



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 208 OF 2016

MOURICE NYONGESA SIMIYU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. C.N. Oruo, RM, delivered on 23/09/2016 in the Senior Principal Magistrate's Court at Webuye in Criminal Case No. 965 of 2015, R v Mourice Nyongesa 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 (1) (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 seven grounds in his petition of appeal.
4. In a coalesced form in grounds 1 and 4 the appellant has faulted the trial court for convicting him in the absence of proof beyond reasonable doubt. In this regard, the evidence of NW (the initials of the complainant's name), who testified as Pw 1 was that on 23/05/2015, she was on her way to the shop. She met the appellant while on the way. She had known the appellant before this incident. They used to talk. The appellant promised to marry her. As a result, they went to the appellant's sister's place at Mawanga. The appellant then touched her private parts. He removed his clothes and also removed those of the complainant. The appellant then put his penis into her vagina.
5. Furthermore, the appellant took her to his home claiming that he had married the complainant. They lived in that home for three months and then moved to Bokoli shopping centre. The complainant testified that she learned that her parents were looking for her. She was later taken to Webuye hospital, where tests were done, which showed that she was not pregnant. She identified the treatment notes, which were later put in evidence as exhibit 1. She was also issued with a P3 form, which was later put in evidence as exhibit 2.
6. She then identified the appellant.
7. The complainant testified that she was sixteen years old.
8. The record shows that Pw 1 was not cross examined. I checked the original hand written record of the learned magistrate and confirmed that the complainant was not cross examined.
9. In addition to the evidence of the complainant, the prosecution called her father namely SW (Pw 2). The evidence of Pw 2 was that on 23/09/2015, he went to check her daughter, where she sleeps. She was there. He then went back to sleep. Pw 2 checked his daughter the following morning in school. She was not there. He then made a report at the AP Camp and at school and finally to the chief. He later learned that her daughter was at Bokoli centre. He took that information to the AP Camp as a result of which both the appellant and the complainant were arrested on 18/09/2015. He put in evidence the birth notification as exhibit 3.
10. Furthermore, the prosecution called the clinical officer namely Leswan Mbalwe (Pw 3). Upon examination she found as follows. Abdomen o mass felt. Hymen was broken. No vaginal discharge. No bleeding. No pus in the urine. HIV test was negative. Syphilis test was negative. Pregnancy test was negative. Complainant was 16 years old. Complainant lived with appellant as a wife from May to September 2015. She then put in evidence the treatment notes as exhibit 1 and the P3 form as exhibit 2.

11. Finally, the prosecution called No. 100552 PC (woman) Fundi Loise (Pw 4), who came to testify on behalf of the investigating officer (Sgt Lugonzo). Sgt Lugonzo had been transferred. He testified as to how the appellant was brought to the station at Webuye and eventually charged with the defilement. Upon being put on his defence, the appellant gave sworn evidence denying the offence. He was a boda boda rider. The appellant testified that on 19/09/2015 at 7.00 am he went to the Ap camp at Bokoli to see an officer who had borrowed his motor cycle for three days. The officer was to pay him shs 3,000/= being the agreed money. The AP police officer told him the motor cycle was at Webuye police station. He demanded to see it. The officer told him it was involved in a road accident. They proceeded there and he left him at Webuye police station. From there they came back with Cpl Lugonzo, who now had arrested him.

12. The appellant testified that he did not know why he was arrested. He denied marrying the complainant.

13. I have independently re-evaluated the foregoing evidence as a first appeal court. I find that the trial court did not allow the appellant to cross examine the complainant. This right to cross examination is granted to an accused person by the 2010 Constitution in article 50(2)(k) which reads as follows: "to adduce and challenge evidence." The fact that the complainant did not testify on oath did not stop her from being cross examined. The complainant was allowed to testify pursuant to the provisions of section 19 of the Oaths and Declarations Act (Cap 15) Laws of Kenya. This did not exempt her from being cross examined by the appellant. The right to cross examination is recognized by section 151 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

14. In the circumstances, I find that the fundamental right of a fair trial of the appellant was breached, which is guaranteed by article 50 (2) (k) of the Constitution. It therefore follows that the trial of the appellant was fatally defective.

15. In the premises, I find that the appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed.

16. The only issue for me to decide now is whether or I should order for the re-trial of the appellant pursuant to the provisions of section 354 (3)(a)(i) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In deciding the issue, I have to take into account the following factors. The appellant has been in custody since 19/09/2015 to date, which translates to over four years. He is a first offender. He is the sole bread winner of his family and he pleaded for leniency.

17. Furthermore, I find that the offence carries a sentence of 20 years' imprisonment. I have also taken into account the fact that the potentially admissible evidence might lead to a conviction.

18. After considering all the above matters and the circumstances of the case I find that an order for a re-trial will not serve the interests of justice. I therefore decline to order for the re-trial of the appellant pursuant to the provisions of sections 354 (3)(a)(i) of the Criminal Procedure Code.

19. The upshot of the foregoing is that the appellant is hereby ordered released unless he is otherwise held on other lawful warrants.

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 of February, 2020.

S. N. Riechi

Judge

13/2/2020