had sex of which satisfies the ingredient of penetration as defined in the Sexual Offences Act.

The complainant's Birth certificate was produced in court which shows that she was born on 21st January 1996. In June 2012 when the offence was allegedly committed she was aged 16 years and was therefore a child. Though she is the one who enticed the appellant into commission of the said offence, the appellant should have known better and done the right thing; that is, resisting. He however jumped right into commission of the serious offence to which the complainant's undesirable behavior can only mitigate but not exonerate him, as a minor under Sexual Offences Act is incapable of giving consent to matters of sex. The complainant herein who was 16 years old had no legal capacity to give consent. The cited case, ***Criminal Appeal No. 32 of 2015 of Martin Charo –vs- Republic,*** doesn't appropriately apply in this particular case.

The appellant avers that *Section 200* of the *Criminal Procedure Code* was not complied with before PW-4 and 5 gave evidence. A perusal of the court record implies it was complied with; the court rejected recalling of PW-1 and recalled PW-2 for further cross examination. The record may not have been made expressly and impressively, but the recorded events doubtlessly implies compliance.

The appellant defence was an afterthought. It was not raised during cross examination of PW-2, who was cross-examined twice. It does not cast a doubt at all on the truth of the prosecution case and was rightly dismissed. Having observed so, I do find that the conviction was proper.

As regards the sentence, I have already observed that the complainant's behavior to a less extent mitigates for the offence. A probation report was also called for and was favourable to a non-custodial sentence. However the trial magistrate sentenced the appellant to 20 years imprisonment, the minimum allowed under *Section 8(1) (3),* where the victim's age is between 12 years and 15. However the victim in this case was 16 years old then, where the minimum sentence under *Section 8(1) (4)* is 15 years. The fact that the trial magistrate stated, *"I would sentence the accused to 20 years imprisonment as provided for under the Sexual Offences Act",* shows that she did not notice that the indicated age of the girl had an error as it was not 15years but 16 years. Also following the Supreme Court finding in the case of ***Francis Karioko Murwatetu and Another –vs- Republic (2017) eKLR,*** mandatory sentences were done away with or declared unconstitutional. Bearing such in mind, if the trial court had advantage of the said information, most probably than not would have passed a lesser sentence. In that regard I do vary the 20 years imprisonment sentence, to 8 years imprisonment.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29TH DAY OF APRIL, 2020.

In the presence of:-

(1) Appellant in person

(2) Mrs Hellen Githaiga for State

(3) Mr. Gregory - Court assistant