



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.106 OF 2019

(Being an appeal from the Judgement of Hon. C. M. Kesse (Srm) dated

14th October, 2019 in Criminal Case No. Kitale CMCRC No. 159 of 2018)

ISAAC KIMUTAI SATIA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1), (4) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that **on the diverse dates between 28th August, 2018 and 23rd September, 2018 within Transzoia County in the Republic of Kenya intentionally caused his penis to penetrate the vagina of EM a child aged 16 years.**

2. The alternative count 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 offence are that **on the diverse dates 28th August 2018 and 23rd September 2018 within Transzoia County in the Republic of Kenya intentionally touched the vagina of EM a child aged 16 years.**

3. The Appellant was convicted and sentence to 4 years' imprisonment hence this appeal. Mr Ngeywa Advocate for the Appellant has raised several grounds in his petition of appeal. Before looking at the same it shall be appropriate to summaries the evidence as presented during trial.

4. PW1 the complainant after a difficult start full of drama, testified that she was 16 years and a student at [*particulars withheld*] School in Form 1. She admitted that they were in a relationship with the Appellant in the year 2018 and that they eloped with him and went to stay in Mois Bridge. They lived as husband and wife in a house she did not know the owner. While living together they engaged in sexual activities.

5. Later after two weeks she became unwell and she came home to seek treatment and she was treated by her father. After she became well she went back to the Appellant. She was later called by her sister to come to town and while there together with the Appellant they were arrested. She was taken to the police station and later to the hospital where she was examined and treated. She also identified the P3 Form as well as the treatment notes.

6. When cross examined she said that she had initially lied as she did not want the Appellant to be jailed. She said that they were living with the Appellant in Mois Bridge and that she was running away from home.

7. **PW2 STELLA MUKITE** a Clinical Officer from Kwanza Sub County hospital examined the Complainant and found that the hymen was broken and old looking and there was vaginal discharge. She filled the P3 Form and produced it as well as other treatment notes.

8. **PW3 GM** the father to the Complainant testified that she was born on the 15th June 2003 as per the birth notification he produced in court. He said the she had disappeared from home but on 28th August 2018 she was found at the Appellant's house although she was supposed to be in school. The Appellant apparently was his neighbour. He went to get assistance from the school but was referred to the police.

9. Later she came back home and sought treatment but she disappeared again. He reported at the police station and both were finally arrested together.

10. When cross examined by the Appellant he said that he relied on the notification of birth when he had her registered for class 8 exams.

11. **PW 4 SGT. MUTAI** from Kwanza police station carried out the investigation after the matter was reported by PW3 whom she claimed that the minor had disappeared. He went to the scene and he noted that they were neighbours. Later he received some report that they were preparing to go to Nairobi and they laid an ambush where both the Appellant and the minor were arrested.
12. When cross examined he said that the minor was not cooperating initially but after counselling she did. She then had her taken to the hospital where a P3 form was filled.
13. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he did not know the Complainant and that he was arrested while coming from the hospital. He was taken to the police station and placed in the cells till the following morning.
14. **DW2 JULIUS SATIA** the Appellant's father testified on his behalf and said that his son was at home on the 28/8/2018 and that PW3 did not go to his home on the said date. He said that the Appellant was arrested while he was running the family posho mill on the 23rd.
15. When cross examined he said that the Appellant was married and the PW3 knew his house very well.

ANALYSIS AND DETERMINATION

16. The court ordered that this appeal be disposed by way of written submissions which apparently the Appellant alone complied. The duty of this court is to re-evaluate the evidence afresh and come up with fresh independent finding as was stated in the case of **OKENO VS. REPUBLIC (1972) E.A .32.**
17. The three ingredients that ought to be satisfied when proving this kind of offence are now known namely, the age of the Complainant, whether penetration occurred and the identity of the perpetrator.
18. In the instant case the age of the minor was proved by the production of the notification of birth certificate. The Appellant has contested the same on the grounds that a birth certificate ought to have been produced as the minor must have used one in registering for her class 8 exams. Whereas that could be true it is noted that the notification of birth is actually the primary document issued after a child is born and what follows thereafter is the birth certificate. The contents of a birth certificate are an extracts of the contents of the notification of birth document.
19. In the premises, it is not therefore fatal for the Respondent to have relied on the notification of birth to prove the Complainant's age.
20. Whether the Complainant was defiled was proved by the production of the P3 form. The Clinical Officer found the hymen to be torn and old looking and that there was virginal discharge. When re- examined she said that she was not able to make a conclusion as there was absence of spermatozoa although there could have been penetration without ejaculation on protected sexual intercourse.
21. Can one therefore conclude that there was penetration?
22. Section 2 of the Sexual Offences Act defines ***“penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person;***
23. The Complainant simply said that when they eloped with the Appellant they were ***“engaging in sex”***. That is too simplistic in my view. It is not just enough to state that they were engaging in sex as what the drafters of the Act anticipated was prove of penetration. There could be other forms of sexual acts outside the normal sexual activities and that is why it was necessary to have explained in details whether there was complete or partial penetration.
24. The offence could as well be proved when there is a contact of the sexual organs namely the penis and the vagina and that could still attract a penalty as provided under section 11(1) of the Act. However, the respondent must always prove either of the two and not to leave it for the trial court to speculate. In this case, there was not much conclusion the clinical officer could reach since the incident had taken more than 72 hours. To find the hymen old and old looking may not necessarily meant that the minor was defiled by the appellant for it could as well have been someone else especially in a situation like this where there is no eye witness and the only evidence to be relied on was that of the victim.
25. The minors conduct in any case was suspect considering her disappearance from home without any reason as well as the school as per the evidence of her father. It is also noted that she was uncooperative from the beginning as per the courts record as well as the evidence of the Investigating Officer.
26. The next question was whether the appellant was the culprit. It is clear that there was no eye witness to the incident. In other words, the appellant was not got in the act. The closest person who mentioned that he saw the two together sleeping was pw3, the minor's father. He said that on the 28/8/2018 he saw them at the Appellant's home and he went to call the police. He said that the minor however ran away.
27. The minor on the contrary did not say at any one time that her father found them at the appellant's home. Instead the minor was categorical that they were with the appellant at Mois Bridge. Her father said that the minor told him that he had been locked in Mois Bridge by the Appellant. The minor did not say that she was locked by the appellant in Mois Bridge.
28. In a situation like this where there is no direct witness, the court is supposed to convict based on the trustworthiness of the Complainant's evidence. That is the spirit embodied in Section 124 of the Evidence Act. The evidence as presented clearly does not present the minor to be consistent and credible. Neither does her father too.

29. There is inconsistency in the way the minor testified concerning why she was initially lying to the court. As a matter of fact it appears it took the coercion of the court to have her testify. This only came after she had been incarcerated at the juvenile home.
30. Secondly she appeared a truant girl and she disappeared at home. There was no evidence that she went to Mois Bridge as she claimed that she was there for two weeks but was even unable to say whose home they were staying in.
31. She said during cross examination that when she was arrested she was told to show where the Appellant was and she did. This was contrary to what pw4 said namely that they arrested both the Appellant and the Complainant together.
32. There was no evidence that they stayed at Mois Bridge. There was no evidence from the minor that they were planning to travel to Nairobi via modern coach bus on the material day as suggested by the Investigating Officer.
33. There was need for the Complainant's sister R to have been called to give her testimony for she was very instrumental it appears in the arrest of the two after luring them to the trap.
34. The Appellant's evidence was of no much probative value as it was unsworn and thus he could not be cross examined. His father simply stated what the appellant was doing before his arrest.
35. In the premises, this court finds that the appellant ought to have been granted the benefit of doubt for the reasons that penetration was not clearly proved. It was not enough for the Complainant to simply state that ***"we used to engage in sex with the accused"***. The same is too broad and allowed for one to speculate and that is why the Clinical Officer was not able to reach a reasonable conclusion.
36. At the same time the evidence of the witnesses especially the complainant, her father and the Investigation Officer was not very consistent. There was nothing to show that the father found the Complainant and the appellant in the act at the Appellant's house. The minor did not mention anywhere that they were found in such situation by her father.
37. The trial's court reliance on the case of **PETER SAIKIPON NAIYION VS. REPUBLIC HCA NO. 29 OF 2019** was relevant in arriving at the sentence. The facts and circumstances though were distinguishable herein for the reason stated above.
38. The appeal is therefore allowed, the Appellant set free unless lawfully held.

Dated, signed and delivered via zoom this 16th day of June 2020.

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H. K. CHEMITEI

JUDGE

16/6/2020