



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NO. 16 OF 2018**

**TITO CHEPKWONY.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the judgement of Hon W. Juma, CM, delivered on 3/7/2018 in Criminal Case (SOA) No. 1 of 2017, in the Chief Magistrate's Court at Narok, R v. Tito Chepkwony)***

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of fifteen (15) 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. The state has supported both the conviction and the sentence.
3. In this court the appellant has raised four (4) grounds in his amended petition of appeal.
4. In ground 1, the appellant has faulted the trial court both in law and fact for convicting him in the absence of conclusive proof of the victim's age. He cited *Mwachongo v. Republic [2016] e-KLR*, in which the court held that proof of age is an essential ingredient because the prescribed sentence is dependent on the age of the victim.
5. The evidence of the complainant (AC, Pw 1) as regards her age, was that she was 16 years old. JN (Pw 2), who is the mother of the complainant testified that her daughter was aged 16 years old. The evidence of both Pw 1 and 2 that the victim was 16 years old was not challenged by the appellant in cross examination. Furthermore, there is the evidence of Benjamin Tum (PW 3), the clinician who examined the complainant. Pw 3 produced his report as exhibit 2. According to that report the estimated age of the complainant was 16 years. I find that the evidence of Pw 3 supports the evidence of both Pw 1 and Pw 2 in respect of the age of Pw 1.
6. In addition to the foregoing evidence on the age of the complainant, there is the evidence of No. 53942 PC Edward Tunga (Pw 5), who was the investigating officer. Pw 5 testified that the complainant was aged 15 years old. The birth certificate of the complainant was processed following the destruction of the original birth certificate in the fire that burned their house. Pw 5 produced the birth certificate of the complainant as exhibit 6. I find that the birth notification that was produced as exhibit 7 was not for the complainant, but for her child. The appellant has challenged the admissibility of the birth certificate and the birth notification since both Pw 1 and Pw 2 did not identify them during their evidence in court.
7. The evidence of Pw 5 is that the complainant was born on 10<sup>th</sup> July 2001 according to her birth certificate (exhibit 6) and was aged 15 years.
8. I find that exhibit 6 is secondary evidence, which would have only been admitted into evidence pursuant to section 69 of the Evidence Act (Cap 80) Laws of Kenya. The law required the prosecution to first file a notice to produce secondary evidence, which was not done. I therefore find that the birth certificate of the victim was inadmissible, for failing to comply with the provisions of section 69 of the Evidence Act. In the circumstances, I uphold the submission of the appellant in that regard.
9. After re-assessing the evidence of Pw 1, Pw 2 and Pw 3, as a first appeal court in respect of the age of the complainant, I have on my own found that the complainant was aged 16 years. The inadmissibility of the complainant's birth certificate into evidence has not affected the court's assessment of the complainant's age.
10. In ground 2, the appellant has faulted the trial court in failing to find that penetration was not proved. In this regard, there is credible and cogent evidence that the victim had sexual intercourse with the appellant. There is further evidence of Nelly Maureen Papa (PW 6), the Government analyst, who carried a DNA blood sampling of the specimen blood that was drawn from the victim, her child daughter and the appellant. She produced her report as exhibit 4. That report conclusively proves that the appellant is the father of the victim's child. The

appellant submitted that no blood sample was drawn from him. The evidence of P.C. Edward Tunga (PW 5) is that blood samples were taken from the appellant, the victim and their child at Narok Referral Hospital on 3/1/2017. PW 5 witnessed the drawing of the blood from all of them by the expert, which samples he took to the Government Chemist in Nairobi.

11. I therefore find the evidence of PW 5 to be credible and cogent.

12. In the circumstances, I find no merit in ground 2, which I hereby dismiss.

13. In ground 3 the appellant has faulted the trial court for failing to appreciate that the victim behaved in a manner suggesting she was 18 years and above. She thus consented to the sexual intercourse. This issue was not raised in the trial court by putting it in cross examination of the complainant and her mother, when they were giving evidence. I therefore dismiss this ground as an afterthought.

14. In the premises, the appellant's appeal against conviction fails and is hereby dismissed.

15. In ground 4 the appellant has faulted the trial court in imposing the prescribed minimum sentence of fifteen years (15) imprisonment. And in doing so, the trial court ignored the decision of the Supreme Court in *Francis Muruatetu & Another v R [2017] e-KLR* in respect of mandatory sentences. By virtue of that decision courts have a discretion to impose an appropriate sentence. I therefore find that the trial court ignored the sentencing guide lines that are set out in that decision. This is an error of law. I therefore set aside the mandatory sentence that was imposed by the trial court.

16. The issue that now arises for consideration is the assessment of the proper sentence. In assessing the proper sentence, I am required to consider the circumstances of the offence, which include the aggravating and mitigating factors.

17. The following are the mitigating factors. First, the appellant is a first offender. The appellant has been in prison custody for now over two years, which period I am required by law to take into account in terms of section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

18. Furthermore, the aggravating factors are as follows. the complainant was aged 16 years old. She was a school going victim. She became pregnant and as a result, she gave birth to a child. This interrupted her schooling.

19. After taking into account all the circumstances of the case, I hereby sentence the appellant to four years' imprisonment, which sentence has to run from the date of this judgement.

**Judgment signed, dated and delivered at Narok this 1<sup>st</sup> day of July, 2020 through video link in the absence of the appellant and Ms Torosi for the Respondent.**

**J. M. BWONWONG'A.**

**J U D G E**

**01/07/2020.**