REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 108 OF 2018

JOB WABWIRE SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. D.O. Onyango, SPM, delivered on 13/4/2018 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 39 of 2015, R v. Job Wabwire Simiyu)

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 8 (4) of the Sexual Offences Act No. 3 of 2006.

2. Ms Koech, 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 faulted the trial court for convicting him in the absence of proof beyond reasonable doubt and on evidence that was not corroborated. GN (the initials of the complainant's name - (pw 1), testified that on 17/6/2015 around 7.00 pm she was going to Kimilili, when she met one Fred who had a motor cycle. Fred pleaded with her to board his motor cycle since it was late. She agreed. Fred then dropped her a T-junction. Since it was late she decided to sleep in a maize plantation. Pw 1 woke up at 5.00am in the morning and started to walk home.

5. While en route home, Pw 1 met the appellant, who used to teach her music in her school. Pw 1 then told the appellant what had happened, which was that her mother caned her. As a result, she left her home on 17/6/2015. The appellant then took her and left her at his house and during the night of 18/6/2015, she had sex with the appellant. The appellant had been pestering her to be his girlfriend. On 19/6/2015 at 3.00 pm the appellant returned with police officers, who were in company of her father and a village elder. Both the appellant and Pw 1 were arrested and eventually taken to Kiminini police station.

6. Furthermore, Pw 1 testified that she was 16 years old.

7. The appellant decided not to cross examine Pw 1.

8. Pw 1 was taken for medical examination at Mt. Elgon sub-county hospital, where she was examined by Ignatius Okumu (Pw 4). Pw 4 was a clinical officer in that hospital. Upon examination the findings of Pw 4 were as follows. She was 16 years old. In her private parts, she had a hyperemic labia minora, that is, it was reddish. The hymen was broken. She had a creamish whitish discharge, which he suspected to be semen in the vagina. She had been treated and given drugs to prevent HIV and pregnancy.

9. PW 4 also examined the appellant. His findings were as follows. The penile shaft was circumcised but without an injury. HIV and syphilis tests were done and were negative. Pw 4 then produced the P3 form for both Pw 1 and the appellant as exhibit 2. While under cross examination Pw 4 testified that he did not establish the sperms from the vagina of Pw 1 were those of the appellant.

10. The father of the complainant namely Moses Mulongo (Pw 2) testified that his daughter on 17/6/2015 left home and did not know where she had gone. He reported her disappearance to the village elder (William Milimo Moli – Pw 3). On 18/6/2015 they checked her at school and she was not there. They had information that his daughter was in the house of the complainant. They reported to the police. As a result, the appellant was arrested. The appellant then led them to his house, which was locked from outside. He unlocked his house. They found the complainant in his house seated on a bed. Both the appellant and complainant were arrested and taken to the police station.

11. Finally, the prosecution called the investigating officer, No. 83734 (Woman) PC Anne Waigwa (Pw 5). Pw 5 testified that she received a report from the father of the complainant that his daughter had disappeared from home on 17/6/2015. The complainant told Pw 5 that she disagreed with her mother and went to stay with the boyfriend (the appellant). Pw 5 testified that the complainant told her that she stayed with the appellant, who was her boyfriend, until she was arrested. The complainant also told her that she had sex with the appellant during the period she was with him. She also told her that she went to the house of the appellant after disagreeing with her mother.

12. Pw 5 further testified that she received from the mother of the complainant a church dedication, which was put in evidence as exhibit pex 3.

13. After the appellant was put on his defence and his rights explained in terms of section 211 of the Criminal Procedure Code, he responded by electing to keep quiet and left the matter to the court to decide.

14. I have independently re-assessed the evidence as a first appeal court. As a result, I find that the age of the complainant according to the church card exhibit 3 is 16 years; since she was born on 25th June 1999. It should not be forgotten that age may be proved by the production of a birth certificate, a baptismal card and an immunization card. It can also be proved by medical evidence. It follows that there is no rule that requires proof of age to be done by medical evidence alone. I do not accept the submission of the appellant that the said card is not an original document as it lacks a stamp of the church. I further find that it was not necessary to carry out a DNA test to prove penetration. I also find that the submission of the appellant that he was HIV positive is not supported by the evidence of the clinical officer, who found the appellant was HIV negative according to the treatment notes exhibit 1. In the instant case, I am satisfied exhibit 3 conclusively proved the age of the complainant to be 16 years. The submission of the appellant is hereby rejected for lacking in merit.

15. Furthermore, I also find that there was penetration of the complainant's vagina by the penis of the appellant. This is based on the evidence of the clinical officer and that of the complainant. The evidence of the complainant that she had sex with the appellant was not challenged. The appellant did not cross examine the appellant and did not testify in his defence. I do not accept the submission of the appellant that the evidence of the complainant was not credible. The appellant did not cross examine her. It follows that her evidence was unchallenged. This evidence was overwhelming, cogent and credible. I therefore reject his submission that the complainant was not truthful. Penetration was therefore proved by ample evidence.

16. The appellant has also submitted that he was kept in police custody beyond the permitted period of 24 hours. The charge sheet shows he was arrested and detained in custody on 19/6/2015 and was taken to court for plea on 23/6/2015. Allegations of infringement of one's constitutional rights such as the instant one are matters that are to be raised before a court exercising civil jurisdiction to investigate and not this court. I therefore dismiss this submission for lacking in merit.

17. After re-assessing he entire evidence, I find that the appellant was convicted on ample evidence. His appeal against convicting fails and is hereby dismissed.

18. The appellant has also appealed against sentence. In sentencing the appellant, the trial court considered the mitigation of the appellant that he was a first offender, an orphan and had a family that depended upon him. However, the court wrongly found that it was bound to impose the minimum prescribed sentence of 15 years' imprisonment. In doing so, the court committed an error of law in view of the decision in ***Francis Muruatetu & Another v Republic [2017] EKLR,*** which allowed trial courts to impose an appropriate sentence. I am therefore entitled to interfere with the discretion exercised by the trial court in that regard. In doing so, I have taken into account that the appellant is a first offender, an orphan and has a family that depends upon him. I have also taken into account that the appellant is convicted of a serious offence, that carries a 15-year sentence of imprisonment and that he has been in custody now for about two years.

19. In the light of all the foregoing factors, I hereby reduce he sentence imposed to six years' imprisonment, which will begin 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

13/2/2020