



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 116 OF 2018

LEWIS WAFULA JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. G. Olimo, RM, delivered on 5/10/2018 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 67 of 2017, R v. *Lewis Wafula Juma*)

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 (1) as read with section 8 (3) 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 six grounds in his petition of appeal.
4. In ground 1 the appellant has faulted the trial court for convicting him, when the age of the complainant was not proved. The evidence of DNW (initials of the complainant's name, Pw 2) in respect of her age was that she was 15 years old. She identified her baptismal card (exhibit 3), which she said confirmed her age. The clinical officer (Simon Simiyu Bwabi, Pw 1), testified that he examined Pw 2 and his findings were as follows. Her HIV test was negative. Her pregnancy test was also negative. The test on her urine was normal. Her hymen was broken and long standing meaning it was not fresh. He had initially examined Pw 2 and made observations in his notes, which were put in evidence as exhibit 2. He then transferred the information in the treatment notes onto the P3 form (exhibit 1). He then examined Pw 2 on age which he assessed using the dental formula to be 13 years.
5. In the light of this evidence I find that the age of the Pw 2 was 13 years as per her baptismal card. The P3 form also confirms her age to be 13 years. The trial court found her to be 13 years. In the circumstances, I find no reason to interfere with the finding of the trial court. I therefore reject ground 1 for lacking in merit.
6. In a coalesced form the appellant has in grounds 2 and 5 faulted the trial court for breaching his fair trial rights as guaranteed by the Constitution in articles 49 (1) (c) and 50 (2) (g) (h). In his written submissions the appellant has submitted that he was not informed of the reason for his arrest citing article 49 of the Constitution and to remain silent. These issues were not raised in the trial court by way of evidence. I therefore reject this submission as an afterthought. The appellant submitted that he was kept in police cells from 27th October 2017 to 1st November 2017, which is contrary to the requirement of being taken to court within 24 hours. These are matters for a court exercising civil jurisdiction to investigate and not a court exercising criminal jurisdiction. In the circumstances, I do not find merit in these grounds which I hereby dismiss.
7. In ground 3 the appellant has faulted the trial court for failing to order for forensic and other scientific tests including DNA to ascertain whether or not the appellant committed the offence. It should not be forgotten that proof of a fact in issue can be proved without scientific evidence and it is not a must that scientific should be resorted to. In the instant case, it was not necessary to carry out a DNA test. This ground is without merit and is hereby dismissed.
8. The unsworn defence of the appellant was that the complainant was escorted to their home by one Robert. She had gone to their home to seek assistance, since she had a personal problem. They then allowed her to stay in their home. The appellant informed the village elder concerning her presence. The appellant confronted her and warned her against tarnishing his name that he had married her. Later he was

arrested by police officers, who escorted him to Brigadier patrol police base. Finally, he testified that the complainant got married to one Richard.

9. The appellant called three witnesses namely Alfred Sikuku Namunguba (DW 2), Augustine Wanjala Simiyu (DW 3) and Helen M. Angaya (DW 4). DW 2, DW 3 and DW 4 supported the evidence of the appellant that the complainant was married to one Richard. Their evidence is in relation to the events after the commission of this offence.

10. As a first appeal court, I have independently re-assessed the entire evidence. As a result, I find that the witnesses called by the appellant namely Alfred Sikuku Namunguba (DW 2), Augustine Wanjala Simiyu (DW 3) and Helen M. Angaya (DW 4), testified in relation to the events after the commission of this offence. In the circumstances, I find that their evidence is not relevant to the offence charged and I therefore reject their evidence. I find from the entire evidence that the conviction of the appellant is sound. His appeal against conviction fails and is hereby dismissed.

11. The appellant has also appealed against his sentence of 15 years' imprisonment. The appellant was a first offender. He now has been in custody since 5/10/2018, which translates to over one year. He has an ailing mother. He is the sole bread winner of his family and his father deserted them.

12. After taking into account both the mitigating and aggravating factors, I find that the sentence of imposed was manifestly excessive, which I hereby quash and in its place, I hereby impose a sentence of six years' imprisonment; which sentence 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