



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION NO. 34 OF 2020

NICKSON KIPKIRUI KIGEN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. NICKSON KIPKIRUI KIGEN the applicant hereinafter after referred to as the applicant was convicted of the offence of defilement contrary to section 8(1) (3) of the Sexual Offence Act No. of 2006 and sentenced to serve 20 years' imprisonment on the 3/2/2020.

2. On the 20th February 2020 the applicant/ appellant filed a petition of appeal. When the matter came up for hearing the applicant's counsel informed the court that they were seeking a review of the case. The applicant was charged with defilement on the 19/9/2018. The particulars of the were that, on diverse dates between January 2018 and 4th September 2018 in Transmara East sub-county with Narok County, intentionally caused his penis to penetrate the vagina of IC a child aged 13 years.

3. Miss Buyaki for the applicant filed written submissions dated the 28th July 2020. In his submissions the applicant raises the following issues that; at the time the alleged offence took place the applicant was 17 years old as per his birth certificate. That the trial court failed to recognise that the applicant was under 18 years old at the time of alleged commission of the offence. No age assessment was done on the applicant, that he committed the offence whilst a minor. That the applicant was not provided the necessary protection in law by the trial court. That the trial magistrate erred in admitting the charged sheet of a minor who was said to be 16 years after the age assessment by PW4 the doctor without ascertaining the age of the subject and whether he was charged correctly. That section 143 (1) of the Children Act No. 2001 provides for presumption and determination of age where a person is brought to court appears to be under 18 years, that the court shall make due inquiry as to the age of such a person. That from January to July it is worth noting that the accused was minor, which is the period the alleged offence took place. That as per the birth certificate the applicant was born on the 28th July 2000. That the applicant was either a minor or was becoming a major after he was arrested. That the initiation and continued protection of the suit was discriminatory and denied the applicant who was at the time of the alleged offence equal right and protection in law. Reliance was made on Article 2(6) of the Constitution of Kenya and Article 2(5). That the applicant was discriminated against on the basis of gender from the time he was charged until the time of his conviction. That the applicant who was a minor at the time he was charged for defiling a fellow minor of female gender. That at the time the applicant was arraigned in court he ought to have been assigned a children's officer who had the duty of getting more information about him. That it's unfortunate that the male gender has been discriminated against in the application of the Kenyan laws when it comes to sexual offence. For this argument the applicant relied on the Siaya Criminal appeal no. 155 of 2016 G. O vs R

4. That the minor testified that she was 13 years yet the evidence adduced by the medical officer who examined her stated that she was 16 years old and that she was 3 months pregnant. That the complainant's evidence was not credible. That the court proceeded to convict the applicant on false evidence given by the investigating officer as to when the applicant was arrested, that in his evidence he stated that the applicant was arrested on the 13th October 2018 and 13th September 2018 hence no clarity.

5. That the applicant was not informed of the gravity of the offence, that the court had the responsibility of assisting the applicant all through the proceedings as provided for the Constitution n Article 50 (2) (h). that the applicant was at the time of the trial left on his own to conduct a hearing of an offence which was complex and which attracts a minimum sentence of 20 years imprisonment. (see the English case of The Queen on the Application of HC (a child by his litigation friend CC) and the Secretary of the State for the Home Department & the Commissioner of Police of the Metropolis [2013]EWHC (Amin).

6. That the prosecution failed to adduce evidence to corroborate the fact of penetration. That the applicant was first offender but the trial court failed to take cognizance of the same and instead went ahead to mete a harsh sentence.

7. The applicant seeks that the court finds that he was minor under age at the time of commission of the alleged offence, that he had a right to be accorded legal representation at the expense of the state. That the charges should be quashed and acquit the applicant.

8. Miss Biyaki relied on the applicant's submission at the hearing and stated that they filed a birth certificate with their submissions. She

also submitted that the doctor's evidence does not link the applicant with the alleged offence. That there was mistrial and the procedures were not followed.

9. Mr. Otieno for the State submitted that there was no evidence during the trial and during sentencing that the applicant was below 18 years old. That the applicant did not produce any evidence that he was below 18 years. that his surety indicated that he was 19 years old. On the evidence it was submitted that Pw1 stated that the applicant was her boyfriend. The 2 were found by Pw1's father. She was 16 years old and was pregnant. That there was sufficient evidence to show that the applicant defiled Pw1.

DETERMINATION

10. I have considered the submissions as summarised above. The issues for determination are was the applicant a minor when he charged in court and did the prosecution prove their case. To enable me consider these 2 issues I need to review the court record the entire proceedings.

11. The applicant claims that he was below 18 years when he was charged tried and convicted. The charge sheet presented in court on the 17/9/2018 indicates that the applicant is an adult. The trial magistrate had the occasion to look at the applicant at the time he took plea. There is nothing on record that shows that the applicant informed the court that he was a minor. The charge was read to him in Kiswahili and he responded that it was not true. A plea of not guilty was entered and the court ordered that the applicant be served with statement. On the 20/9/2018 the Court examined the applicant's surety one William Cheruiyot Arap Bill. The said surety informed the court that the applicant is his in-laws son called Irene Chepkemo and that the applicant was 19 years old. The trial court approved the surety after examining him. The applicant's surety did not inform the court that the applicant was a minor. During his defence the applicant never stated that he was a minor and that he was being tried as a minor. His defence was that he was arrested for no reason from his uncle's place and taken to the police station and charged. He admitted that he knew the complainant who is his neighbour and that she was lying in court and he could not tell why.

12. As correctly submitted by the prosecution the issue of the applicant's age never came up during the trial. The record shows that his own surety informed the court that he was 19 years. Counsel submitted that a birth certificate was attached to the submissions. One cannot adduce evidence through submissions. If at all the applicant wanted the court to admit fresh evidence the applicant ought to have made the appropriate application. The submissions made do not help the applicant's case because he was an adult at the time he was charged and his surety informed the court he was 19 years old.

13. On the evidence adduced there was adequate evidence adduced by the prosecution through Pw1 that the applicant had sex with her several times, that he was her boyfriend and that she was pregnant. I agree with the trial court's finding that *pregnancy normally is a result of sexual inter course unless otherwise stated by any other scientific methods which are not applicable and that penetration was proved*. Pw1's pregnancy was confirmed by the medical officer. Pw1 and the applicant were found by Pw1's father and she confessed her relationship with the applicant. The applicant admitted knowing the complainant but only wondered why she was lying. Pw1 was 13 years old as per evidence but was found to be 16 years old when Pw4 examined her. She was a minor. Penetration was proved, the applicant was a person known to PW1, the applicant too admitted knowing the complainant. The prosecution proved their case beyond reasonable doubt. The applicant was properly convicted. I affirm the conviction. The clinical officer informed the court that the complainant was 16 years. The charge sheet indicate that the victim was 13 years. The trial court ought to have taken into account the evidence of Pw4 whilst sentencing the accused. Section 8 (3) and (4) 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.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

14. The appropriate sentence is under sub section (4) which is a term not less than 15 years. Considering the circumstance of this case I find it in order to revive the sentence imposed by the trial court. I therefore set aside the imprisonment term of 20 years and substitute it with an imprisonment term of 3 (three) years from the date of sentence by the trial court.

Dated, signed and delivered at KISII this 17th day of December 2020

R.E.OUGO

JUDGE

In the presence of:

Applicant In person

Miss Biyaki For the Applicant

Mr. Otieno Senior State Counsel Office of the Directorate Public Prosecution

Ms. Rael Court Assistant