



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 14 OF 2018

WENSILLAS WANGILA MABONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being aggrieved by the Judgment of the Principal Magistrate's Court at Sirisia delivered on 3/4/2018

for the offence of defilement and upon being sentenced to 15 years imprisonment

do appeal against the said decision)

J U D G M E N T

The Appellant has appealed against his conviction and sentence of fifteen (15) years imprisonment for the offence of defilement contrary to **section 8(4) of Sexual Offences Act No. 3 of 2006**.

The State has supported both the conviction and sentence.

In his petition of appeal to this court the appellant has raised 4 grounds.

In ground 1, the appellant has faulted the trial Court for convicting and sentencing him to fifteen (15) years imprisonment, when the age of the victim was not proved. In this regard, the evidence of HO (PW 2) was that the victim was born in 2000. PW 2 was her uncle. There is also the evidence of Aska Rotich (PW 6), who was the clinical officer. PW 6 examined the victim and assessed her age as being approximately 17 years. He produced the age assessment report as PEXH 3. Counsel for the appellant submitted that the exact age for the victim was not established. I bear in mind that the assessment of age of the victim is not an exact sentence. I therefore find that the victim was aged between 16 and 17 years. In the circumstances, I find no merit in this ground, which I hereby dismiss.

In ground 2, the appellant has faulted the trial court both in law and fact in convicting the appellant in the absence of corroborating evidence and for failing to comply with Section 124 of the Evidence Act (Cap 80) Laws of Kenya. In this regard, I find that the victim testified on oath. The sworn evidence of a child of tender years does not need corroboration: See **Kibangeny Arap Kolil -vs- Regina (1959) E.A 92**. It is clear that in the instant appeal the victim was treated as a child of tender years. Furthermore, I find there is corroboration of the victim's evidence in that of Richard Kimutai Langat (PW 5), who after carrying out the DNA profile of both victim and the appellant, found that the appellant was the biological father of the child, that was born by the victim. The evidence of the victim (PW 1) was that she had sexual intercourse with the appellant on two occasions. The first one was on 2nd December 2015. The second one was on 1st April 2016. When the victim was examined by PW 6, she was found to have a pregnancy of six months. It therefore follows that the victim became pregnant on 2nd December 2015, that is when she had her first sexual intercourse with the appellant. In the circumstances, I find no merit in ground 2, which I hereby dismiss.

In ground 3 the appellant has faulted the trial court both in law and fact in sentencing him on the prosecution's evidence which was inconsistent. In this regard, I have found that the complainant was aged between 16 and 17 years. The penalty section namely **Section 8(4) of the Sexual Offences Act** provides as follows:-

“A person who commits an offence of defilement with child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years.”

In sentencing the appellant, this court has to consider both the mitigating and aggravating factors.

The mitigating factors are as follows. The appellant was a first offender. He now has been in imprisonment custody for about 1½ years. In terms of **Section 333(2) of Criminal Procedure Code (Cap 75) Laws of Kenya**, this custody period has to be taken into account in sentencing him.

The aggravating factors are as follows. The appellant defiled a school going student. Additionally, he made her pregnant. Finally the victim was aged between 16 and 17 years.

After considering the mitigating and aggravating factors in view of the totality of the evidence adduced, I find that the sentence was manifestly excessive. I therefore reduce it to six years imprisonment which the appellant now has to serve.

The upshot of the foregoing is that the appellant's appeal in respect of the conviction fails, which I hereby dismiss. His appeal against sentence succeeds and he now has to serve six years imprisonment.

Judgment signed, dated and delivered at Bungoma this 9th day of August, 2019 in the presence of the appellant and Ms Nyakibia for the Respondent.

J. M. Bwonwong'a.

J U D G E

9th August, 2019.