REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 85 OF 2018

RS..APPELLANT

VERSUS

REPUBLIC...............................RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. C.M.Wattimah, RM, delivered on 15/8/2018 in the Principal Magistrate's Court at Sirisia in Criminal Case No. 20 of 2017, R. v. RS)

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 life imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8(2) 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 five grounds in his petition of appeal.

4. In ground 1 the appellant has faulted the trial court for convicting him when crucial witnesses were not called to testify. In this regard the appellant submitted that the prosecution failed to call JN, who was staying with the complainant at the material time. The prosecution attempted to have the trial adjourned to enable it to trace the said JN, who was said to have relocated to Uganda, but the court declined to grant the adjournment. As a result, the prosecution was forced to close its case without her evidence. The appellant has therefore urged the court to draw an adverse inference citing ***Bukenya v Uganda [1972] EA 549*** in support of his submission. This raises the question as to whether the evidence adduced proved the case beyond reasonable doubt. In this regard, the prosecution called the following witnesses.

5. IM (her initials) (Pw 1), was allowed to make unsworn statement following *a voire dire* examination. Pw 2 testified that she was born in 2006. She testified that on 3/8/2013 her mother had gone to Uganda to attend a funeral. On that day the appellant who was armed with a knife came and told her to go to bed with him or else he stabs her with the knife. Pw 1 refused to do so. He called her to the bed and undressed her and forcefully had sex with her. He used his penis to penetrate her vagina. She felt pain. She then started to bleed. The time was 7.00 pm. Thereafter the appellant went out and sat outside the house.

6. The appellant used to live in the house of the complainant. The mother of Pw 1 arrived but Pw 1 did not tell what had happened because the appellant had threatened to kill her if she did so. The following morning her mother asked her as to why she was she was walking in pain. She was scared to tell her. Instead she told her other mother JN the following day. JN then told the complainant's mother. Her then took her to Kang'aga dispensary from where she was referred to Cheptais health centre; where she was given medication. While under cross examination, she testified that she told her step mother (JN) about the defilement, because she was suffering and was in pain.

7. Pw 1 was thereafter examined by Oscar Makata (Pw 2) at Cheptais health centre. The findings of Pw 2 were as follows. She had bruises at the private parts. Hymen was missing. A cream discharge was seen at her womanhood. HIV and PITC status were negative. Purse cells and yeast cells were seen. Gram was negative. There was lemicocytes and purse cells which were a sign of infection. She was given antibiotics. He then produced the P3 OF Pw 1 as exhibit 2. The age assessment was done by Janet Chebet and was found to be between 6-8 years old.

8. Pw 2 also examined the appellant on 5/8/2013. His findings as per the P3 form exhibit 4 were as follows. Age 28 years. Urinalysis showed purse and yeast cells, a sign of infection. Both the appellant and the complainant had infection.

9. The mother of the complainant (P. N.-initials of her name) testified as Pw 3. She testified that on 3/8/2013 she had gone for a funeral to Uganda leaving behind her 7-year-old daughter behind. Upon return Pw 1 did not tell anything. It is her aunt, JN who told her that Pw 1 had been defiled by the appellant. The appellant is an uncle to Pw 1. Pw 1 did not tell her mother about the defilement, because the appellant had threatened her.

10. No 66111 Cpl Ochieng Otieno took over the investigations from Cpl Charles Momanyi. It was his evidence that they had recorded a statement from JN and that he was not able to trace her, although she had signed her witness statement by thumb printing.

11. Furthermore, the deputy OCS Cheptais police station was in court testifying in respect of the remaining witnesses namely the investigating officer (Weldon), who was transferred to Isiolo and JN. He further testified that witness JN had declined to sign summons and kept running away when served with summons. As regards, the mother of the complainant, this witness testified that she was displaced due to a curfew. He then prayed for two weeks to avail all witnesses. More importantly, he testified that when the investigating officer was present in court, he was unable to testify since the appellant was not in court. It is therefore clear that they were unable to avail some witnesses, because of forces beyond their control. In the circumstances, I am unable to draw an adverse inference as submitted by the appellant. I therefore find no merit in this ground 1 which I hereby dismiss.

12. In ground 2 the appellant has faulted the trial court for failing to consider that the charge was at variance with the evidence. In this regard, the appellant submitted that the charge sheet is defective in that it alleges that the offence was committed at Nairobi "B" village in Cheptais district, while in her evidence Pw 1 testified that the place where the offence was committed was Kang'aga. I find that this was an error that is curable under section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. Furthermore, the appellant has also submitted that the charged sheet is not rubber stamped, is not signed and also lacks the OB number. I have perused the original charge sheet. I find that it is signed by the OCS of Cheptais Police station. It also bears the stamp of that police station. However, it lacks the OB number. As a result, I find that the this is an error that is curable under section 382 of the Criminal Procedure Code. This ground lacks merit and is hereby dismissed.

13. In ground 3 the appellant has faulted the trial court for summarily dismissing his defence. The sworn defence of the appellant was that he was arrested on 5/8/2013 after he had taken care of his animals. He further testified that he differed with his in law who refused to come and testify. That in law warned him, because the appellant refused to sleep with her. While under cross examination the appellant denied knowing the complainant. He also denied knowing where the complainant came from.

14. The trial court saw and heard the appellant and the prosecution witnesses testify on oath. It did believe the appellant's evidence. That court believed the prosecution evidence that Pw 1 positively recognized the voice and facial appearance of the appellant. The circumstances favouring identification were as follows. The appellant lived in their house. She is the niece to the appellant. She knew his voice. The forced sexual intercourse was preceded with the demand that the complainant should have sex with the appellant. In the circumstances his defence was considered and rejected following the finding of the court that the appellant was positively identified. This ground lacks merit and is hereby dismissed.

15. In ground 4 the appellant has faulted the trial court for not failing to find that there was no medical evidence to link him to the offence. There was medical evidence from the clinical officer that found the appellant with the same infection that afflicted the complainant. This ground lacks merit and is hereby dismissed.

16. In ground 5 the appellant has faulted the prosecution for charging him with the offence of defilement when he should have been charged with an indecent act. The evidence reveals and supports the charge of defilement and I find that it was the proper charge that was preferred against the appellant. This ground lacks merit and is hereby dismissed.

17. The appellant has also faulted the trial court for imposing a manifestly excessive sentence of life imprisonment. In his mitigation the appellant told the court he had been in remand since 2013, which was due to the re-trial ordered by the High Court; which translates to about seven years. He regrets the offence and has asked the court for forgiveness. He was also a first offender.

18. The aggravating factors include the following. The appellant defiled a 7-year-old child, who was his niece. He was staying with the victim and her mother. He abused his trust.

19. After considering all the foregoing factors I find the trial may not have not been aware of the Supreme Court decision in ***Francis Muruatetu & Another v Republic [2017] EKLR***. I find that the sentence imposed is manifestly excessive, which I hereby reduce to twelve years' imprisonment; which sentence will begin to run from the date of this judgement.

Judgement signed and dated at Narok this 19th day December, of 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