REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 63 OF 2016

ERICK ONSONGO MARANGA.................APPELLANT

=VRS=

REPUBLIC...RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 18th day of January 2016 in the Original Keroka Chief Magistrate's Court Criminal Case No. 828 of 2013}

JUDGEMENT

The appellant was sentenced to 15 years' imprisonment for defilement of a child aged 15 years contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act. The particulars of the charge were that on 18th July 2013 at [particulars withheld] Sub-location in Masaba South District within Kisii County he intentionally and unlawfully caused his penis to penetrate the vagina of JKO a child aged 15 years.

This appeal is against the conviction as well as the sentence. The appeal is premised on the five supplementary grounds filed herein on 2nd October 2018. The appellant faults the trial magistrate firstly, for convicting him without an age assessment or birth certificate to show the complainant was a child. In ground 2 he faults the trial magistrate for failing to consider that this was a case of mistaken identity and also that he was framed by the complainant on the insistence of her mother.

In grounds 3 and 4, he contends that the prosecution's evidence was inconclusive and that it went against the provisions of Section 198 (1) (2) & (3) of the Criminal Procedure Code and Section 99 of the Evidence Act. In ground 5 he avers that the sentence of 15 years' imprisonment is manifestly oppressive and discriminatory and is a violation of Article 27 (1) (2) (4) and (5) and 29 (a) (d) (e) of the Constitution. By the appeal he has urged this court to quash the conviction and set aside the sentence.

At the hearing of the appeal, the appellant relied on written submissions in which he reiterated the grounds for the appeal. Prosecution Counsel opposed the appeal and submitted that the charge against the appellant was proved beyond reasonable doubt.

I have considered the submissions by both sides carefully but this being the first appellate court my foremost duty is also to reconsider and re-evaluate the evidence in the trial court so as to arrive at my own conclusion. In doing so, I have made provision for the fact that unlike the trial court I did not observe the demeanour of the witnesses as I did not see or hear them give evidence **(see Okeno V. Republic [1972] EA 32**).

I am satisfied that the charge against the appellant was proved beyond reasonable doubt. The complainant gave evidence that was in my view cogent, consistent, credible and trustworthy and whereas under Section 124 of the Evidence Act there was no necessity for corroboration there was more than enough evidence to corroborate her evidence. The P3 Form and the evidence of Pw4 (the Clinical Officer) who produced it confirmed there was penetration. The notes of her initial treatment at Ibacho Sub-District Hospital indicated that a high vaginal swab revealed presence of spermatozoa. This corroborated the complainant's evidence that she had sexual intercourse with the appellant. The appellant had picked her from her home on a motor cycle and taken her to his house. He stayed with her for two days even though he only had carnal knowledge of her the first night. After the second day he escorted her to her home at 5am. The complainant knew the appellant before the incident. According to her, he had befriended her and proposed that she be his girlfriend and she had agreed. She narrated of another incident when "boda boda" riders had found them together and beaten her. I am not therefore convinced that this was a case of mistaken identity. The complainant readily told her mother (Pw2) where she had been and what had transpired that night. I am satisfied that she was a truthful witness.

Contrary to the appellant's submission, the age of the complainant was proved. Even though a birth certificate was not produced, the Clinical Officer who filled her P3 Form estimated she was 15 years old and at Ibacho Sub-District Hospital her age was also indicated as 15 years. In her judgement, the trial magistrate noted that the clinical officer produced an immunization card as proof of the complainant's age. However, that card is not on the record and was not even listed as one of the exhibits in the list of exhibits. I am however satisfied that the apparent age of the complainant was 15 years. She was therefore incapable of giving consent to sexual intercourse and the offence of defilement was therefore proved beyond reasonable doubt.

The appellant has raised the issue of his own age. He submitted that the clinical officer alleged the complainant's history was that she had been defiled by someone who was 16 years old. It is however clear from the evidence that the Clinical Officer never saw the appellant and his remarks cannot be taken as assessment of the appellant's age. In the treatment notes from Ibacho Sub-District Hospital the history was that she had been defiled by a person above 18 years and according to the police the appellant was an adult. In my view his raising the issue of his age at this stage is but an afterthought intended to save his skin. The record shows that he actively participated in the proceedings. He cross examined the witnesses especially the complainant and her mother at length and in his defence he admitted that he had carried the complainant on his motor cycle therefore confirming the complainant was a truthful witness. His defence could not match that of the complainant which as I have stated was very credible and trustworthy. I am satisfied that he was contrary to his submission given adequate time to defend the charges against him and that the reason he did not raise the issue of his age is because as indicated in the charge sheet he was an adult. Moreover, it was his own evidence that he was a boda boda rider which for obvious reasons he could not have been if he had

not attained the age of eighteen years. Only those who are above 18 years qualify to obtain driving licences in this country.

I find no merit in the appeal against the conviction. As for the sentence, the trial magistrate imposed the sentence provided for under Section 8 (4) of the Sexual Offences Act instead of Section 8 (3) that he was charged under. However, the State has not cross appealed and for that reason this court will not disturb the sentence. The appeal is dismissed with an order that the appellant shall continue serving his sentence. Right of Appeal to the Court of Appeal explained.

Dated, signed and delivered at Nyamira this 31st day of January 2019.

E. N. MAINA

JUDGE