REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 16 OF 2018

S K N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence dated 2nd November 2015 the

Chief Magistrate's Court in Criminal Case No. 1802 of 2015, Republic v S K N)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against his conviction and sentence of ten years imprisonment in respect of the offence of an indecent act contrary to section 11(1) of the sexual offences Act No 3 of 2006.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted on the evidence of the complainant (Pw 1).

FINDINGS ON THE GROUNDS OF APPEAL ON CONVICTION

4. In this court the appellant has raised thirteen grounds in his petition of appeal.

5. In ground 1 the appellant has faulted the trial court both in law and fact for failing to find that the appellant's defence fell under section 8 (5) of the Sexual Offences Act. There is no evidence on record to show that the appellant appeared to be a grown up or not. Furthermore, Mr. Kilele for the appellant did not pursue this ground both in his written and oral submissions in this court. I find this ground is without merit and is hereby dismissed.

6. In ground 2 the appellant has faulted the trial court in failing to find that the complainant failed to report the offence to the police with a reasonable time. In this regard, it is important to note that the offence was committed on 15th October 2015. The mother of the complainant (Pw 4), who had earlier on gone to Ololulunga on business returned to her home. PW1 told her the appellant had forced her to remove her skin-tight, biker and panty. She continued to tell the mother that the appellant made her to lie on the sofa and then touched her vagina and vulva. The mother then rang the chairman of elders. She was told to see him the following morning, that is, on 17th October 2015. The chairman escorted them to the administration police, who went and arrested the accused. The record of the proceedings shows that the accused first appeared in court on 19th October 2015. It is clear from this evidence that the chairman of elders is a person in authority. This explains why the first report was made to him on 16th October 2015, a day after the commission of the offence. On the following day the administration police then arrested the appellant. This short delay has been explained adequately and I find that it was reasonable in the circumstances of this case. I therefore find that there is no merit in this ground and is hereby dismissed.

7. In a coalesced form the appellant in grounds 3, 4, 5, 6, 7 and 10 has faulted the trial court in finding that the prosecution had proved the offence beyond reasonable doubt. Furthermore, in grounds 11 and 12 the appellant has faulted the trial court in failing to find that the evidence of the complainant was not corroborated. The evidence of P. C., the initials of the complainant (P w 1) is that the appellant caressed her by touching her thighs, vagina and vulva with his hands and fingers. Pw 1 escaped being defiled by pretending to go out in answer to a call of nature. This was followed by the entry of her aunt, I C (Pw 3), in the house of PW 1.

8. PW 1 gave sworn evidence following a successful *a voire dire* examination. By virtue of this, her evidence does not in law require corroboration. See ***Kibangeny arap Kolil v Regina (1959) EA 92***. The complainant narrated to Pw 3, what the appellant had done to her. After re-assessing the entire evidence I find that the complainant was a truthful witness and by virtue of section 124 of the Evidence Act (CAP 80) Laws of Kenya, the trial court was entitled to convict solely on her evidence. There is corroboration of the complainant's evidence by that of her aunt (Pw 3), who rushed to see what was happening to the complainant as reported to her by S. C. (her initially) (PW 2), who like the complainant was a child of tender years. S. C. (Pw 2) made an unsworn statement after failing to satisfy the trial court that she understood the nature of the oath. The defence of the appellant was that he was framed. In his sworn evidence, he testified that both the complainant and her mother have no grudge against him. They therefore had no reason to lie against him. I therefore find no merit in grounds 3,4, 5, 6, 7, 10, 11 and 12 and hereby dismiss them.

9. In ground 4 the appellant has faulted the trial court both in law and fact in relying on a defective charge to convict the appellant. I find the complainant did not deceive the appellant that she was over eighteen years. I further that the appellant had no basis of reasonably believing that the complainant was over eighteen years. The reason being that the appellant and the complainant are cousins from the same locality. Moreover, the appellant knew the complainant very well. There is no way the appellant could have mistaken the complainant to be over eighteen years. And by his own admission, the appellant is a cousin to the complainant, and nephew to the parents of the complainant. I therefore dismiss this ground.

10. In ground 8 the appellant has faulted the trial court both in law and fact in relying on the inconclusive evidence of the medical officer to convict the appellant. In this regard, the evidence of the medical officer was presented to the court by the investigating police officer, Cpl (w) Chebii Elizabeth (Pw 5). Pw 5 produced in evidence the age report of the complainant as prosecution exhibit Pexh 1, the P3 form as exhibit exh 2, the treated notes as exhibit exh 3 and the post rape care form as exhibit exh 4. The medical officer was not called as a witness. The report of the medical officer was put in evidence under section 77 of the Evidence Act., which confers upon the court the discretion to admit such reports. I am satisfied the report of the medical officer was properly produced in evidence, since there was no objection raised to its admission. I therefore confirm the conviction.

Finding on the ground in respect of sentence.

11. The appellant has faulted the trial court both in law and fact in imposing a sentence that was manifestly excessive. I find that the trial court erred in law in failing to assess the sentence in the ordinary way before imposing the minimum sentence of ten years imprisonment. It is only after doing so, that the court could then impose the minimum if the appropriate sentence was found to be below the prescribed minimum. ***See Kibirgen v R (1975) EA 250.*** Furthermore, the complainant did suffer serious physical injuries. In the circumstances, I find that the sentence imposed was manifestly excessive. I am therefore entitled to interfere with it. And by virtue of the Supreme Court decision in ***Francis Karioko Muruatetu and Another v. R (2017)eKLR I find that I am not bound to impose the prescribed minimum sentence.*** I have taken into account that the appellant has already served about three and half years. In terms of section **333 (2) of the Criminal** Procedure Code (Cap 75) Laws of Kenya, I hereby reduce the sentence to three years imprisonment which now the appellant has to serve.

Judgement dated, signed and delivered in open court at Narok this 8th day of April, 2019 in the presence of Mr. Kilele for the appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

8/4/2019