REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 20 OF 2019

(From Original Conviction and Sentence in Mumias PMCSO No. 702 of 2015, by Hon. CS Nambafu, Senior Resident Magistrate, on 18th October 2016)

BENJAMIN MEJA BARASA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon CS Nambafu, Senior Resident Magistrate, on one count of defilement, contrary to section 8(1), as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006, and was accordingly sentenced to serve fifteen (15) years imprisonment. The particulars of the offence charged were that the appellant on divers dates between 19th February 2015, at [particulars withheld] Village, Emakali Sub-Location, in Matungu Sub-County, within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of MAM, a child aged 15 years.

2. He pleaded not guilty to the charge before the trial court on 18th September 2015, a plea of not guilty was entered, and a trial was conducted, where the prosecution called 6 witnesses. PW1 was the complainant, who described the appellant as her boyfriend, and of how she had sex with him on several occasions, and how she eventually got pregnant. PW2 was the arresting officer, she arrested the appellant after he was pointed out by PW1. PW3, was the Clinical Officer who produced antenatal documents relating to PW1, when she was attending clinics during her pregnancy. PW4 was the investigation officer, she received the appellant after he was arrested, and she detailed the steps she took in the course of her investigations. She also took the appellant and PW1, and the infant born of PW1for extraction of deoxyribonucleic acid (DNA) samples, which were forwarded to the laboratories, which yielded results to the effect that the appellant had 99.9% chance of being the father of PW1's child. PW5 was the analyst who carried out the DNA test, and who presented the findings to the court. The appellant was put on his defence, he gave a sworn statement, where he merely denied the offence.

3. Being dissatisfied with the conviction and sentence, the appellant appealed to this court, and raised several grounds of appeal. He avers that the age of the complainant was not ascertained, there was no proof of penetration, the prosecution case was not proved beyond doubt, and that his defence was not considered.

4. As the first appellate court, I have re-evaluated the record of the trial court. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the prosecution witnesses and the appellant as they testified. I am guided in that regard by the decision in ***Okeno vs. Republic*** **(1972) EA 32 (Sir Willian Duffs P Law and Lutta JJA).**

5. The appeal was canvassed by way of written submissions, placed on record by the appellant. He submitted mainly on the sentence, urging that the same be reviewed. He pleaded that he was a first offender, and was remorseful. He said he was a youth of 19 years, at the material time, and blamed peer pressure for his deeds. He pleaded for a lesser sentence to enable him go back to school.

6. I am not surprised that the appellant herein chose not to submit on the grounds of appeal that he had filed, because this is the clearest of the cases of defilement, where an accused person is plainly linked to the offence. The whole case turned on the DNA evidence, and once it turned out positive, the appellant's goose was cooked, as it were. The issues that he raised in his grounds about there being no proof of penetration, the case not being proved beyond reasonable doubt and his defence not being considered, held no water. Only the ground on the age of PW1 could be said to be arguable, but then again the State had produced her certificate of birth. The case against the appellant was established beyond any shadow of a doubt.

7. The only thing that may be considered now is the sentence. Can it be reviewed? Are there grounds for review?

8. On whether it can have reviewed, I will rely on *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, *(Maraga CJ. Mwilu*

DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJ), which brought down the strictures placed on sentencing by minimum and mandatory sentences, which reduced the discretion of the courts, to do justice in each case, based on the very own unique circumstances of each. At the time of sentencing in this case, those restrictions were in place, and the trial court was not open to impose sentences other than imprisonment, and even then within the ceilings fixed by the law.

9. Are there grounds for review? I believe there are. I note that the appellant was just 19 years old, when he committed the offence, while the complainant was described as 15 going to 16. The age difference between them was roughly 3 to 4 years, putting them, more or less, in the same age bracket. They were both teenagers, one slightly younger and the other a little older. The appellant was just a year old into adulthood. I note too that the sexual encounter was consensual, and the complainant described the appellant as her boyfriend. She did not describe him as a person who had forced himself on her, attacking her with brute force, forcibly removing or ripping her clothes apart. No. She said she willingly took herself to his house severally, and removed her own clothes, and lay down with him, without any form of compulsion or intimidation from him. I am conscious of the fact that consent is not a defence in cases of this nature, but the consensual nature of the relationship ought to be taken into account for the purpose of determining sentence.

10. Of course, the appellant was the older of the two teenagers, which would suggest that he was expected to be the more responsible of the two. He could be blamed for taking advantage of the younger teenager. But then the age difference between them was just 3 or 4 years. He was himself still a child, barely legal at the threshold of adulthood. It may be unjust to place too much responsibility on a 19-year-old.

11. I am persuaded that the appellant has learnt his lesson from the ordeal that he has gone through so far. He had pleaded not guilty to the charges, and forced the State to expend time, finances and other resources to prove the fairly straightforward case against him. But that should not be taken against him. No records were placed before the trial court to suggest that he had committed previous offences of similar kind or any kind, and, therefore, he can quite properly be treated as a first offender. He has realized his folly, hence he abandoned his grounds of appeal, and simply invited the court to reconsider his sentence. He has pleaded leniency, on the basis of remorse.

12. The appellant has already served part of the custodial sentence, since his conviction on 18th October 2016. A custodial sentence may not be ideal for a person of his age, indeed it could, in fact be more detrimental to his growth and wellbeing. He could be contaminated by mixing up with hardcore criminals in prison. He is still growing, and still requires guidance and counselling. He is still in his formative years, at the threshold of adulthood, still at the bridge between childhood and adulthood. He may require to be handled with far more care than defilers in their 30s, 40s and beyond.

13. After weighing everything, I am inclined to find that the time he has spent in prison custody is adequate punishment for him, and I am considering having him released from custody, and thereafter placed under probation, for a period of 2 years, so that he can be guided away from behaviour that brings him into conflict with the law, and to assist him to reintegrate back into society. I hereby accordingly substitute the appellant's custodial sentence with a probation order, to be served for two years. He shall be released to the probation office at Kakamega. Should he commit other offences, or breach the terms of his probation during the probation period, the probation order shall be cancelled, and he shall be liable to have the sentence that I order set aside reinstated. It is so ordered.

PREPARED, DATED AND SIGNED AT KAKAMEGA ON THE 17th SEPTEMBER, 2021

W MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY,2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Benjamin Meja Barasa, Appellant, in person.

Mr. Mutua and Mr. Mwangi, instructed by the Director of Public Prosecutions for the Respondent.