REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.194 OF 2016

(From CM's Bungoma Cr.No. 917 of 2014 by: Hon. C.L. Yalwala (SRM)

RODGERS SIMIYU MASINDE.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

JUDGMENT

Rodgers Simiyu Masinde, the appellant, was convicted for the offence of ***defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act***.

The particulars of the charge are that on diverse dates between 6/4/2014 and 15/4/2014 at [Particulars Withheld] in Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **DNM**., a child aged 17 years.

In the alternative, he faced a charge of ***committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act***. Upon conviction on the main charge, he was sentenced to serve 15 years imprisonment.

The appellant is dissatisfied with the conviction and sentence and filed this appeal. The grounds of appeal in the petition are just mitigation; that the appellant's mitigation was not considered by the trial court; that he is the sole breadwinner of his family and the only ground is that he was not conversant with the language of the court. However, the appellant filed submissions in which he raised other grounds that:

1. ***The complainant's age was not proved;***

2. ***That the prosecution evidence was full of contradictions;***

3. ***That the offence was not proved to the required standard;***

4. ***The sentence was harsh and excessive.***

He prays that the conviction be quashed and sentence be set aside.

This being a first appeal, it is the duty of this court to assess all the evidence that was tendered in the lower court, analyze it and draw its own conclusions. The court must of course remember that it did not have an opportunity to see the witnesses testify in order to weigh their demeanor. It is the lower court that had that opportunity. *See* ***Okeno v Republic (1972) EA 32***.

The Prosecution Case:

The prosecution called a total of five witnesses. **PW1 DNM**., told the court that she was 17 years old, having been born on 12/7/1997 and was then a pupil at [Particulars Withheld] Primary School in Standard 6. She testified that on 6/4/2014, after church, she went home, had lunch and went to [Particulars Withheld] Centre to shave her hair. There was no electricity and on her way home, she met Rodgers (appellant) whom she knew well as they went to the same church. He asked PW1 to accompany him to his house which she did but when she wanted to leave, he told her that she could not and told her that he wanted to make her his wife; that she had sexual intercourse with the appellant from that day till 15/4/2014 about 5.00 a.m. when they heard a knock on the door. She opened the door and found that it was her grandfather, JM (PW2), her uncle M and Administration Police. The police entered and found the appellant in bed and arrested both of them and she was taken to hospital for treatment and age assessment.

PW2 JWM is the grandfather to PW1. PW1 lived with him. He recalled that on 6/4/2014, PW1 returned from church about 3.00 p.m., then she left to go and shave her hair but never returned. PW1 started to search for PW1 amongst relatives, reported to the head teacher at [Particulars Withheld] Primary School where she was a student. He received information that PW1 had been seen on Rodger's (appellant) motor cycle and he reported to Administration Police Camp. Before he went to the appellant's house, five people went to his house, introduced Rodgers, the appellant, to him and told him that it is the appellant who had taken his granddaughter and had come to apologize. PW2 told them the matter was beyond him. Next morning on 15/4/2014, (same night), PW2 went to the appellant's house with police officers, they found Rodgers – the appellant with the complainant in bed and both were picked up. The complainant was taken for age assessment and medical examination. PW2 did not know the appellant before. PW2 also stated that after his arrest, the appellant's brother lured PW1 to disappear and after 2 weeks PW1, was found in [particulars withheld]Area.

PW3, Dr. Haron Ombongi of Bungoma District Hospital examined the complainant who had a history of defilement. From the treatment notes, he concluded that she was defiled. PW3 also produced an age assessment report P.Ex.4 which confirmed that the complainant was 17 years old.

PW4, Ip. Jacob Tirop received a report from PW2 that a pupil of [particulars withheld] Primary School had disappeared; he started to make enquiries and found where the suspect was and went to the house at 5.00 a.m. where he found the complainant with the appellant in bed and both were arrested.

PW5 MW, Head Teacher of [Particulars Withheld] Primary School recalled that she received a report of a missing pupil from class 7 and she wrote a letter on 10/4/2014 to help in investigation.

PW6 Ip. Mohamed Mwanduni then of Nalondo Police Staiton received a report from PW2 that his daughter had disappeared and he had investigated and found that she was living with the appellant. PW6 issued a warrant of arrest for the appellant and next day, Administration Police took the appellant to the police station and later the appellant and complainant were taken to the hospital for examination but the doctors were on strike and so the appellant was not examined.

Defence case:

When called upon to defend himself, the appellant made an unsworn statement in which he denied committing the offence; that on 6/4/2014, he was from church on his motor cycle; that he carried a lady with a man upto [Particulars Withheld] Market and next day, he heard rumors that the girl had disappeared; that on 14/4/2014, some elders went to the home of JM (PW2), and they found that he had reported to the police and by then the girl had returned home. They left and next morning at 5.30 a.m., he saw 2 police officers, the complainant and PW2 and he was arrested to go and show where the boy he had carried on the motor cycle with PW1 was. He was interrogated over the boy but the boy was not found and he was arrested and the girl went to live with the man till she came to court.

In his oral submissions, the appellant said that he was not challenging the conviction but only the sentence. He however went ahead to submit on the failure to examine him. The appellant's submissions are also on both conviction and sentence. The court will therefore consider both whether the appellant was properly convicted and whether the sentence is harsh.

Ms. Njeru learned Counsel for the State opposed the appeal on grounds that the complainant was 17 years; that she stayed with the appellant from 6/4/2014 to 15/4/2014; that the complainant was found in the appellant's house on 15/4/2014 at 5.00 a.m. PW1 was found to have vaginal bleeding and spermatozoa were present which was evidence of defilement; that the defence corroborated the prosecution evidence when the appellant went to PW2's home to apologize; that the issue of mistaken identity did not arise; that the court considered the appellant's mitigation before sentence.

I have considered all the evidence on record, the grounds of appeal and the oral submissions of the parties.

The first ground I wish to address is whether the trial court used a language that the appellant did not understand. On the date of plea, it is recorded that the interpretation was English and Kiswahili. The charge was read to the appellant and he replied in Kiswahili that it was not true. Thereafter, the court record shows that the appellant cross-examined the witnesses in Kiswahili. Although it is not indicated, he made a statement in his defence. It means that the appellant understood the language of the court which was English and Kiswahili. He cross-examined witnesses and gave a detailed defence. The appellant never complained that he did not understand the language of the court. He cannot be heard to complain so late in the day. The court record is evidence that the appellant understood the language of the court and actively took part in the proceedings.

The appellant faced a charge of defilement. To prove that charge, the prosecution must ensure that the following ingredients exist:

1. Proof that the victim is a child;

2. Proof of penetration;

3. Proof of the identity of the perpetrator.

PW1 told the court that at the time the offence was committed, she was 17 years old having been born on 12/7/1997. An age assessment was conducted at Bungoma Hospital which confirmed that she was aged 17 years at the time. The age assessment report was produced as P.Ex.4. No doubt the complainant was 17 years and therefore a child.

Section 2 of the Sexual Offences Act defines "***penetration***" to mean "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

PW1 narrated in detail how the appellant invited her to go and see his home and thereafter refused to let her go and instead decided that he had married her. PW1 remained in the appellant's house from 6/4/2014 till 15/4/2014 when they were found there by PW2 and PW3. All this time PW1 said they had sex as a result of which she bled since it was her first experience.

PW1 was taken for examination on the same day of arrest on 15/4/2014. She was later examined by Dr. Ombongi (PW3) who found that she was bleeding from the vagina, pus cells were seen but no spermatozoa.

From the examination, PW3 was of the view that PW1 took part in sexual activity. PW2, told the court that indeed on visiting the appellant's house in company of PW4, found PW1 and the appellant in bed. The trial court was satisfied that PW1 was defiled and I do agree with the finding that there is ample evidence to prove that the complainant was defiled.

As found above, PW1 stayed with the appellant for about 10 days, from 6/4/2014 to 15/4/2014. PW1 was found in the appellant's house. The evening before the appellant's arrest, PW2 said that the appellant had gone to his home with elders to report that he was the one with the complainant and wanted to apologize. PW2 did not know the appellant before and there is no reason for PW2 to frame the appellant. PW4 was with PW2 when they found the complainant in the appellant's house on 15/4/2014 at about 5.00 a.m. In fact, the appellant did agree to having visited PW2's home the day before the arrest. The appellant's defence was a mere denial.

I agree with the lower court's finding that the complainant was actually in company of the appellant, in the appellant's bed. The appellant purported to have married PW1 and I am satisfied that the appellant was positively identified as the culprit.

On allegations that there were contradictions in the evidence of PW4, I found none at all. PW4 only examined PW1 after she was seen by another doctor and was treated and he produced the treatment notes which helped in filling of the P3 form.

As regards what class PW1 was; whereas PW1 said she was in class 6, PW3, her teacher said it was class 7 but the letter produced by PW3 P.Ex.1, shows that PW1 was in class 6.

In any event, that was not a material contradiction that goes to the root of the charge.

In the end, I find that the prosecution did prove beyond any doubt that PW1, a child aged 17 years, was defiled by the appellant. The conviction is well founded.

After the conviction, the appellant asked for forgiveness and that he is a motor cycle rider.

The court considered the appellant's mitigation, that he was a first offender and the circumstances of the offence. The court handed the appellant the minimum sentence of 15 years imprisonment, having been convicted under Section 8(4) of the Sexual Offences Act. This court has no discretion to vary it.

In the end, I find the appeal to be unmerited and it is dismissed in its entirety.

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

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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