



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO (P), OKWENGU & SICHALE, J.J.A.)**

**CRIMINAL APPEAL NO. 167 OF 2017**

**BETWEEN**

**SHADRACK OWAGA OJAL.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of the High Court of Kenya*

*at Homa Bay (H. Omondi, J.) dated 16<sup>th</sup> March, 2017*

*in Criminal Appeal No. 19 of 2016)*

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**JUDGMENT OF THE COURT**

On 16<sup>th</sup> March, 2017 at Homa Bay High Court, H Omondi, J. upheld both the conviction and the 20 years’ sentence of the appellant by the trial Magistrate’s Court, being satisfied that the appellant, as a matter of fact, sexually abused the complainant, who at the time was 14-years old and with whom he stayed for over 2 months treating her as his wife as he had purportedly paid the bride price.

Like the trial court, the learned Judge found the testimony of the complainant to be clear, detailed and compelling; that indeed, even the appellant’s own evidence regarding their liaison, corroborated the events described by the complainant; and that based on that evidence, the learned trial magistrate was convinced that the complainant was a witness of truth.

The learned Judge too believed that the complainant’s father was not entirely innocent in the scheme of things, given his complacency after receiving information that his daughter had eloped with the appellant.

The Judge ruled out the availability to the appellant of the defence under **section 8(5)** of the Sexual Offences Act, that the complainant deceived him into believing that she was over the age of eighteen years. According to the Judge, there was no reasonable basis for such belief, as the appellant and the complainant were neighbours and knew each other well; that from the trial magistrate’s own independent observation and the pre-bail report, it was obvious that the complainant’s age was apparent and given the fact that the appellant himself had children of ages ranging from 36 to 9 years, in secondary, Form 2 and primary, standard 4.

The Judge similarly agreed with the trial magistrate in dismissing the appellant’s explanation that he had the consent of the complainant’s parent to ‘take’ her; that, as a matter of fact, it was the complainant’s parents who took her to his home; that it was her who would go to him crying for help; that on one such occasion she went to his home and he gave her Kshs.10,000; that at no time did the complainant’s parents ever mentioned that she was in school; that to the contrary, her father told him that she had dropped out of school and was aged 20 years; and that he was framed up by the complainant’s parents after he failed to top up the pride price of Kshs.10,000 he had paid earlier.

Both the conviction and sentence were confirmed by the High Court, prompting this appeal. The two courts below, having reached concurrent findings on factual matters, our jurisdiction is narrowed to consider only matters of law. See **section 361 of the Criminal Procedure Code**. We are therefore bound by the lower courts’ findings of fact, unless those findings are not supported by evidence. See **Boniface Kamande & 2 Others vs. R.** [2010] eKLR.

The two courts reached concurrent conclusions that the complainant was a child, aged 14 years at the time of the offence; and that the appellant did not contest the facts relating to how he lived with the complainant as his wife, committing with her sexual intercourse for

weeks.

Based on the grounds of appeal, the only two questions of law that we have been invited to interrogate are whether the defence under **section 8(5)** aforesaid was available to the appellant and whether, in the circumstances of this case the High Court ought to have reduced the sentence imposed by the trial court in conformity with the decision in **Francis Karioko Muruatetu & another vs. R.** [2020] eKLR.

Indeed, the rest of the grounds are only what can be regarded as his mitigating circumstances; his advanced age, how remorseful he is for his actions and how he has reformed in the six years he has served so far in prison.

Starting with the first question, there was overwhelming evidence from both sides, that the complainant and the appellant knew each other well, being neighbours. But of significance is the complainant's testimony that on 5<sup>th</sup> August, 2015 she met with the appellant at her school, where the latter and his son were making school windows; that the appellant took her on a motorcycle to a house he said was his where they spent one week; that each day he defiled her; that on the eighth day, she decided to return to her parents but halfway, she changed her mind and went back to the appellant's house and the ordeal continued; and that they traveled to Kisumu where they stayed for two months, living together and engaging 'several times' in sexual activity, until they were arrested. The complainant stated that the appellant had promised to pay her school fees.

The significance of this evidence is that it pointed to the fact that there was no mistake as to the identity of the appellant; that he was the person who defiled the complainant; and that he knew that the complainant was a pupil.

Like the courts below, we cannot find anything in the evidence on record to suggest that the complainant deceived the appellant into believing that she was an adult. If the appellant was mistaken, then it was not a mistake a reasonable man would make, in the circumstances we have given. That ground fails and we reject it.

On the second ground, the appellant has pleaded for our re-consideration of the sentence of 20 years imposed by the trial court and confirmed by the High Court. He says, among other things, that at 74 years, and having reformed, he is ready to return to the community and be a law-abiding citizen.

Mr. Kakoi, learned counsel for the respondent, did not mind the Court exercising its discretion to re-consider the sentence in view of the appellant's mitigation.

For our part, taking into consideration the appellant's age, and the fact that the State has no opposition to our re-consideration of the appellant's sentence, we think the appellant deserves leniency. Applying **Francis Karioko Muruatetu** (supra), we allow the appeal on sentence which we reduce to 10 years from the date of conviction.

This appeal fails and is accordingly dismissed, save for our decision above on sentence.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of April, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**