



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 92 OF 2018

SALVIN KIMTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. L.N. Kiniale, SRM, delivered on 11/9/2018 in the Senior Resident Magistrate's Court at Kimilili in Criminal Case No. 22 of 201, R v. Salvin Kimtai)

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 twenty 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 four grounds in his petition of appeal and five supplementary grounds of appeal.
4. In ground 1 the appellant has faulted the trial court for failing to find that the prosecution evidence was full of contradictions and speculation. The appellant in his written submissions has submitted that both PW 1 and Pw 2 contradicted themselves as to the place where the appellant was found. H.I. (the initials of the complainant's name), testified as Pw 1. She testified on oath following a *voir dire* examination. Pw 1 testified that she is 13 years'old. She also testified that on 24/06/2018 she was at home with her parents and thereafter proceeded to the appellant's home on her volition. The appellant was her boyfriend. She found him there. She slept there and had unprotected sex with him. He inserted his penis into her vagina. That night the complainant's father went to the house where she was and arrested both the complainant and the appellant. She was taken to Cheptais sub-county hospital, where her teeth were counted and an age assessment done in respect of which a report was prepared and put in evidence as exhibit pexh 7. A P3 form was also completed and was also put in evidence as exhibit Pexh. 3.
5. While under cross examination Pw 1 testified that she knew the appellant very well. She testified that both herself and the appellant were found in the house that night.
6. Furthermore, Marya Matui (Pw 2) testified that on 24/06/2018, she was with her children including the complainant. The complainant after eating proceeded to clear the table and they went to sleep in the room. Dennis rang Pw 2 at 9.00 pm and enquired as to whether the complainant was at home. Pw 2 proceeded to the complainant's room and found out that she was not there. Dennis Kiptoo Kibusi (Pw 4) told Pw 2 that he met the appellant with the complainant going to Maringo, but the complainant dodged and hid. Pw 2 together with Pw 4 and Erick Kipketer (Pw 3) proceeded to the house of the appellant. After sometime the appellant opened his house. Pw 3 entered the house and checked in the house. As a result, he found the complainant in the appellant's house. They arrested both the appellant and the

complainant. They found the appellant alone with the complainant in that house. The appellant wanted to run away but Pw 4 held onto his hand.

7. The complainant was examined by Philip Karo (Pw 5), who was a clinical officer at Cheptais sub-county hospital. Upon examination, he found as follows. She was 13 years old. She was defiled by a person known to her in the night of 24/06/2018. Pregnancy test was negative. The labia majora was inflamed but had no bruises. He used the dental formula to assess her age as being 13 years. The P3 form was put in evidence as exhibit 3 and the age assessment report was put in evidence as exhibit 2.

8. The appellant's made an unsworn statement in response to the above evidence. He testified that he was a cleaner at Maringo dispensary. He further testified that in the night of 25/06/2018 he was arrested by Erick (Pw 3) and two others. Pw 3 and his group assaulted him. They demanded Kshs 50,000/=, which he did not have and that is why he was charged with an offence he did not know.

9. The appellant called Deophlas Kibet (DW 2), who testified that he did not know whether the appellant was with the complainant.

10. I have independently evaluated the entire evidence as a first appeal court. As a result, I find that there are no contradictions in the evidence of PW 1 and Pw 2. Their evidence is cogent, credible and consistent. I also find that the age of the complainant was proved to be 13 years old based on the evidence of Pw 5. I also find that the name H. C. and H.K. refer to the complainant.

11. Furthermore, the defence of alibi of the appellant was considered and was rightly rejected. He was arrested at night being with the complainant. In the circumstances I find no merit in his defence, which I hereby dismiss.

12. The appellant's appeal against conviction fails and is hereby dismissed.

13. As regards the appellant's appeal against sentence, I find that the trial court sentenced the appellant to the minimum prescribed sentence of 20 years' imprisonment. The trial court did not take into account the Supreme Court decision in *Francis Muruatetu & Another v. R. [2017] EKLK*, which gives trial court's discretion to impose an appropriate sentence.

14. I have taken into account that the appellant was a first offender and was an orphan, who has siblings depended upon him. I have also taken into account the period he has been in custody, which is well over one year.

15. In the circumstances, I hereby reduce the sentence imposed to five 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