REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 179 OF 2019

SAMUEL BARASA MAUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. I. G. RUHU - RM.,

dated 20th September, 2019 in the SPM'S Court at Kimilili Sexual Offence Act,

in Criminal Case No.26 of 2019, Republic vs Samuel Barasa Mauka)

JUDGEMENT

The appellant has appealed against his conviction and sentence of 20 years in respect of the offence of defilement contrary to section 8(i)(3) of the Sexual Offence Act No. 3 of 2006.

In this court the appellant raised 4 grounds of appeal in his petition of appeal. For convenience, I will start with ground 3, in which the appellant has faulted the trial court in law and fact for convicting him on fabricated evidence. In this regard, the evidence of the complainant YC – (name withheld) testified that on the material day whose date she could not remember, she was herding their sheep in the forest. In the course of herding their sheep in the forest, the appellant who was seated next to the forest got hold of her and told her that the sheep had grazed on his beans. He then forcefully had sexual intercourse with her. It was her evidence that she had not known the appellant before this incident. The appellant was wearing a pink jacket.

Furthermore, the complainant testified that she screamed and a good Samaritan who was riding a motorcycle arrived at the scene. The good Samaritan arrested the appellant. She reported the incident to her mother who took her to hospital at Kaptama. From Kaptama hospital they proceeded to Kapsokwony hospital where she was examined.

In cross-examination she testified that she registered the facial features of appellant.

The complainant was examined by Erick who was a clinical officer attached to Mt. Elgon Sub-County hospital; whose report of examination was put in evidence by Godfrey Wanjala Khaemba (Pw3). Upon examination the clinical officer made the following findings:

> *No external injuries from the head to the toe.*
>
> *There were no physical tears and bruises on the external genitalia.*
>
> *The vagina endrotus appeared reddened.*
>
> *There was no hymen.*
>
> *There was no injury to the cervix.*
>
> *A whitish discharge was noticed on the external genitalia.*
>
> *A specimen of a vaginal swab was taken to confirm presence of sperms.*

There were no spermatozoa seen.

The following tests namely HIV, syphilis and pregnancy, were done and all of them turned negative. Pw3 produced the P3 form as exhibit I.

Furthermore, the father of the complainant MNM (PW2) was informed of this incident. Pw2 went to the scene of crime and found the complainant crying. He also found a big crowd of people who told him to rush his child to hospital. The complainant told her father that the appellant had defiled her inside the forest. Her father then took her to hospital.

Finally, the prosecution called No.70814 P. C. Samuel Kipkoech (Pw4) who was attached to Kaptama Police Station. Pw4 upon receipt of this incident proceeded to the scene of crime. Upon arrival he arrested the appellant and charged him with this offence.

Upon being placed on his defence the appellant testified on oath and did not call any witness in his defence. He stated that he is a peasant farmer and that in view of his age he could not defile a small girl; since he had a wife and a small child.

He continued to testify that he was at a loss as to why he was arrested. He also testified that he was not informed of the reason for his arrest and he had been falsely accused of this crime.

The appellant continued to testify that he did not understand why the members of the public arrested him. Finally, he testified that those members of the public assaulted him.

This is the first appeal. As a first appeal court, I have re-evaluated the entire evidence. As a result, I find that the prosecution witnesses were credible. I further find from the evidence of Godfrey Wanjala Khaemba (PW3) that proved of the complainant vagina was not proved. The reason for this was that after the vagina swab was taken no spermatozoa was found in the vagina of the complainant; instead the clinical officer (PW3) found a whitish discharge on the external genitalia of the complainant. The fact that the hymen was broken is not evidence of penetration. The clinical officer did not give evidence as to when the hymen was broken. It has scientifically been proved that a girl may not be born with a hymen. It may also be raptured due to intensive physical exercise.

In the circumstance I find that the offence proved was that of committing an indecent act with a child contrary to section 11(i) of the Sexual Offence Act No.3 of 2006.

I find the defence evidence to be incredible in view of the ample credible evidence of the prosecution witnesses, who had no reason to give false evidence against him. Here is an appellant who wants the court to believe that he did not know why members of the public arrested him. He also wants the court to believe that he did not know why members of the public assaulted him. This in itself clearly indicates why the appellant was found incredible by the trial court. I therefore reject his defence for being incredible.

In the premises, I find that the appellant is not guilty of the main charge of defilement. I therefore acquit him of that charge. However, I find him guilty of the alternative charge of committing an indecent assault contrary to section 8(i) of Sexual Offence Act No.3 of 2006. I therefore convicted him accordingly.

As regards sentence I find that the appellant was found to be 19 years when he was examined on 18th March, 2019. And also taking into account that he was above 18 years by the time the offence was committed on 26th December, 2018; he does not therefore qualify to be a young person who could have been entitled to a noncustodial sentence. It is to be remembered that those who are below 18 years may only be sentenced to prison imprisonment as a last resort; since young persons are sentenced to noncustodial sentence for rehabilitative purposes. And this is clearly recognized in article 53(2) of the 2010 Constitution which directs that:

> *"a child's best interests are of paramount importance in every matter concerning the child."*

Furthermore, I bear in mind that the mandatory sentence under Section 11(i) of the Sexual Offences Act is a term of imprisonment of not less than 10 years.

In addition to the foregoing I find that the appellant has been in custody during the pre-trial and post judgment and sentence period for about 3 years. It therefore follows that in terms of section 333(2) of the Criminal Procedure Code the appellant is entitled to credit for the period he has been in custody. In view of the fore going, I hereby sentence the appellant to a term of seven (7) years' imprisonment, which will run from the date of this judgment.

Judgment signed, dated and delivered in open court at Bungoma on this day of the 10th September, 2021.

J. M. BWONWONG'A

JUDGE

In the presence of

C/A – Kizito

The appellant

Ms. Nyakibia for the Respondent