REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 19 OF 2018

MICHAEL KARANJA GIKONYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement, conviction and sentence of Hon. Juma delivered on 9th July 2018

in the Chief Magistrate's Court at Narok in Criminal Case No. 728 of 2015, Republic v Michael Karanja Gikonyo)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 20 years imprisonment in respect of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No 3 of 2006, being count 1 and four years imprisonment in respect of the offence of abduction contrary to section 259 of the Penal Code (Cap 63) Laws of Kenya, being count 2. The sentences were ordered to run concurrently.

2. In this court the appellant has raised ten grounds of appeal in his petition of appeal to this court.

3. In grounds 1, 3 and 8 in a coalesced form the appellant has faulted the trial court for failing to find that the offences of defilement and abduction were not proved beyond reasonable. In this regard, the evidence of the complainant (Pw 1) was she befriended the appellant in December in 2014. She testified that she was born on 1st April 2000, a matter in respect of which a birth certificate was produced as exhibit Pexh 1. she also testified that the appellant worked in his mother's hotel at [Particulars withheld] in lower Majengo in Narok town. She further testified that the appellant gave her his telephone number. She was to call him whenever her mother was away. The appellant then told her to go and stay with him. She declined to do so, telling him to wait for an opportune time. On 13th April 2015, her mother left the house. She then rang the appellant to go for her. The appellant went for her and they went to his house at Silent, where he stayed with his brother in a single room. That night they had sex and she lost her virginity. She stayed with him for one month. They were arrested by police on 19th May 2015.

4. It was her evidence that the appellant had been threatened her to withdraw the case and go to stay with him. She also testified that the appellant thereafter took her to his brother in Eldoret. He then told her not to communicate with her mother. The complainant became pregnant. It also her evidence that the appellant told her that he could not have a friend, who could not stay with him. She testified that she did not ran away from her home because of mistreatment, but it was because the appellant threatened to kidnap her. She did not tell her mother about the threats, because she feared her. She testified that the mother of the appellant gave her transport for her to be taken to Maasai Girls, so that she could go to Eldoret.

5. The mother of the complainant namely NAN (initials of her name) testified as Pw 2. Her evidence was that the complainant was born on 1st April 2000. It was her evidence that on 13th April 2015 she took her young child to hospital leaving the complainant at home. After returning home, she found that the complainant was not at home. On the table was a letter returning telling her that she had gone to Nairobi. The complainant was missing. She then reported the disappearance of the complainant to the chief. According to Pw 2 the complainant had been missing for three weeks. Subsequently, she learned about the whereabouts of the complainant. She then informed the police and as a result they found the complainant with the appellant in Majengo. Both the appellant and the complainant were arrested and taken to the police station. She then took the complainant to the hospital for medical examination.

6. The complainant (Pw 1) was examined by Hillary Kiptoo (Pw 3) on 20th May 2015. Upon examination Pw 3 found as follows. Pw 1 was aged fifteen years. She did not have any bodily injuries. Pw 1 told him that the person who defiled her was a person she knew and that they were staying as a husband and wife. The hymen was torn long standing. Pregnancy test was done and it turned to be negative. He then produced the report of examination as exhibit Pexh 2. Thereafter he also produced an ultra sound report as exhibit Pexh. 3, which showed that Pw 1 was pregnant. Pw 3 concluded that the broken hymen was evidence of defilement. The pregnancy was 18 weeks old and

conception would have been four months earlier.

7. No 92756 PC Juliet Ruto (Pw 5) was the investigating officer. It was her evidence that Pw 1 went missing and on 15th May 2015 the mother (Pw 2) received information as to where Pw 1 was. Pw 2 led to the arrest of the appellant. Furthermore, Pw 2 informed police that her daughter was in Kisumu-Ndogo area at Langas in Eldoret. Police in Eldoret went and arrested both the appellant and Pw 1.

8. The appellant gave sworn evidence and called three witnesses in his defence. In his evidence, he testified as follows. He did not know the complainant. He first saw her at Narok police station on 19th May 2015. He also denied defiling her between 13th April 2015 and 19th May 2018. He further testified that on 19th May 2015, he was arrested. He denied having lived at [particulars withheld] in Narok town.

9. The mother of the appellant testified as DW 2. She testified that the appellant is her son and that police arrested him while he was working with him. She testified that she lived at Majengo and that the appellant lived near PEFA church. Lucy Muthoni Njoki (DW 3) testified that she was at her place at Silent washing her clothes. She further testified that on 19th May 2015 a girl was arrested by police outside her place and took this girl. She had never seen this girl. In the evening, the same police officer returned and took her to go and write a statement. He saw the appellant, when he was produced at the station. She denied that the girl had ever lived in their plot. She also denied that the appellant did not live on the same plot with DW 3. She also denied that the appellant lived in their plot.

10. In addition to the foregoing witnesses the appellant called Anne Wambui Muchiri (DW 4). DW 4 testified that the appellant was her neighbour in Majengo near PEFA church. He never saw appellant with visitors.

11. I have re-assessed the entire evidence as I am required as a first appeal court. I have also considered the authority cited by the prosecution counsel. As a result, I find that Pw 1 was a credible witness, whose evidence was cogent. I believe it and was rightly believed by the trial court. In terms of section 124 of the Evidence Act (Cap 80) Laws of Kenya her evidence does not require corroboration. I also find that the defence was incredible and was rightly rejected. I therefore find that the offences against the appellant were proved beyond reasonable doubt. I therefore reject grounds 1, 3 and 8 for lacking in merit.

12. The appellant has faulted the trial court for convicting him on a defective charge. I find that the charges against the appellant as filed are not defective. Count I is drafted in accordance with law for it contains the particulars of the offence and law that is said to have been infringed. Count II is drafted in accordance with law for it contains the particulars of the offence and law that is said to have been contravened. The charge as drafted and filed is not defective, because the provisions of section 259 of the Penal Code are fully set out in the charge. This ground lacks merit and is hereby dismissed.

13. In ground 4 the appellant has faulted the trial court for disregarding the defence evidence. In this regard the trial court pronounced itself as follows: "*The court has considered all these issues and is persuaded that the prosecution has proved beyond shadow of doubt that Pw 1 is a child of age 15 years. She was defiled and her evidence is supported by medical evidence…… What happened in this instant case is a clear case of abduction for sexual exploitation. In this case the accused had intentions of confirming (sic) Pw 1 to his house and the minute she was exposed herself, the world saw her. He was with her between 13th April 2015 and 19th May 2015*." It is clear from this passage that the defence was considered and rejected. This ground lacks merit and is hereby dismissed.

14. In ground 5 the appellant has faulted the trial court in failing to consider the inconsistencies and contradictions in the prosecution evidence. I find that there were minor contradictions, which do not affect the conviction. This ground is without merit and is hereby dismissed.

15. In grounds 6 the appellant has faulted the trial court in relying on circumstantial evidence to convict the appellant. The evidence against the appellant was direct evidence from the complainant (Pw 1). This ground lacks merit and is hereby dismissed.

16. In grounds 7 and 8 the appellant has faulted the trial court for convicting him on uncorroborated evidence. The evidence of the complainant did not need to be corroborated, since it was found to be credible in terms of section 124 of the Evidence Act, a finding of fact with which I am also in agreement. I therefore confirm his appeal against conviction, which I hereby dismiss.

17. In ground 10 the appellant has faulted the trial court for imposing a manifestly harsh and excessive sentence. In this regard, I find that the trial court failed to take into account the Supreme Court decision in ***Francis Karioko Muruatetu and Another v Republic (2017) eKLR*** in sentencing the appellant. The court also erred in failing to take into account the period the appellant had been in custody in terms of section 333 (2) of the Criminal Procedure Code. I am therefore entitled to interfere with the sentence imposed. I therefore reduce it to eight years' imprisonment, which the appellant now has to serve.

Judgement dated, signed and delivered at Narok in open court this 16th day of October, 2019 in the presence of Mr. Kilele for the appellant and Ms. Nyaroita for the state.

J. M. Bwonwonga

Judge

16/10/2019