REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 22 OF 2019

BENSON KIMAIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. W. Juma, CM, delivered on 13/5/2019 in the Chief Magistrate's court at Narok in Criminal Case (SOA) No. 1 of 2019, Republic v Benson Kimaiyo)

J U D G E M E N T

1. The Appellant has appealed against his conviction and sentence of twenty (20) years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported the conviction and sentence.

3. In this court the appellant has raised eight (8) grounds of appeal in his petition of appeal.

4. I will determine the grounds in the following order namely grounds 3, 4, 5, 6, 2 1 and 7 and finally ground 8.

5. In ground 3 the appellant has faulted the trial court for convicting him in the absence of conclusive proof of the age of the victim namely D.N. (Pw 1). In this regard, the evidence of the victim, who testified on oath after a successful *voire dire* examination, was that she was 14 years old as at the time she was testifying on 18/1/2019.

DNS (Pw 3), who is the father of the victim testified that his daughter was 14 years old.

6. Benjamin Tum (Pw 4) is the clinical officer, who examined the victim. Upon examining the victim in Narok referral hospital on 1/1/2019, PW 4 found that she was aged 15 years old. Pw 4 also made the following findings. The victim was sober and had not inhaled any drugs. She had no injuries on the head, neck, thorax, abdomen, upper and lower limbs. Hymen was long standing broken. The pregnancy test was positive. UDRL for syphilis, HIV and hepatitis tests were all negative. Urinalysis was done and was found to be negative. Pw 4 then produced his report as exhibit Exh 2. Pw 4 was unable to determine the age of the pregnancy.

7. After re-assessing the evidence on the age of the victim, I find that the victim was 14 years old. The examination by Pw 4 is not conclusive for it is scientific in nature; which science may not be exact. I find that the unchallenged evidence of the victim and her father is conclusive as far as her age is concerned.

8. I therefore find that the age of the victim was proved to be 14 years old. And for this reason, I find no merit in ground 3, which I hereby dismiss.

9. In ground 4 and 5 the appellant has faulted the trial court for convicting him in the absence of conclusive proof of penetration and that the case against him is fabricated. In this regard, Messrs. Ochego –Onduso & Advocates, counsel for the appellant submitted that DNA should have been conducted to prove penetration. The evidence of the victim in this regard was that on 15/12/2018 at 9.00 pm the appellant rang her. He told her to go to his place. She went there and had sexual intercourse. She further testified that they had unprotected sex. She then went home and slept. After one week she started feeling stomachache. She then went and told the appellant that she was pregnant because she missed her periods.

10. Furthermore, the victim testified that: *"When I told him I was pregnant he said he accepted it and we agreed to elope because I told him if my mother knew of it she could kill me*." As a result, they eloped on 29/12/2018 and that on 31/12/2018 they took off with the appellant.

11. In response to the foregoing evidence of the victim, the appellant in his sworn evidence testified that the victim lied that they used to

engage in sex.

12. I have re-assessed the evidence of the prosecution and that of the defence, as a first appeal court. As a result, I find that the evidence of the victim has a ring of truth whereas that of the defence is untruthful.

13. I therefore find that grounds 4 and 5 lack merit and are hereby dismissed.

14. In ground 6 the appellant has faulted the trial court in failing to find that the language used in that court was not a language of his choice. The record of the proceedings shows that the charge against the appellant was read over to him in Kiswahili on 2/1/2019. He was reminded of the charge in that language. The evidence was taken on 18/1/2019. The record further shows that the victim testified in Kiswahili and the appellant then cross examined her. The appellant was reminded of the charge in Kiswahili on 15/2/2019 and he also cross examined the mother of the victim namely M.K (Pw 2), who testified in Kiswahili. The appellant himself testified in Kiswahili and was cross examined.

15. It is clear from the foregoing that Kiswahili language was used in the proceedings of that trial. The appellant never complained that he was unable to follow the proceedings in Kiswahili. He himself testified in Kiswahili. In the circumstances, I find that this is an afterthought.

16. I therefore find no merit in this ground, which I hereby dismiss.

17. In ground 2 the appellant has faulted the trial court for convicting him on evidence that was riddled with contradictions. In his counsel's submissions, there is no issue taken on the alleged contradictions. I have perused the record and find no such contradictions. I therefore dismiss this ground for lacking in merit.

18. In ground 1 and 7 the appellant has faulted the trial court for imposing a sentence of 20 years' imprisonment when he himself was a minor. Additionally, he has faulted the trial court for not following the decision of the Supreme court in *Francis Muruatetu v Republic [2017] e-KLR,* which held that the courts are not bound to impose the statutory minimum sentence upon conviction for murder. The decision has been extended by the courts to cover non-murder cases.

19. In this regard, counsel for the appellant did not pursue the issue of age in respect of the sentence in his written submissions. There is no evidence that the appellant was a minor. The issue was raised for the first time in his grounds of appeal. I find this to be an afterthought. I therefore reject the issue of age at this stage.

20. In sentencing the appellant, the trial court found that the appellant did not offer any mitigation. And it is on that basis that it sentenced him to minimum prescribed sentence of twenty years' imprisonment. Notwithstanding that the appellant did not offer any mitigation, the trial court should have taken into account the period the appellant had been in custody. The failure of the trial court to do so, constitutes an error, which entitles this court to interfere with the sentencing discretion of the trial court.

21. The record shows that the appellant ought to have been treated as a first offender.

22. Furthermore, the record of the proceedings shows that the appellant has been in remand and prison custody since 30/12/2016 to date, which translates to about four years. This period of four years' in custody ought to be taken into account by the court as mandatorily by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. I am therefore entitled to interfere with the sentencing discretion. of the trial court.

23. After considering the circumstances of the case including the aggravating and mitigating factors, I hereby reduce the sentence to seven years' imprisonment, which will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 14th day of October, 2020 through video link in the presence of the appellant and Ms. Torosi for the Respondent.

J. M. BWONWONG'A.

J U D G E

14/10/2020