REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 141 OF 2018

LWW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement, conviction and sentence dated 12th November 2018 of the Senior Resident Magistrate (Hon G P Omondi) in the Chief Magistrate's Court at Bungoma in Criminal Case No. 2862 of 2014, Republic v Lucas Wanyama Wafula)

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 ten years' imprisonment in respect of the offence of indecent act with a child contrary to section of 11 (1) 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 eleven grounds of appeal in his petition of appeal.

4. In grounds 1, 2, 3, 4, 7 and 8 in a coalesced form the appellant has faulted the trial court for convicting him on evidence that did not prove the offence beyond reasonable doubt; since the age and penetration were not proved. In this regard, I.S. (her initials) (PW 1) was allowed to give sworn evidence following a successful *a voire dire* examination. She testified that she was born in July 2000. The recalled evidence of Pw 2, who is his father (name withheld) was that IS. was born in 2000. The evidence of the clinical officer namely Elias Adoka (Pw 5) was that he examined IS. in respect of her injuries and age. His report was not put in evidence, since the original P3 form was not in court, when Pw 5 testified. Pw 5 was not thereafter recalled to produce the said report. Even in the absence of the medical report I find that the age of IS. was proved by her father. Her age was 14 years old at the time the offence was committed. It was therefore not open to the trial court to take judicial notice that since IS. was in class seven she was a minor. This was a misdirection but has been cured by the evidence of the father of IS.

5. Furthermore, as regards penetration there is the evidence of I.S. (Pw 1), who testified that on 21st March 2014 at night she went out of their house in answer to a call of nature. In the course of doing so, the appellant who was her neighbour got hold of her and took her to his house and forcefully had sex with her. I.S. continued to testify that on the same night the appellant put her on his motor cycle. He then took her to his sister called D at Chwele. IS. stayed in the house of Doreen for two months. The appellant left and went away. Thereafter, the appellant left and went away. IS. continued to live in that house. She could not go far from that compound, but she used to go to the shop. The appellant returned and took her to Kiminini to a house, which the appellant had rented; where they lived for one week. The appellant used to have sex with her. He did not allow IS. to go to her home.

6. The evidence of Pw 3 corroborates that of IS. that the appellant had sexual intercourse with her.

7. It is important to point out that the appellant elected to remain silent after being explained his rights under section 211 of the Con 211 of the Criminal Procedure Code (Cap 75) Laws of Kenya which provisions are in relation on how an accused may defend himself; after being put on his defence.

8. In ground 5 the appellant has faulted the trial court for denying him his right to legal representation. The evidence in this regard is that after the appellant had engaged counsel for his legal representation, his advocate Mr.Wattanga was allowed to cross examine the recalled prosecution witnesses. In the circumstances his right to legal representation was not breached.

9. I find that there were a number of potential witnesses that the prosecution ought to have called. One such witness was Doreen, where IS was kept for one week by the appellant. Doreen, would have shed light on the circumstances under which IS was kept in her house. It is

difficult to assess the effect of her potential evidence.

10. In ground 10 the appellant has faulted the trial court for being biased. After perusing the record of the proceedings I have not found evidence of the alleged bias.

This is a first appeal. As a first appeal court, I have independently re-assessed the evidence produced at trial. As a result, I find that the appellant was convicted on sound evidence. His appeal against conviction is hereby dismissed.

11. In ground 11 the appellant has faulted the trial court for imposing a harsh and excessive sentence. The trial court imposed the minimum sentence of ten years' imprisonment. According to ***Francis Karioko Muruatetu and Another v Republic*** (2017) eKLR the trial court was not bound to impose the minimum sentence. The court had a discretion to impose a suitable sentence. This was an error of law that entitles this court to interfere with the sentence imposed.

12. In this regard, I have taken into account that the appellant has been in custody since 12th November 2018, which translates to about over one year. He is also a first offender with family responsibilities. I have also taken into account that the victim (IS) was a willing participant in the commission of the crime against herself. She had several opportunities to escape but did not do so. After considering all these matters, I find that the sentence imposed was manifestly excessive. In the circumstances, I hereby reduce the sentence to three years' imprisonment, which now the appellant has to serve.

Judgement signed and dated at Narok this 27th day of August 2019.

J. M. Bwonwong'a

Judge

AND

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

S. N. Riechi

Judge

12/2/2020