



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 124 OF 2019

(Appeal arising out of conviction and sentence of Hon. Karanja V. Senior Resident Magistrate) in Kitale Chief Magistrate's Court
Criminal Case No. 157 of 2019 delivered on 27th November 2019)

ABRAHAM SANDE....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Abraham Sande, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the **Sexual Offences Act** before the trial magistrate's court. The particulars of the offence were that on diverse dates between 7th July 2019 and 11th July 2019 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of D.M, a child aged sixteen (16) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the charge were that on diverse dates between 7th July 2019 and 11th July 2019 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of DM, a child aged sixteen (16) years. On arraignment, the Appellant pleaded not guilty to the two counts. After full trial, the Appellant was convicted of the 1st count as charged and sentenced to serve **fifteen (15) years imprisonment**.

The Appellant was aggrieved by the respective conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the trial court failed to take into account the fact that Appellant was placed in police custody for a period of more than 24 hours, his defence was disregarded and that the penetration was of a broken and old looking hymen thus no proper incriminating evidence was adduced against him. Consequently, the Appellant urged this Court to allow the Appeal, quash the conviction and set aside the custodial sentence.

During the hearing of the appeal, parties informed the court that they would rely on their written submissions. The Appellant submitted that the complainant was seventeen (17) years old and not sixteen (16) years. That on her own volition, she accompanied the Appellant to a club for a drink after they met at [Particulars Withheld] supermarket at 4.00 p.m. and not at night. The witnesses could not conclusively place him at the scene of crime and therefore their evidence was unreliable in totality. He stated that PW3 indicated that they (the Appellant in the company of the complainant) were found at Meru farm contrary to PW2's assertion that they was found at [Particulars Withheld]. Additionally, PW5 stated that he found PW1 at the showground forest. That by virtue of her intoxicated, it was impractical for the complainant to tell that she was coerced into having sexual intercourse with the Appellant. That there was no evidence of semen or traces of the blood on the complainant's vagina the presence of bruises notwithstanding. That the hymen was old looking and this draws the conclusion that the complainant was sexually active prior to the incident. That the prosecution failed to establish the elements of defilement on a preponderance of the evidence adduced. Consequently, the prosecution did not make out the case against the Appellant to the required standard of proof beyond any reasonable doubt. The Appellant further faulted PW5 for failing to adduce photographic evidence of his arrest as well as production of DNA results on the samples from the complainant's genitalia. Additionally, the omission of the word 'unlawfully' rendered the charge defective. Finally, in view of the foregoing, the Appellant claimed that he was not afforded a fair trial.

Mr. Nderitu for the State opposed the appeal. He stated that the prosecution proved that the complainant was a minor having produced the complainant's birth certificate showing that the complainant was sixteen (16) years old at that time. Further the court was satisfied as to her age having seen her at trial. On penetration, the State submitted that bearing in mind the principle of absolute penetration, it had proved that indeed there same was answered in the affirmative. This was because PW1 confirmed that they had sex after intoxication, PW2 found them together and PW4 observed a torn old looking hymen with fresh bruises on the labia and further found pus cells. On identification, the prosecution relied on PW1's testimony that she has known the Appellant as her brother's friend as "Abuu" and was thus sufficiently recognized and identified.

On contradictions pointed out by the Appellant, Learned Prosecutor submitted that they should only be considered if they affect the outcome of the trial process. In his view, these were minor contradictions that did not alter the outcome of the case and must be dismissed. On being held in custody for more than 24 hours, Mr. Nderitu submitted that this was an afterthought as this issue was never raised at trial. Be that as it may, his recourse is in compensatory damages in a civil court. Finally, the defence raised was not persuasive. The trial court was right in reaching its findings. He was of the view that the sentence meted on the Appellant was proper and urged the court to dismiss the appeal and uphold the conviction and sentence that was imposed on him.

“It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See **Okeno –vs- R [1972] EA 32; Mohamed Rama Alfani & 2 others –vs- Republic, Criminal Appeal No. 223 of 2002**. In the present appeal, the issue for determination by this court is whether the prosecution established the charge levelled against the Appellant to the required standards of proof beyond any reasonable doubt.

The prosecution called five (5) witnesses to establish the charges brought against the Appellant. PW1 the complainant testified that she was a student at the material time at St. TB and was in Form 3 aged sixteen (16) years. She was born on 12th December 2002. She testified that she met the Appellant at Khetia’s Supermarket on 07th July 2019 where after they proceeded to a club. He bought her spirit mixed with an energy drink which she partook. She got drunk and confused. She passed out and in one of her lucid moments found the Appellant lying next to her. He told her that she was his wife. She was taken to [Particulars Withheld], PW1 stated that she experienced pain in her vagina while bathing and had difficulty walking. She could not comprehend what had happened. PW1 further testified that the Appellant was her neighbour and met him at 4.00 p.m. on the fateful day that nothing in violation would happen to her. She also testified that the Appellant was his brother’s friend who used to visit their home. She knew him as Abu. He was in possession of a Ugandan Identity Card. She was taken to hospital. The matter was reported to the Police. The Appellant, on the following night coerced her into engaging in sexual intercourse in spite of her rebuff. Her efforts to escape from hands of the Appellant were unsuccessful. When she had attempted to receive treatment, the Appellant was infuriated. At the pharmacy, the people there informed her that he had indicated that she has completed school. The following day, they slept in a lodging but had no sexual relations. It is on 11th July 2019 that the Appellant and PW1 were found at [Particulars Withheld] Farm by Police Officers and escorted to the Police Station. She stated that they came out of the lodging and walked to [Particulars Withheld] House. He was arrested in the presence of PW1’s brother.

PW2, PW1’s father testified that her daughter went missing on the night of 07th July 2019. She was found on 11th July 2019 at [Particulars Withheld] in the company of the Appellant. He identified the Appellant as their neighbour. PW3 who is PW1’s brother testified that the Appellant had disappeared from home between 07th July 2019 and 11th July 2019 and was found at [Particulars Withheld] farm in the forest. PW1 was taken to Kitale District Hospital where she received treatment following her complaint that she had been sexually assaulted. He confirmed being present at the time of arrest.

PW4 the clinical officer at Kitale County Hospital produced treatment notes and the P3 form as PExh. 1 & 2 that he filled personally. Some parts of the P3 form were filled by the Police. He stated that PW1 came to their facility on 11th July 2019 with a history of defilement. She had a torn hymen old looking (more than 72 hours) with bruises on the labia that were fresh. Tests conducted revealed an epithelial cells in the urine and pus cells. He found no evidence of semen. He concluded from the results that PW1 was sexually assaulted. There was evidence of penetration.

PW5, the investigating officer, testified that he was initially assigned a case of a missing child on 10th July 2019. It was brought to her attention by PW2 and PW3, the father and brother of PW1 respectively. E informed him that the complainant was last seen with a known person. The Appellant was contacted and agreed to meet Erick at the show ground. There was a nearby forest. On giving a description of the person he sought to arrest, he received a tip from the mobilized members of the public regarding the Appellant’s whereabouts. He was arrested and taken into police custody. The brother of PW1 in her company gave his narration of facts to PW5. She stated that the Appellant bought her alcohol after being hoodwinked to meet him in town and found herself naked at Kitalale in bed wherein she stayed for two (2) days. They moved from one house to another until the Appellant’s arrest. Her birth certificate was produced and marked PExh. 3.

The Appellant was placed on his defence. He stated that he worked at the farm in Uganda on 02nd July 2019 and on 08th July 2019. He came to Kenya and specifically to Kitale which he alleges was unfamiliar territory, as he had been sent by his mother. He met his uncle on arrival and proceeded to his home. While walking around the area, he was nabbed by a police officer. He produced his Identity Card. He was taken to the police station. He was told that he was to be charged with being illegally in the country. He saw the complainant for the first time in court and at the Police Station. He claimed that he was framed.

It is trite law and practice that for a conviction to sustain on a charge of defilement, the prosecution must establish the following three ingredients have been proved:

1. Age of the complainant
2. Penetration
3. Identification of the perpetrator

This court has aptly summarized the evidence of the trial court. On the complainant’s age, PW1, who was the complainant testified that she was a Form 3 student and was born on 12th December 2002. This was corroborated by the evidence of PW5 who produced her authenticated birth certificate. The same was unchallenged. The incident is alleged to have occurred on diverse dates between 07th July 2019 and 11th July 2019. A rudimentary arithmetic calculation will reveal that indeed the complainant was sixteen (16) years of age at that time. This court is satisfied that the complainant was indeed a child and shall not disturb that finding.

The next issue is penetration. Section 2 (1) 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.”

PW1's testimony gave an account of an uninhibited sexual encounter with the Appellant. She testified that she had sexual intercourse with the Appellant on 07th July 2019 and 08th July 2019. She also testified that she had experienced a lot of pain in her genitalia after her first encounter. PW2 and PW3 confirmed that PW1 went missing from home from 07th July 2019 to 11th July 2019. PW4 examined PW1. In his remarks, he stated:

“She had a torn hymen old looking, bruises on the labia was fresh. The laboratory examination revealed epithelial coup in the urine and pus cells. I made a conclusion of sexual assault and penetration.”

This court finds that there was evidence of penetration on account of the two witnesses. The Appellant challenged PW4's evidence. He stated that no semen samples were collected thereby vitiating his testimony. This Court is not convinced by the Appellant's challenge. There is overwhelming evidence based on the testimony of the two witnesses that there was indeed penetration. Suffice to add that **Section 124 of the Evidence Act** states that corroboration is not necessary in criminal cases involving a sexual offence provided the court is convinced that the victim was telling the truth. The evidence of a sole witness, who is the victim, is sufficient enough if the court is satisfied that the victim was truthful.

The next 6 issue is the identification of the perpetrator. PW1 testified that she knew the perpetrator long before the incident. He used to visit their home. He knew Abuu. He was her neighbour. This was corroborated by PW2 who testified that the Appellant was their neighbour. The trial court in part held:

“The accused being a neighbour took advantage of her naivety. He abused the trust and friendship between him and PW1's brother to turn to his little sister and defiled her. He was known to her and the issue he raised that she is a stranger to her is an afterthought and he was well identified as the perpetrator”

This Court is satisfied that the Appellant was properly identified as the perpetrator.

On the defences raised, the trial court evaluated the Appellant's defence finding that it was not credible. This court has analyzed the said defence in consonance with the grounds of appeal espoused in the Appellant's petition of Appeal and articulated in his submissions. The Appellant by and large has introduced several facets that were not raised at trial and are indeed novel at the Appellate stage. Furthermore, his submissions are conjured around red-herrings with a view to divert the court's attention on the real issues in controversy. He for instance contends that the charge sheet was defective for omission of the word 'unlawful'. This is not the position in law. This court is alive to the fact that such omissions does not render the charge defective. Be that as it may, the same is curable under **Section 382 of the Criminal Procedure Code**. The trial court considered the evidence of the Appellant and arrived at a correct conclusion. The principle constituents to warrant a conviction on a charge of defilement were met and the prosecution proved its case to the required standard of proof beyond reasonable doubt. Having reevaluated the evidence adduced before the trial court, this court for the above reasons holds that the Appellant's appeal against conviction in respect of the above charge lacks merit and is hereby dismissed. This court shall consequently not interfere with the conviction of the trial magistrate.

As regards sentence, the Appellant was under **the Sexual Offences Act** given a custodial sentence of 15 years. **Section 8 (4)** of the said statute provides as follows:

“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.”

The Appellant appeals against the conviction and sentence and seeks that they both be quashed. In the present appeal, it was clear to the court that the trial court committed no error in principle or applied the wrong considerations in arriving at the said sentence. The trial court took into account the nature of the offence, the evidence adduced and the mitigating factors raised by the Appellant at trial. This court takes further account of the fact that the Appellant was sentenced to serve the minimum sentence imposed by statute. The Appellant lured a young girl and defiled her. He did not show remorse for the offence that he committed. The conviction was founded. This court shall thus not disturb the sentence imposed. Consequently, the Appellant shall continue to serve sentence imposed by the trial court.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE