REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 126 OF 2017

FRANKLINE KIPROTICH RONO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(AN Appeal from the original judgement, conviction and sentence of Hon Juma

delivered on 28th July 2017 in the Chief Magistrate's court

at Narok in Criminal Case No 2 of 2017)

JUDGEMENT

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

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

3. In this court the appellant has raised four grounds in his amended petition of appeal.

4. In ground 1, the appellant has faulted the trial court for convicting him in the absence of proof of the age of the victim. In this regard the evidence of the victim was that she was born on 1st August 2003. Her birth certificate which shows she was born on that date was put in evidence as exhibit 2. Benjamin Tum, the clinical officer (Pw 3) examined the victim and estimated her age to be thirteen years old. He put in evidence the P3 from as exhibit 1A. In view of this evidence I find that the age of the victim was proved to be 13 years old. I therefore find no merit in this ground of appeal, which I hereby dismiss.

5. In ground 2, the appellant has faulted the trial court for convicting him, when penetration was not proved. The evidence of the Pw 1 was that she had known the appellant before this incident. On 17th December 2017 one Dominic (not called as a witness) told her to take a phone that the appellant has called. She then talked to the appellant. The appellant told her to go to Kimogoro. She used shillings one hundred that the appellant had sent using the cell phone of one Mosonik (also not called as a witness). She went to Kimogoro and then proceeded to Sogoro using a motor cycle. While there, the appellant arrived in a motor vehicle with some other people. From there they proceeded to his home, where she had sex with the appellant twice.

6. Following the arrest of the appellant, the victim was taken for medical examination at Narok referral hospital, where she was examined on 31st December 2016 by Benjamin Tum (Pw 3). Pw 3 after examining the victim made the following findings. The hymen was long broken. HIV, pregnancy and syphilis test were negative. Urinalysis was normal. She told Pw 3 that she had engaged in unprotected sex with the appellant more than two times, between 18/12/2016 and 28/12/2016. I find that the victim was a truthful witness. The finding by Pw 3 that she engaged in sex with the appellant for more than two times is consistent with the hymen that it was long broken. In the circumstances, I find that penetration was proved. I find that there is no merit in this ground which I hereby dismiss for lacking in merit.

7. In ground 3, the appellant has faulted the trial court for convicting him on uncorroborated, contradictory and insufficient evidence. I find after re-assessing the evidence as a first appeal court that the conviction of the appellant was based upon sound evidence.

8. In ground 4, the appellant has faulted the trial court in law in convicting him without considering his defence. The unsworn evidence of the appellant was that on 27/12/2016, he was in Litein selling herbal medicine. He then proceeded to Soimet, where he was arrested by police. Those police asked him if he was Franklin. They then asked if he knew where the girl was. He replied that he only knew his wife. He was asked these questions before being arrested. After his arrest he was taken to Melelo police station till 3/1/2017 and thereafter he was charged

in court for an offence he did not commit. It is clear that the defence of the appellant was that this offence was fabricated against him. In rejecting the defence of the appellant the trial court found: "*the defence of the accused has no chances. He in a way abducted this child, counting her into a wife of sought. She was defiled, the dates in issue are supported by evidence.*" It is clear from this passage that the defence was considered and rejected. After re-assessing the evidence as a first appeal court, I find that the defence was a bare denial which the appellant also said was fabricated. I find from the totality of the evidence that the victim had no reason to fabricate the case against him. It should be remembered the appellant is the one who sent her money that enabled her to travel and meet the appellant at Soimet.

9. The appellant's appeal fails on conviction and is hereby dismissed.

10. The appellant also appealed against sentence. By virtue of the decision in ***Francis Karioko Muruatetu & Another v. R (2017) EKLR***, I am not bound to impose the minimum sentence as prescribed by statute. In re-assessing the appropriate sentence, I am required to take into account the mitigating and aggravating factors.

11. The mitigating factors are as follows. The appellant is a first offender. He has been in custody since 29th December 2016, which translates to about three years.

12. The aggravating factors are as follows. The appellant has been convicted of serious offence that carries a minimum sentence of twenty years' imprisonment. He kept the victim in his custody from 11/12/2016 to 28/12/2016, which translates to about 12 days. The victim was a school going student.

13. After taking into account all the mitigating and aggravating factors, I find that the appropriate sentence is eight years' imprisonment, which takes effect from today.

Judgement signed, dated and delivered in open court at Narok this 10th day of December,2019 in the presence of the appellant and Ms. Nyaroita for the Respondent.

J. M. Bwonwong'a

Judge

10/12/2019