REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 21 OF 2019

SIMON SIMIYU MAKEKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. L.N. Kiniale, SRM, delivered on 30th January 2019 in the Principal Magistrate's Court at Sirisia in Criminal Case No. 32 of 2019, R v. Simon Simiyu Makeke)

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 (2) as read with (4) of the Sexual Offences Act No. 3 of 2006.

2. Ms. Nyakibia, 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 ground 1 the appellant has faulted the trial court for failing to appreciate that the charge sheet was fatally defective which led to a miscarriage of justice. In his submissions counsel for the appellant has abandoned this ground of appeal.

5. In grounds 2 and 4 the appellant has faulted the trial court for convicting him in the absence of clear evidence that the complainant was aged 16 years old. In this regard, the evidence of MMW (the initials of her name), who is the complainant (Pw 1), is that she was born on 25th April 2002. She identified in court her birth certificate (exhibit 1), which shows she was born on the said date.

6. Furthermore, the evidence of the complainant on age is supported by the P3 form exhibit 4, which was prepared by Oscar Mahathe, but was put in evidence by Everline Biketi (PW 5). PW 5 read the findings of Oscar Mahathe which were as follows. Pw 5 was familiar with the handwritings of Oscar Mahathe. His findings were as follows. Pw 1 was seen at the facility on 19th July 2018. Pw 1 had a history of having gone missing from 15/07/2018 to 17/07/2018. Pw 1 had no hymen. No bruises were noted in her private parts. There were no PVS cells. HIV done did not reveal anything. Urinalysis did not reveal anything. She had no HIV or STI. The doctor administered prophylaxis. P3 form was put in evidence as exhibit 4. An age assessment using the dental formula was done and it confirmed the complainant was 16 years old (exhibit 3). Both exhibits 3 and 4 were put in evidence pursuant to the provisions of section 33 (b) of the Evidence Act (Cap 80) Laws of Kenya, after she testified that the maker of those two exhibits was away for further studies for one year.

7. As regards, age the trial court found that the prosecution produced the birth certificate (exhibit 1) and the age assessment form of the complainant (exhibit 4), which confirmed the age of the complainant as 16 years old. The trial court found that the victim was 16 years old. This finding is supported by ample evidence. After re-assessing this evidence I am satisfied that age was proved beyond reasonable doubt. I therefore reject grounds 2 and 4 for lacking in merit, which I hereby dismiss.

8. In grounds 3 the appellant has faulted the trial court for failing to find the evidence of recognition of the appellant was not free from error or mistake. Mr. Milimo, counsel for the appellant has submitted that the evidence of the complainant lacks corroboration and the trial court did not warn itself of the dangers of convicting on the evidence of a single witness. The evidence of Pw 1 was that she knew the appellant as a neighbour since 2013, which translates to a total of about six years. Furthermore, it was also the evidence of Pw 1 that the appellant went to her home at around 2.00 pm on 15/7/2018. They then had sexual intercourse during the night and in the following morning the appellant took her to her grandmother at Moding using the motor cycle of Dennis Wangus Nyongesa (Pw 3). The law in this regard, is that the sworn evidence of a minor does not require corroboration: see *Kibangeny arap Kolil v. Regina (1959) EA 92.* Moreover, Pw 1 knew the appellant as

a neighbor for about seven years and the offence was committed during day time. In the night they slept together and in the following morning the appellant took her to her grandmother at Moding. In the circumstances, the complainant had ample time to recognize the appellant. After re-assessing the entire evidence, I am satisfied that the evidence of recognition was positive. I therefore find no merit in this ground which I hereby dismiss for lacking in merit.

9. In grounds 5 and 6 the appellant has faulted the trial court for convicting him on evidence that was contradictory and on the demeanour of the complainant, which was wanting in veracity. In her evidence in chief the complainant testified that she went to the home of the appellant at the request of the appellant; while in her evidence under cross examination she testified that the appellant took her to his home. This is a minor contradiction, since it is the complainant who initiated her movement to his home. It is the appellant who took the complainant to her grandmother because things were bad at her aunt's place namely Dinah Namasa Wekesa (Pw 2). The evidence of Pw 2 was that she was the custodian of Pw 1 and effectively acted as her mother. In this regard, I find that the trial court was better placed to assess the demeanour of Pw 1 and after doing so, it found her to be a credible witness, a finding of fact that is supported by the evidence adduced. I find that there is no basis to interfere with that finding of fact and for that reason I find no merit in these grounds of appeal, which I hereby dismiss.

10. In ground 7 the appellant has faulted the trial court for imposing a manifestly harsh sentence.

11. In sentencing the appellant, the trial court did not take into account that it was not under an obligation to impose the minimum sentence. This is an error of law that the trial court committed. Furthermore, the trial court also fell in error in failing to take into account that the appellant had been in custody since 19th July 2018, which now translates to about one and a half years. Section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, requires the period the appellant has been in custody to be taken into account. Additionally, the appellant was a first offender.

12. The aggravating factors were that he defiled a minor. He then took her grandmother in a bid to cover up his offence.

13. After considering all these matters, I hereby reduce the sentence to six years' imprisonment, which has to start running 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 12th day of February, 2020.

S. N. Riechi

Judge

12/2/2020