REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 5 OF 2018

GEOFFREY MUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence dated 28/2/2018 in Criminal Case No. 482 of 2015 in the Chief Magistrate's court at Narok, R. v. Geoffrey Mutai)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence in respect of the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted on the direct evidence of the complainant (PW 1). PW 1 gave sworn evidence after undergoing a successful *voir dire* examination.

4. In this court, the appellant has raised five grounds in his petition of appeal. In ground one, the appellant has faulted the trial court both in law and fact for convicting him when penetration was not proved. In this regard, the complainant testified that the appellant was his friend. She further testified that they discussed and agreed to stay together. She also testified that she agreed to be married by the appellant. As a result, she moved to the home of the appellant towards the end of March 2015.

5. It was also her evidence that they used to make love and played sex every day. She then decided to leave school. Her father, JKM (PW 2) went and took her away from the home of the appellant. PW 2 then took her to Longisa District Hospital where she was examined. Upon examination, she was found not pregnant.

6. It is important to point out that the appellant did not cross examine the complainant.

7. Langat Richard (PW 5), who was a Clinical Officer at Longisa District Hospital, examined the complainant. He found her to be 17 years old. He found that she had no physical injuries on her private parts but her hymen was broken. He concluded that the complainant had multiple sexual intercourse. He then produced the P3 form as exhibit 2.

8. It is clear from the foregoing evidence that the appellant and complainant were living together as husband and wife. Their relationship was cut short by the complainant's father. In view of the foregoing evidence, I find that there is ample evidence that proved penetration. I therefore find no merit in ground one and I hereby dismiss it.

9. In ground two, the appellant has faulted the trial court both in law and fact for convicting him in the absence of proof of the age of the complainant. In this regard, the evidence of the complainant was that she was born in 1998 and was 17 years old at the time she was testifying. Furthermore, there is the evidence of the father of the complainant who produced a child vaccination card which showed she was born on 23/9/1998. The vaccination card was produced in evidence as exhibit 1. In the circumstance, I find that the age of the complainant was conclusively proved to be 17 years old. I therefore do not find merit in ground two and I hereby dismiss it.

10. In ground three, the appellant has faulted the trial court both in law and fact for convicting him on medical evidence that was defective, for it did not show that he committed the offence. I have perused the P3 form (exh. 2) and the evidence of the clinical officer (Langat Richard) and I find that there was no defect in the medical evidence. I therefore do not find merit in this ground of appeal and I hereby dismiss it.

11. In ground 4, the appellant has faulted the trial court both in law and fact for convicting him without analyzing his defence which was

truthful. The defence of the appellant was a mere denial. It is important to point out that he made unsworn statement. In that statement, he has stated that on 3/4/2015, he was in his shamba at home. While there, people came bringing with them one child, whom they assaulted. He then asked them as to what was the problem. As a result, he was arrested by those people who claimed that he had been with that child. In her judgement, the trial court pointed out that the appellant did not challenge the key prosecution witnesses namely the complainant and her father. That court pointed out that the appellant did not challenge the prosecution witnesses as to why they had gone with the strange girl whom he did not know. He also did not put to them under cross examination as to why they were beating the girl. In conclusion, the trial court found that there was overwhelming evidence that the appellant had defiled the complainant for a number of days. In the circumstances, I find no merit in this ground and I hereby dismiss it.

12. In ground five, the appellant had indicated that he wanted to be present during the hearing of his appeal. This is now spent as he was allowed to attend his appeal hearing.

13. This is first appeal. As a first appeal court, I have reassessed the entire evidence tendered at trial and I find that the appellant was convicted on ample evidence. I therefore confirm his conviction.

14. As regards sentence, the appellant was sentenced to fifteen years (15) imprisonment which is the prescribed minimum.

15. The appellant was a first offender. He was an orphan. He also had siblings who were dependent on him. Furthermore, I find the complainant was a willing partner of the appellant, although she was 17 years old. By virtue of the Supreme Court decision in *Francis Karioko Muruatetu v. R (2017) eKLR*, I am not bound by the statutory minimum sentence.

16. The trial court was required to assess the sentence to be imposed in the ordinary way. If it found that sentence is less than the minimum, the minimum sentence must be imposed (see *Kibirgeny v. R (1975) EA 250.*

17. In view of the strong mitigating factors and the favourable circumstances of the offence, I hereby find that the sentence imposed was manifestly excessive. I therefore reduce it to seven (7) years imprisonment, which he now has to serve.

Judgement delivered in open court this 19th day of December, 2018 in the presence of the appellant and Mr. Mwangi for the state.

J. M. Bwonwonga

Judge

19/12/2018