REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 15 OF 2018

HUMPHREY WAKOLWA WANJALA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement, conviction and sentence dated 4th April 2018 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 7 of 2015, Republic v Humphrey Wakulwa Wanjala)

JUGEMENT

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

1. The appellant has appealed against his conviction and sentence of 20 years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006

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

3. In this court, the appellant has raised six grounds of appeals in his petition of appeal. For convenience, I will consider the grounds in priority as follows. Grounds 2 and 6, 5, 1, 4 and ground 3.

4. In grounds 2 and 6, the appellant has faulted the trial court for convicting him on the prosecution evidence that was inconsistent and for lacking in corroboration. Additionally, the appellant has faulted the trial court for recording a conviction based on speculative evidence.

5. The prosecution evidence in this regard, was that the complainant (PW 1- name withheld), took maize to the posho mill of the appellant for grinding. The posho mill was not functioning as there was no electricity. She left her maize there. She returned later and saw her maize in the bedroom of the next building to the posho mill. She then went to pick the maize in the bed room. In the course of doing so, she found the appellant hiding just behind the open door. The appellant then held her hand tightly and pushed her to his bed. He proceeded to forcefully have sex with her. Before this incident the appellant had severally asked her to be his friend. Pw 1 then heard John Oduor Akumu (Pw 2) asking why Pw 1 had not come out of that house. Pw 2 pushed open the door and found her in bed. The appellant unsuccessfully tried to escape, but Pw 2 managed to take the appellant and Pw 1 to Mbakalo police station.

6. The evidence of Pw 2 corroborates that of Pw 1.

7. Pw 1 was taken for medical examination and was examined by Michael Okumaruti (Pw 3) on 14th January 2015. Upon examination he found the following. Pw 1 was aged approximately 16 years old. There were no injuries in the genitalia. The hymen was missing. She had a two months' pregnancy. Both syphilis and HIV tests were negative. Pw 2 then put in evidence the P3 from as exhibit Pexh 1.

8. Furthermore, the parent of the complainant, EK (Pw 4), testified that the complainant was born on 13th October 1999, a matter in regard to which the parent put in evidence the birth certificate as exhibit Pexh 3.

9. I have re-assessed foregoing evidence. As a result, I find it to be credible. I therefore find no merit in ground 2, which I dismiss for lacking in merit.

10. In ground 5, the appellant has faulted the trial court for being biased generally and in failing to find that the age of Pw 1 was not proved. In this regard, the parent of the complainant testified that Pw 1 was born on 1st October 1999, who also produced a birth certificate as exhibit Pexh 3. I do not find evidence of bias in the record of the proceedings. Ground 5 lacks in merit and is hereby dismissed.

11. In grounds 1 and 4, the appellant has faulted the trial court for convicting him without considering his evidence and that of his witnesses; which rebutted the prosecution evidence. The sworn evidence of the appellant was that he was riding his motor cycle from Naitiri market. While en route, two persons stopped him and he took them as pillion passengers. At their request he took them to the police station. He was then arrested and put in cells. He was shocked by the arrest. He testified that he did not know the reason for his arrest. He also testified that he did not know the complainant.

12. Furthermore, the appellant called Edwin Wafula (Dw 2). Dw 2 testified that he did not know that the appellant had been accused of defilement. He also testified that the appellant was a colleague at the posho mill, who had left him to take care of the posho mill when the appellant left the posho mill on 13th January 2015 at 7. O0 am. The trial court saw and heard the defence witnesses testify and found them to be incredible. The court then proceeded to reject the defence evidence. It is therefore not correct that the defence evidence rebutted the prosecution evidence. It is equally not correct that the defence was not considered. I therefore dismiss grounds 1 and 4 for lacking in merit.

13. I have independently re-assessed the entire evidence adduced in the trial court as a first appeal court. As a result, I find that the appellant was convicted on ample evidence. I therefore dismiss his appeal against conviction.

14. In ground 3 the appellant has faulted the trial court both in law and fact for convicting and sentencing him to 20 years' imprisonment; which was harsh and excessive in the circumstances of the case. In sentencing the appellant, the trial court took into account his mitigation that he was a first offender, the bread winner of his family and that he had requested for forgives. The court then concluded thus: "*The Hands of the court are tied as the Act provides mandatory minimum sentence.*" In doing so the trial court erred in law in view of the decision of the Supreme Court in ***Francis Karioko Muruatetu and Another v Republic (2017) EKLR,*** which held that trial courts have discretion to impose an appropriate sentence. It therefore follows that this court is in law entitled to interfere with the discretion of the trail court in sentencing the appellant. I therefore quash the sentence imposed upon the appellant. In addition to the foregoing mitigation of the appellant, I have also taken into account that the appellant has been in custody since 4th April 2018, which translates to one and a half years. After considering both the mitigating and aggravating circumstances, I hereby impose a sentence of eight (8) years imprisonment, which the appellant has to serve.

Judgement signed and dated at Narok this 14th day of August 2019

J. M. Bwonwonga

Judge

Judgement signed, dated and delivered in open court at Bungoma this 12th day of February, 2020.

S. N. Riechi

Judge

12/2/2020