



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 51 OF 2018

(BEING AN APPEAL FROM THE DECISION OF HON.P K MUTAI IN CRIMINAL CASE NO.110 OF 2017)

KEVIN WANJALA WASILWA.....APPELLANT

VERSES

REUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

KEVIN WANJALA WASILWA.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between December, 2016 and August, 2017 at [particulars withheld] area within Trans-Nzoia County intentionally caused your penis to penetrate the vagina of CNO a child aged 15 years.**
2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between December, 2016 and August 2017 at [particulars withheld] area within Transzoia county intentionally caused the contact of your organ (penis) with the female organ (vagina) of CNO a child aged 15 years.**
3. The Appellant was convicted and sentence to 15 years’ imprisonment hence this appeal. Before looking at the grounds raised therein it is imperative to summarise the evidence as presented during trial.
4. **PW1 PETER MASAKE** a Clinical Officer from County Referral Hospital testified that he examined the Complainant on 18th September, 2017 who had by then conceived a child. He filled and produced the treatment notes as well as the P3 forms.
5. PW2 the Complainant testified that she was a form 2 student at [particulars withheld] Secondary school and was 16 years old. She said that she was approached by the appellant during school holidays and they started a relationship and had consensual sex together severally in their home as well as in his place. Thereafter she discovered she was pregnant when she started missing her monthly period. Afraid of her parents she moved to stay with the appellant as husband and wife till she delivered.
6. After delivery she experience some stomach problems and she was taken to the hospital where she was operated and admitted and in the process she was discovered and the appellant arrested. She was issued with a p3 form by the police which was filled. She said that she did not engage herself sexually with any other person except the Appellant.
7. **PW 3 CW** the mother to the Complainant said that she disappeared from home on 5th January, 2017 and she looked for her in vain. In August, 2017 her grandfather received information that she was at Big Tree and she was unwell. She was taken to hospital where she was later operated. She said that she later came home with a baby girl.
8. On 17th September, 2017 she saw a motorcyclist who was looking for the Appellant. She then compelled him to bring the Appellant who was later arrested as he tried to flee. He was taken to Kiminini Police Patrol Base. She said that she was not aware of the affair between the

appellant and the Complainant.

9. **PW4 NAOMI JOSHUA ONYANGO** testified that she was called on 10th August, 2017 by the Complainant who had disappeared for a while. She was crying and wanted help. The following day they traced her at her sister in laws place where she was with her young baby. They took her to cottage hospital as well as Mt. Elgon hospital. The Appellant was later arrested.

10 . **PW5 SGT. FELICITY CHERONO** from Kitale police station testified on behalf of P.C Mbaacha who was the investigating officer. She produced the birth certificate indicating the minor to be 15 years old at the time of the incident.

11 . When placed on his defence, the Appellant gave unsworn evidence denying the charges. He said that he was a boda boda operator till September, 2017 when he was arrested by 2 people and taken to the police station. He was later brought to court and charged with the offence which he still denied. He said that the Complainant was an adult.

ANALYSIS AND DETERMINATION.

12 . The court has perused the proceedings herein as well as the home made written submissions by the Appellant. The duty of this court at this level was well captured in the case of **OKENO V. REP, (1973) E. A 32**. It stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

13 . The main grounds raised in the petition basically are that the evidence by the prosecution was not sufficient enough to sustain a conviction on the basis that the same was full of contradictions. He said that the witnesses were blood relatives and that his defence was plausible.

14 .The three ingredients of this offence are namely the age of the victim, the identity of the perpetrator and whether there was penetration.

15 .The age of the Complainant was said to be 15 years at the time of the offence. The certificate of birth produced was however procured after the case had begun, something which the Appellant has contested.

16 .The question of penetration was concluded by the evidence that the Complainant had already given birth to a child. The Clinical Officer attested to this by the production of the P3 form as well as the treatment documents.

17 . Was the Appellant the perpetrator? The evidence of the Complainant was to that effect. She said that she stayed with the Appellant as husband and wife for 8 months. My understanding is that she stayed so till and after the child was born. If that was the case what was she doing all along? Wasn’t there a friend or a relative who saw her in that home?

18 . Is it possible that her parents acquiesced and they may have been aware of her disappearance for almost one year? What efforts did they make? Even if she was afraid of her parents, staying in the Appellant’s house as a wife for all those months does not indicate in my considered view an innocent minor.

19 . More importantly, there was no evidence that she was actually school going. Save that she stated so during the hearing of the case, no teacher or any school report was produced to support this.

20 . There are no witnesses who saw the two staying as husband and wife. Surely the 8 months’ period cannot be said to be a shorter time.

21 . There was also an admission by the Complainant that she engaged herself sexually with other men before. Is it then possible that the Appellant was just part of the statistics? In essence, there should have been conducted a DNA procedure to determine the child’s paternity.

22 . In a nutshell, I do not find her truthful. She cannot benefit from the provisions of Section 124 of the Evidence Act. The case in my view was poorly investigated and or there was complacency on the part of the Respondent.

23 .This court shall give the Appellant the benefit of doubt. To the extent that there was no eye witness to their “marriage” this court finds the Complainant evidence and by extension the entire evidence not sufficient. The Appellant evidence was of not much probative value as it was unsworn and thus did not offer any chance for cross examination.

24 . The appeal is allowed, the Appellant set free unless lawfully held.

Dated, signed and delivered via Zoom at Kitale on this 30th day of April 2020.

H. K. CHEMITEI

JUDGE

30/4/2020