REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO 5 OF 2020

ABRAHAM KIPYEGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. L.G.G Okwengu, RM, delivered on 6/3/2020 in the SPM's Court at Kapenguria, in Criminal Case (Sexual offence) No. 9 of 2019, Abraham Kipyego)

JUDGEMENT

The appellant has appealed against his conviction and sentence of ten (10) years imprisonment in respect of the offence of committing an indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The appellant was acquitted of defilement.

In this court the appellant has raised three grounds of appeal in his petition of appeal.

In grounds 1 and 2 the appellant has faulted the trial court for convicting him in the absence of proper identification of himself and for committing an indecent act which was not proved, respectively. In this regard, the evidence of FC (Pw 1) was as follows. That on 30/5/2019 at 7.00 pm she was with her brothers and sisters. Her parents were away. Pw 1 was then called by a neighbour called Chepachikya, who told her to go to her house and collect her mother's money. She went there. Chepachikya who had a torch lied. The appellant was in the house of Chepachikya. Chepachikya then closed the door and went to prepare food.

The appellant then told Pw 1:"*Utakubali kunipea ama hapana nikuuwe."* meaning "*Will you agree to have sexual intercourse with me for if you do not I will kill you*." The appellant then proceeded to forcefully have sexual intercourse with her. He then inserted his penis into her vagina. The appellant warned Pw 1 if she screamed he would kill her. Thereafter the appellant ran away after having forced sex with her. Chepachikya then opened the door and as a result, Pw 1 went to her parents' house. She then told her parents what had happened; in particular she told her mother that the appellant defiled her and had threatened to kill her.

The mother of Pw 1 then looked for the Kenya Police Reservist who looked for the appellant and arrested him. Pw 1 told police that it was the appellant who had defiled her.

She went to the police station, where she was issued with a P3 form, which later was produced as exhibit Pexh.2

The next witness called by the prosecution was SC (Pw 2), who is the mother of Pw 1. Her evidence was that she was at the centre, when her daughters went and told her that Pw 1 had been closed in the house of Chepachikya. Pw 2 and her husband went to that house and found Pw 1 there. They did not find the appellant in that house. They then went home and found Pw 1 crying. Pw 2 then took Pw 1 for medical treatment at Kachelipa hospital. Pw 2 then identified the clinical notes of Pw 1, which were later produced as

exhibit Pexh.3.

The prosecution also called OC (Pw 3), who is a sister to Pw 1. Pw 3 supported the evidence of Pw 1; and added that she saw the appellant defiling Pw 1.

Pw 1 was examined by Solomon Tukei (Pw 4), was the clinical officer. Pw 4 examined Pw 1 at Kacheliba hospital. Upon examination Pw 4 made the following findings. There was no blood or mucus in her clothes. There was a tear on her pant. There were no bruises or lacerations. In respect of her genitalia, there was no injury on the labia manora and majora. There was a whitish discharge. Pw 4 then sent Pw 1 to the laboratory for tests.

The tests showed pus cells and the hymen was an old scar. Pw 1 told Pw 4 that she had a boyfriend. HIV tested negative. Pw 4 completed the P3 form which he produced as exhibit Pexh. 2. The pus cells were not a STD but a sign of infection. In his opinion Pw 4 concluded that "*there was no tangible evidence to show that there was penetration as the lady stated that she has a boyfriend and we could not tell whether it happened most recently.*"

The prosecution also called No. 1142 PC John Alonda (Pw 5, who was the investigating officer. Pw 5 testified that he recorded the statements of the witnesses and upon completion of his investigations, he charged the appellant. He also testified that they are still looking for Chepachikya to charge her in court.

The appellant made an unsworn statement denying the charge. He stated that he was a boda boda rider. And that on 31/5/2019 the appellant woke up and got a client who was to pay him shs.200/-. The appellant further stated that when he got to Siwayo, he was paid shs 200/-. He further stated that at Siwayo, he saw two people who stopped him. He offered to give these two people a ride for shs 200/-. They then got to a place where he stays and there someone came with handcuffs. He did not know the person with handcuffs. When they got to Kongelai he was handcuffed and put in cells.

I have re-evaluated the entire evidence as a first appeal court. As a result, I find that the defence of the appellant was that of an alibi. I further find that the appellant was positively identified by Pw 1 and Pw 3 at the crime scene. They were enabled in their identification of the appellant by the light from the torch. Both Pw 1 and Pw 3 were close to the appellant.

In the circumstances, I find no merit in ground 1 and hereby dismiss it for lacking in merit.

In ground 3 the appellant has faulted the trial court in failing to find that his defence was credible. The defence of the appellant was that of an alibi. Since the appellant was positively identified, I find no merit in this ground of appeal, which I hereby dismiss.

In the premises, I hereby confirm the conviction of the appellant

As regards sentence, the appellant was sentenced to the prescribed minimum sentence of ten years' imprisonment. In sentencing the appellant the trial court did not take into account that the appellant was a first offender. That court also did not take into account the pre-trial custody period of the appellant which began on 31/5/2018 and ended on the day he was sentenced in this case on 6/3/2020. This translates to a period of about two years.

And since his imprisonment the appellant has been in post sentence custody from 6/3/2020 to date; which translates to 15 months imprisonment. The trial court was mandatorily required by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya to take into account the period the appellant had been in custody; which was not taken into account by the court.

Additionally, the trial court did not consider the other mitigation of the appellant. In short, the trial court irregularly and summarily sentenced the appellant.

Although sentencing is in the discretion of the trial court, I am entitled to interfere with that discretion in view of the errors committed by that court.

The upshot of the foregoing is the sentence imposed upon the appellant is hereby reduced to the sentence already served with the result that he is hereby ordered set free unless held on other lawful warrants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAPENGURIA THIS 14TH DAY OF JUNE 2021.

J M BWONWONG'A

JUDGE

In the presence of

Mr Juma and Ms Hellen, court assistants

The appellant

Mr.Sitati for the Respondent