



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 142 OF 2016

BENSON BARASA WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. C. Menya, RM, Kimili Principal Magistrate's Court at Kimilili in Criminal Case No. 48 of 2014, R v. Benson Barasa Wanyonyi)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellant has appealed against his conviction and sentence of fifteen years' imprisonment in respect of the offence of defilement contrary to section 8 (2) as read with section 4 of the Sexual Offences Act No. 3 of 2006.
2. Ms Nyakibia, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised four grounds in his petition of appeal.
4. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.
5. In ground 2 the appellant has faulted the trial court for convicting him on insufficient evidence. In this regard, the prosecution evidence through the complainant (Pw 1) namely EMW, the initials of her name, was that on 20/06/2014 at 3.00 pm, she was from school and was en route to a place where she shaves her hair. She met the appellant at the market. The appellant told her they go to his house. She agreed. He pulled her into his house, locked the door, removed her inner wear and had sexual intercourse with her. It was her evidence that she shouted and Evans heard them and he found them. She further testified that Evans Wanjala (Pw 4) called her mother, who then arrested the appellant and took him to the Wabukhonyi police station. Before being arrested the appellant attempted to escape. She further testified that she was beaten. She then went to Naitiri hospital where the P3 form was completed. She also testified that her baptismal card showed she was born on 10/03/1998. The card was put in evidence as exhibit 2, while the P3 was put in evidence as exhibit 1. She identified both these documents.
6. The complainant was examined by Philip Koros (Pw 6), who was a clinical officer at Bokoli sub-county hospital whose findings were as follows. She was mentally disabled and had pain in the abdomen. Her private parts were inflamed. Her hymen was ruptured. She had a whitish discharge from her private parts. Her urine had blood. She was 17 years old. She had no venereal disease. HIV was negative. PDT was negative. She was placed on ARVS.
7. According to Pw 6, the appellant was tested for VDRL which showed he had syphilis. This forced him to treat the complainant for syphilis. Pw 6 put in evidence the P3 form as exhibit 1.
8. Furthermore, Evans Wanjala (Pw 4), who is a neighbour to the complainant, saw the appellant entering a house with the complainant. Pw 4 followed them. He saw the appellant defiling the complainant on a sofa set. The complainant was struggling and she was in school uniform. The appellant was sleeping on the girl. He had lowered his inner pants. Pw 4 then ran and informed the mother (PW 2) of the complainant. PW 4 joined Pw 2 and ran towards the scene of crime.
9. Upon arrival they found the appellant standing on the door with only his underwear. They then entered the house and found the complainant crying. Upon being asked the complainant told them that the appellant had promised money and that is why she followed him to his house. While under cross examination Pw 4 testified that he saw blood oozing from her private parts. He also testified that the complainant was challenged mentally. Pw 4 also testified that he saw blood on the legs of the complainant.
10. The evidence of P4 is supported by that of the mother of the complainant in material particulars. Pw 2 confirmed what Pw 4 told her of

seeing the appellant entering the house with the complainant. She also confirmed that her daughter was mentally challenged. She ordered the appellant out of the house. The appellant complied. The appellant started apologizing. He was also remorseful. She then took him to Wabukhonyi police station.

11. While under cross examination, the mother testified that her daughter consented to the sexual intercourse. She confirmed that the appellant had promised the complainant sugar cane. She also confirmed that her daughter told her that she had had sexual intercourse with the appellant.

12. Peninnah Wanjala Wanyonyi (Pw 3), also corroborated the evidence of Pw 1. She accompanied the mother of the complainant to the scene of crime and found the appellant outside in an underwear. The appellant then asked for forgiveness. She checked the complainant and found sperms oozing from her vagina. The appellant asked the complainant to wear her underwear. The appellant then begun asking for forgiveness.

13. In answer to foregoing evidence the appellant testified on oath that he did not know the complainant. He also testified that the mother of the complainant namely EK had gone to him to borrow money; since her husband was ill in hospital at Ndaluu. He told her that he did not have any money. He testified that he was arrested because EK had complained that the appellant had "eaten" his money.

14. Furthermore, the appellant testified that he went to the market to charge his phone and while there a police man by the name Kosgey arrived. Kosgey told him to see him later in his house. He complied, but he did not find him in his house. Instead he found PC Ruto. He asked Ruto where Kosgey was. He then saw the mother of the complainant emerge from the house of Ruto. PC Ruto asked him what quarrel he had with the mother of the complainant. The mother of the complainant said that the appellant had eaten her money. Finally, the appellant testified that he was surprised to hear the charges in court.

15. I have considered the written submissions of the appellant. The baptismal card conclusively proved the age of the complainant. I have also independently re-assessed the entire evidence produced at trial as I am required to do as a first appeal court. Having done so I find that the evidence upon which he was convicted was overwhelming. The appellant was seen defiling the complainant by Evans Wanjala (Pw 4). Additionally, the appellant apologized to the mother of the complainant. In the circumstances I find no merit in ground 1 of the appeal, which I hereby dismiss.

16. In ground 3 the appellant has faulted the trial court both in law and fact in failing to find that the defence evidence created reasonable doubt. I find that the defence of the appellant was that he was framed by the mother of the complainant. I have also considered this defence and I find no merit in it and it is hereby dismissed.

17. In ground 4 the appellant had wanted to be furnished with the record of the lower court, which was done. This ground is now spent.

18. The upshot of the foregoing is that the appellant's appeal against conviction fails and is hereby dismissed.

19. The appellant has also appealed against his sentence of 15 years' imprisonment. His mitigation was that he was an orphan with a family of children, whom he did not know where they were. Additionally, he requested for forgiveness.

20. The trial court considered his mitigation. The appellant was suffering from syphilis. He would have infected the complainant with that disease had it not been for the timely intervention of the clinical officer who put the complainant on ARVS and other treatment.

21. I have also taken into account that the appellant has been in custody since 20TH June 2014, which translates to about five and a half years.

22. I have also found that the appellant was a first offender.

23. The lower court did not consider the period the appellant had been in custody as required of every court by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. This was an error of law that entitles this court to interfere with the sentence imposed.

24. After considering all these factors, I hereby reduce the sentence imposed upon the appellant to five years, imprisonment, which begins to run from the date of this judgement.

Judgement signed and dated at Narok this 19th day of December 2019.

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Bungoma this 13th day of February, 2020.

S. N. Riechi

Judge

