REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 79 OF 2017

BETWEEN

BENJAMIN WANJALA SIMIYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case S.O Number 38 OF 2016 in the* Chief Magistrate's court at *Bungoma by Hon. J.K.Kingori (CM) on 29.6.17)

JUDGMENT

The trial

1. The Appellant **BENJAMIN WANJALA SIMIYU** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of ***the Act***. The particulars of the main count are that

> ***On 21st October, 2016 at [particulars withheld] village in Bungoma Central sub-county within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of JNL a girl aged 14 years***

The prosecution's case

2. The prosecution called 6 witnesses in support of the charges. PW1 JNL recalled that on the material date at about 8.00 pm, she went out for a short call and met the appellant who was her neighbor and boyfriend and together they walked to appellant's house which was about 100 metres away where she stayed until 24.10.15 within which they engaged in sex every night. It was her evidence that the appellant escorted her from his home on the night of 24.10.15 and on the way they met her cousin E. She stated that she then spent a night in the house of E from where her father picked her on 25.10.15 and escorted her to hospital and later to the police station. PW2 E W stated that on his way home on 24.10.15 at about 10.30 pm, he met the appellant and the complainant. PW3 J L K, the complainant's father stated that complainant who was 14 years old left home on the night of 21.10.15 and he later found her at the home of one Eunice on 25.10.15 from where he escorted her to hospital and later to the police station. PW4 Tom Barasa a clinical officer examined complainant on 25.10.15 and prepared a P3 form PEXH. 3 which showed that her hymen was perforated from which he concluded that there was evidence of penetration. He also produced as PEXH. 2 the complainant's age assessment report which shows that she was 14 years old.

The Defence Case

3. When the appellant was put on his defence, he denied the offence. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years imprisonment.

The Appeal

4. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 18th July, 2017. From the grounds of appeal and written and oral submissions by the appellant, I have deduced the following issues:-

1. ***Identification of the appellant***

2. ***That he was a minor when he was convicted***

3. ***That complainant's age was not proved***

4. ***That he was not examined to confirm that he committed the offence***

5. Mr. Oimbo learned Counsel for the state opposed the appeal and submitted that the appellant who was the complainant's boyfriend was well known to her and stayed with her for 3 days within which time the offence was committed. He further submitted that complainant's age was proved by way of an age assessment report while penetration was proved by way of a P3 form the P3.

Analysis and Determination

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".***

8. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a) Identification of the appellant

9. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Anjononi and Others vs The Republic [1980] KLR****;*

> ***"……This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"***

10. That is not to suggest of course, that cases of misrecognition cannot occur (See ***Karanja & Anor vs. Republic [2004] KLR 140)*** and courts are still duty-bound to examine such evidence with great care.

12. This is a case of recognition since it is on record that the appellant was well known to the complainant being her long time neighbour and boyfriend. The complainant stated that she stayed in the appellant's house from 21.10.15 to 24.10.15 which was a period of three days. Further to the foregoing, PW2 told court that he met the appellant whom he knew by his name Benjamin and the complainant at 10.00 pm on 24.10.15 and even talked to them. The complainant stated that she stayed in the appellant's house from 21.10.15 to 24.10.15 which was a period of three days. The evidence on record leads to the conclusion that the appellant was satisfactorily and more reliably recognized since he was not stranger to complainant and PW2.

b) Appellant's age

13. Appellant submitted that he was a minor when he was tried. This issue was however not raised before the trial court which would have subjected him to age assessment. No documentary or other evidence was placed before the court to establish the claim that indeed the appellant was a minor when he was tried, convicted and sentenced.

c) Was complainant's age proved?

13. The Court of Appeal in ***J.W.A. v. Republic (2014) eKLR*** held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report. The exact age of the complainant is critical for purposes of computing the applicable penal provision under the Sexual Offences Act. Evidence by the complainant and her father that she was 14 years was corroborated by the age assessment report PEXH. 2 which shows that complainant's age was assessed to be 14 years old.

d) Did medical evidence confirm the charges?

14. **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.

15. Complainant told court that the appellant had sex with her every night from 21st to 24th October, 2015. Her evidence was corroborated by PW4 Tom Barasa a clinical officer who *stated that examination of the complainant revealed* that her hymen was perforated from which he concluded that there was evidence of penetration.

e) ***Was examination of the appellant necessary?***

16. The appellant urged the court to find that there was no medical evidence to link him to the offence. **Section 36** of the Sexual Offences Act provides as follows:

> *"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence".*

16. My reading of this provision is that there is no requirement that a person who is charged with committing a sexual offence be subjected to medical examination for the purpose of obtaining evidence that he committed the offence. The Sexual Offences Act, in the section set out above, leaves the discretion to the trial court, which I believe would be exercised on the basis of the circumstances before the court. In the present case, the trial court believed the evidence of PW1, without corroboration, which it was entitled to do under section 124 of the Evidence Act. In my view, there was no requirement that the appellant should have been subjected to medical examination to prove whether or not he had committed the offence.

17. Section 8 of the Sexual Offences Act provides as follows:

> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

The appellant was sentenced 20 years which is the prescribed minimum sentenced for defilement of a child between the age of 12 and 15 years as was the complainant. The sentenced meted against the appellant is lawful and I find no reason to interfere with it.

18. Having considered the evidence in its totality, I find that the appeal is without merit, and it is hereby dismissed. Both the conviction and sentence are upheld.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Ribba & Diannah

Appellant -

For the State - Mr Oimbo