REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.43 OF 2017

(From SPM's Court at Bungoma Cr.3448 of 2015 by: Hon. J. Kingori (CM)

DENNIS SIFUNA WANGILA.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

JUDGMENT

Dennis Sifuna Wangila, the appellant herein, was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the amended charge are that on diverse dates between 6th March, 2015 and 27th September, 2015 at [particulars withheld] in Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of CMS a child aged 16 years.

In the alternative, he faced a charge of committing an indecent act Contrary to Section 11(1) of the Sexual Offences Act in that he caused his penis to come into contact with the vagina of CMS a child aged 16 years.

After a full trial, the appellant was convicted and sentenced to serve 15 years imprisonment.

The appellant is aggrieved by the said conviction and sentence. He has filed this appeal based on the following grounds:

(1) That the court erred in convicting him of the offence when the complainant's evidence exonerated him;

(2) That the court erred in dismissing the appellant's defence;

(3) That the charge was defective;

(4) That no DNA test was conducted to link him to the pregnancy;

(5) That the prosecution evidence was contradictory.

The appellant's prayer is that the conviction be quashed and the sentence be set aside.

The appellant also filed submissions in support of the appeal which he adopted and relied upon.

Ms. Njeru, learned counsel for the State opposed the appeal contending that the complainant's birth certificate was produced in evidence and confirmed that she was 15 years while assessment placed her at 16 years; that the appellant and complainant knew each other; they lived together as husband and wife from March to September, 2015; that the complainant got pregnant and that the issue of identification did not arise; that the complainant exonerated the appellant from blame in that he did not force her into the sexual relationship but the law is that she could not give consent to a sexual act; counsel urged that ignorance of the law is no defence in Kenyan law.

This is a first appeal and this court is required to re-evaluate all the evidence that was tendered in the trial court, analyze it and arrive at its own conclusions. See ***Kiilu v Republic (2005) KLR 174*** and ***Okeno v Republic (1972) EA 32***.

The prosecution called a total of five witnesses. PW1 C.M.S. the complainant, told the court that she was born on 7/5/1999 and that on 6/3/2015, her mother sent her away an allegation that she had stolen Kshs.1,000/= and that she should take her pregnancy to her husband. She decided to go to her husband, the appellant; that she went to her grandmother's home from where the appellant picked her and took her

to his grandmother's home; that her mother did not know where she was; she lived with the appellant as husband and wife till July when the uncle visited and told her to go back home; that during her stay with the appellant, she had sex with the appellant with her consent and they were arrested on 27/9/2015 and taken to police station. She was examined at Bungoma Hospital; she asked the court to release the appellant because they were still living together as husband and wife and having sex.

PW2 PS is the father of PW1. He testified that PW1 was a student at [particulars withheld] Girls in Form 1: that between 6/3/2015 and 27/9/2015, she disappeared from home and he reported to police. He learned that she was living with the appellant. In September, he informed the police and on 27/9/2015, the appellant was arrested together with PW1; that PW1 was examined and found to be pregnant.

PW3 SN the mother of PW1 reiterated what PW2 told the court and that after PW1 and appellant were traced and arrested, PW1 was found to be pregnant.

PW4 Dr. Harun Ombongi produced a P3 form filled by a Clinical Officer Quinto, on 30/5/2015; that on examination PW1 was found to be 5 months pregnant and he concluded that she had been defiled.

PW5 PC Robert Lagat received a report from PW2 and 3 that their daughter's whereabouts were known and he went together with members of Community Policing and found the appellant and PW1 at the Patrol base and took them to Bungoma Police Station. Later, the girl was examined at Bungoma Hospital and found to be pregnant.

When the court invited the appellant to defend himself, he opted to remain silent. The fact that the appellant remained silent, which is his Constitutional right, does not at all lessen the burden placed on the prosecution to prove its case beyond reasonable doubt.

The appellant was charged with the offence of defilement under Section 8(1) of the Sexual Offences Act. It is the duty of the prosecution to prove beyond reasonable doubt:

> ***(1) That the complainant was a child;***
>
> ***(2) That there was penetration;***
>
> ***(3) Positive identity of the perpetrator.***

The complainant testified that she was born on 7/5/1999. That fact was corroborated by her parents PW2 and 3 and further by the birth certificate produced in evidence as P.Exh.3. As of 6/3/2015 when the complainant left home, she was about to turn 16 years. There is no doubt that as of 6/3/2015, the complainant was a minor (child).

Whether penetration was proved:

PW1 told the court that she had sexual intercourse with the appellant repeatedly from the time she went to his home and even at the time he was in court, they were still at it. Besides, PW1 was examined on 30/9/2015 and found to be 5 months pregnant. That proves that indeed there was penetration.

In her testimony, PW1 said that she has been living with the appellant as husband and wife.

PW2 to 4 testified that they found PW1 with the appellant and arrested both. The appellant never challenged PW1's 2's and 3's testimonies by way of cross examination. The said testimonies stand unchallenged and I find that the appellant was the perpetrator.

The appellant contends that no DNA was done to ascertain whether the child is his. The issue here is not who impregnated PW1. PW1 may have as well been impregnated by another person but the question is whether the appellant had sexual intercourse with PW1. In any event, the courts have made it clear that the fact of defilement or rape need not be proved by medical evidence. It can be proved by oral evidence of the victim or circumstantial evidence. *See* ***Kassim Ali v Republic CRA.84/2005*** where the court held:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."***

According to PW2 and 3, PW1 was a student in Form I when she disappeared. The appellant did not raise any defence under Section 8(5) Sexual Offences Act that he believed PW1 to be of age or that she presented to him as such.

As regards the alleged defect in the charge, I find none. The charge was amended and the new charge indicated that PW1 was 16 years. Even if that amendment was not done, 15 years and 16 years is not much of a difference and it falls under the same bracket under Section 8(4) Sexual Offences Act.

Even though the appellant opted to remain silent. There was overwhelming evidence against the appellant that he defiled PW1 from 6/3/2015 till 27/9/2017. She was a child and without capacity to consent to sexual acts. The trial court arrived at the correct finding.

I affirm the conviction and sentence and dismiss the appeal in its entirety.

Signed and Dated at *NYAHURURU* this *9th* day of *April, 2019*.

.....

R.P.V. Wendoh

JUDGE

Delivered by *S. Riechi (J)* at BUNGOMA this *20th* day of May, *2019*.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present