REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 89 OF 2019

ISAAC WEKESA BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the judgement of Hon. D.O. Onyango, CM, delivered on 21/6/2019*

in Criminal Case No. 42 of 2016 in the Senior Principal Magistrate's Court

***at Kimilili, Republic v* Isaac Wekesa Barasa)**

J U D G EM E N T

1. The Appellant has appealed against his conviction and sentence of sixteen (16) 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 six (6) grounds of appeal.

4. The appellant has in his oral submission to this court abandoned his original petition of appeal and has urged the court to rely on the supplementary grounds of appeal.

5. In ground 1 of the supplementary grounds of appeal, the appellant has faulted the trial court for failing to find that the age of the complainant was not proved. The evidence of the complainant (Pw 1), JKN,being her initials, was that she was aged 17 years old. She also testified that she dropped out of school in class 8 before siting for her examinations. The father of the complainant, JK (Pw 2), presented to the court the birth certificate of the complainant, which was later produced as exhibit 1. Exhibit 1 shows that the complainant was born in 12/9/1999, which translates to the complainant being about 17 years at the time the offence was committed.

6. Furthermore, there is the evidence of the clinician namely Beatrice Akhosa (Pw 3), who medically examined the complainant. Pw 3 was based in Kimilili sub-county hospital. As a result of her examination, she made the following findings. The complainant was 16 years old in 2016. She found that she had a pregnancy of 36 weeks. She had no hymen. She had no venereal diseases. Urinalysis test was negative. She gave her a history of defilement. Pw 3 concluded that she had unprotected sex and she became pregnant. Pw 3 produced her report in evidence as exhibit Pexh 2.

7. In his submissions the appellant cited the case *of Francis Omuroni v Republic, Criminal Appeal No. 2 of 2006*, in which the court held that medical evidence in a case of defilement is paramount and the doctor is the only person, who is qualified to determine it. That case is distinguishable from the instant appeal. In the instant appeal there is a birth certificate which was produced as exhibit 1. Additionally, there is the evidence of the mother of the complainant, who testified that her daughter was 17 years old, which was not the position in that other appeal.

8. After re-assessing her age as a first appeal court, I find that there is ample evidence that the complaint was aged 16 years at the time the offence was committed. In the circumstances, I find no merit in ground 1 and I hereby dismiss it.

9. In ground 2 the appellant has faulted the trial court for convicting him on speculations and circumstantial evidence. This was not a case of circumstantial evidence. This is a case of direct evidence from the complainant, which upon re-assessment I find it to be credible. Furthermore, the conviction is based upon the direct evidence of the complainant and that of her mother and the medical evidence of the

clinician (Pw 3). It therefore follows that the submissions of the appellant that the conviction is based on speculation is unfounded and is hereby dismissed for lacking in merit.

10. The appellant has pointed out that there is no evidence as to when, how and where the complainant was defiled. The evidence of the complainant is that she was defiled at *[Particulars Withheld]* in November 2015. She confirmed that she was not defiled at [Particulars Withheld] area. Instead she confirmed that she was defiled at *[Particulars Withheld]* and not *[Particulars Withheld]* area while being cross examined. The evidence of the investigating officer (Pw 4) was that the complainant told her that: "*she had a friendship with the accused in [Particulars Withheld) and [Particulars Withheld]* . *She did not tell me about [Particulars Withheld] market*." It is clear from this evidence that they became friends in those two areas namely *[Particulars Withheld]* and *[Particulars Withheld]* . I do not find any inconsistencies between the evidence of Pw 1 and Pw 4. Upon re-assessing the evidence in this regard, I find that the defilement took place at *[Particulars Withheld]* and not at *[Particulars Withheld]* and *[Particulars Withheld]* . I therefore dismiss the submission of the appellant that there were inconsistencies in the evidence of the prosecution.

11. In grounds 4, 5 and 6 the appellant has in a coalesced form faulted the trial court for imposing upon him an extremely harsh and excessive sentence in view of his being a first offender and in addition to being remorseful and for ignoring his mitigation.

12. In sentencing the appellant to 16 years' imprisonment the trial court took into account the following factors. The appellant was a first offender. He had seven (7) children and a wife, who were dependent upon him as he was the sole bread winner of his family. The court also took into account that he was 42 years' old. All these were mitigating factors.

13. The court found as aggravating factors that the appellant took advantage of the complainant, who was 16 years old.

14. After considering the circumstances of the appeal including the mitigating and aggravating factors, I find that the court imposed a sentence that was above the authorized minimum sentence of 15 years. I further find that the appellant has now been in custody for about five years.

15. I find from the circumstances of the case that there was no justification for imposing a sentence that was above the authorized minimum sentence because the circumstances were not so grave as to warrant the imposition of the 16 years' sentence of imprisonment.

16. In the premises I am entitled to interfere with the sentence imposed by reducing it to seven years' imprisonment which will run from the date of this judgement.

Judgement dated, signed and delivered through video link conference at Narok in open court this 29th day of September, 2020 in the presence of the appellant and Mr. Thuo holding brief for Ms. Nyakibia for the Respondent.

J. M. BWONWONG'A

JUDGE

29/09/2020