



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 60 OF 2019

FRED WAFULA WANGILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon. C.L.Adisa, RM, delivered on 15/5/2019

in Criminal Case (SOA) No. 54 of 2018 in the Chief Magistrate's Court

at Bungoma, Republic v Fred Wafula Wangila)

J U D G E M E N T

1. The Appellant has appealed against his conviction and sentence of fifteen (15) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of Sexual Offences Act No 3 of 2006.
2. The state has supported the conviction and sentence.
3. In this court the appellant has raised four (4) grounds of appeal in his petition.
4. In ground 1, the appellant has stated the unchallenged fact that he did not plead guilty.
5. In ground 2 the appellant has faulted the trial court for convicting him on contradictory evidence of the prosecution witnesses. In his submissions he has submitted that the evidence of the investigating officer No. 111598 PC Stela Wamaita (Pw 5) and that of the father of the victim namely SW (Pw 2) are contradictory as regards when the report was made to the police station. The evidence of Pw 5 was that she received a complaint on 29/9/2017 from the father of the victim and her daughter (Pw 1), that she had been defiled. Pw 5 then took the victim to hospital where she was treated. She also testified that the victim was 16 years old. Pw 2 testified that he took the victim to Bumula police station on 22/8/2017. She was issued with a P3 form in that police station.
6. In this regard, I find that the evidence of both Pw 5 and Pw 2 are indeed contradictory as regards the date of reporting to the police. Pw 5 testified that the report was made on 29/9/2017, while Pw 2 testified that the report was made on 22/8/2017. Both agree that the report was made to the police station. The contradiction is only in relation to the dates. I have re-assessed the evidence in this regard and I find that the report was made on 29/9/2017 and not on 22/8/2017. This is clear from the OB entry which shows that the report was booked on 29/9/2017 as OB entry No. 10/29/9/2017.
7. I therefore find no merit in ground 2, which I hereby dismiss for lacking in merit.
8. In ground 3 the appellant has faulted the trial court for convicting him in the absence of proof beyond reasonable doubt. In this regard, the evidence of the victim (Pw 1) namely H.W., the initials of her name was that the appellant was the father of her child. She also testified that the appellant was her boyfriend. It was also her evidence that on 20/7/2017, her mother sent her to the market to buy vegetables. She left for the market and met the appellant. The appellant told her to follow him to his house. She agreed. They went to his house at Wekelekha. They ate and slept. The appellant then removed her clothes. He then inserted his penis into her vagina. She did not return home. Thereafter they went to the home of the aunt of the appellant. Later she missed her periods. The appellant then told her that he would assist her.
9. Furthermore, on 22/8/2017 her father and another person went to that home looking for her. They found her in the house of the aunt of the appellant. They took her to Bumula hospital and there she was told she was pregnant. Thereafter she was taken to Bungoma district hospital. Her age assessment report was put in evidence as exhibit 2, which shows she was 16 years old. On 16/4/2018 she delivered a baby.

10. The father of the victim namely SW (Pw 2) supports the evidence of the victim; except that he added that he took her to the police station because she was in school. Additionally, he testified that she announced the missing of the victim on Sulwe F.M. radio station. This was after he had reported her disappearance to the assistant chief.

11. The evidence of the victim's mother namely IW (Pw 3) supports that of the victim. Additionally, she testified that the appellant was their neighbour.

12. On 4th October 2017 the victim was medically examined by the clinician namely Alex Juma Siakora (Pw 4) at Bumula hospital. His findings were as follows. Her clothes had no blood stains and they were not torn. She severally had sex with a person known to her. Her pregnancy was 12 weeks old. Her hymen was missing. Age assessment confirmed she was 16 years old. Pw 4 produced his report as exhibit Pexh 2, being the P3 form.

13. No. 111598 PC Stela Wamaitha (Pw 5) was the investigating officer. She arrested the appellant and charged him with defilement.

14. The appellant in his unsworn evidence testified that he is a farmer. He testified that on 10/10/2017 he was coming from Nairobi; when he met the victim.

15. After talking to her, the victim agreed with him that they involve their parents before they got married. It was his evidence that they had been staying together since 13/10/2017 and that they have one child of the marriage. He also testified that he did not know how the child was going to survive if he was going to be jailed.

16. With the permission of the court, the appellant was allowed to call a defence witness namely Chrispinus Were (Dw 2). This was after he informed the court that he was confused when he was testifying. The appellant then produced two agreements namely the agreement dated 18/7/2017 and another dated 18/7/2017; which he put in evidence as exhibits Dexb 1 and Dexb 2 respectively.

17. The defence witness namely Chrispinus Were (Dw 2) testified that the appellant was his neighbour. Dw 2 also testified that the appellant married the victim and stayed with her for no less than two years as his wife. They also had one child of the marriage. The father of the victim asked for dowry, but the appellant sought time within which to pay. Before he would pay the appellant was charged.

18. This is a first appeal. As a first appeal court, I have independently re-assessed the entire evidence. I find that the appellant took the victim as his wife well knowing that she was still school going. The victim being a minor aged sixteen years was incapable of consenting to the marriage. I also find that they have one child of the born as a result of the defilement.

19. In the circumstances, I find that there is ample evidence that the prosecution proved their case beyond reasonable doubt. Ground 3 of the appellant's appeal fails and is hereby dismissed.

20. The appellant has urged the court to reduce his sentence of fifteen (15) years imprisonment. In imprisoning the appellant to 15 years' imprisonment, the trial court considered his mitigation and the minimum prescribed sentence of fifteen (15) years imprisonment.

21. His mitigation was that he was found to be a first offender.

22. The court properly directed its mind and correctly found that the Supreme Court in *Francis Muruatetu & Another, Petition No. 154 of 2015, [2017] e-KLR*, struck down as unconstitutional the automatic imposition of the penalty of death upon conviction for murder contrary to section 204 of the Penal Code. She also found as persuasive the decision of Nyakundi, J in *Daniel Maina Wambugu v. Republic [2018] e-KLR*, in which that court upheld the prescribed mandatory minimum statutory sentence of life imprisonment that was imposed upon the appellant, who had been convicted of defilement.

23. However, I find that the trial court failed to take into account that the appellant had been in custody since 15/06/2018 according to the charge sheet until 9/1/2019, when he was released on bail; which translates to about eight months in custody. There is a further custody period following his imprisonment on 15/5/2019 to date; which translates to a custody period of about one year; all totaling to one year and eight months. The law in this regard is that even where there is a prescribed mandatory minimum sentence, the court is mandatorily bound to take into account the period the accused has been in custody as required by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. The accused is entitled to credit for the period he has been in custody.

24. I have taken into account the circumstances of the offence including the mitigating and aggravating factors. I find that the trial fell in error in failing to take into account the custody period before sentencing the appellant. I am therefore entitled to interfere with sentencing discretion of the trial court.

25. In the premises, I find that the appeal succeeds in respect of sentence, which I hereby reduce to five years' imprisonment; which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 29th day of September, 2020 through video link in the presence of the appellant and in the absence of Ms. Nyakibia for the Respondent.

J. M. BWONWONG'A.

J U D G E

29/9/2020