



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.16 OF 2019

(Being an appeal from the judgement of Hon. V Wandera dated 25th February 2019 in criminal case No. Kitale 66 of 2017)

DAVID WAFULA OPIYO.....APPELLANT

VERSES

REPUBLIC.....PROSECUTION

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

DAVID WAFULA OPIYO.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement 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 the 23rd day of May 2017 at [particulars withheld] Farm within Transzoia County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of FNW a child aged 15 years.**
2. The alternative charge was **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 the 23rd day of May 2017 at [particulars withheld] farm within Transzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of FNW a child aged 15 years.**
3. The Appellant after a full trial was convicted and sentenced to 20 years’ imprisonment hence this appeal. The general issues raised in the grounds of appeal by the Appellant is the veracity of the evidence that led to his conviction. He said that the case was not proved beyond a shadow of doubt.
4. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial as well as the submissions by the parties.
5. The Complainant **PW1** testified that she was 16 years old and a class 7 pupil at [particulars withheld] centre. Previously she was at K Primary school in particular during the incident. S he said that on 23rd May 2017 she met her friend C who told her that the Appellant had been with her and that she knew him having transported her using a motorbike. She did inquire from her since the Appellant was her boyfriend.
6. While they were talking her teacher Evelyn, C told her that the Complainant wanted to fight with her because of the Appellant. The said teacher told her to bring her father to school the following day but she did not comply. She was scared as her father was likely to beat her.
7. On the 24th May 2017 the said teacher Evelyn called the complainants father who came to school but the Complainant disappeared. She went to the house belonging to the Appellant’s grandfather. At around 3pm the Appellant came and found her outside the said house and they went to the maize field where they engaged in consensual sex.
8. They thereafter went back to the house at around 7.00 pm where she was taken to the Appellant’s aunty where she spent the night. Her father arrived the following morning and picked her and took her home where she found the Appellant locked in a store.

9. The Complainant as well as the Appellant were escorted to Kwanza police station by Police Reservist. She was later taken to Kitale District hospital where she was examined, treated and released. She said that the Appellant had been her boyfriend for less than one year. She also identified the P3 Form as well as the treatment notes.

10. On cross examination she said that she saw the Appellant carrying the said C previously and that she was the Appellant's girlfriend before the said date. She denied that one Samuel Opiyo was her boyfriend. She also said that she did not know if the Appellant had any differences with her father. She said that she slept at Rahimas house after being taken by one Samuel, the uncle to the Appellant.

11. **PW2 DR. MUIRA RACHEL** a Dentist at the County Referral hospital examined the Complainant and formed an opinion that she was around 16 years of age.

12. **PW3 JOHN KOIMA** a Clinical Officer from Kitale County Referral hospital relying on the notes prepared by Dr. Kegode who treated the Complainant concluded that her hymen was torn, numerous pus and epithelial cells and thus there was penetration. On cross examination he said that there was no trace of spermatozoa.

13. **PW 4 CWM** the father to the Complainant testified that she was 16 years old as she was born on 4/1/2002. He said that on 24/5/2017 he received a phone call from her teacher who told him to go to school and when he arrived there the said teacher told him that the Complainant was having sexual intercourse with the Appellant. Apparently PW1 escaped from school when she saw him.

14. He said that he searched for the Appellant in a funeral till 2.00 am but managed to trace him at his friend's house on the 25/5/2017. He was arrested at 4.45 a.m. and locked inside a store. The Appellant told them that he had taken the Complainant to M house where he went with one AT and found her.

15. He thereafter telephoned Police Reservist who came and took him to Kwanza police station. He was arrested together with his uncle one SO. He then escorted the Complainant to the hospital where she was examined and P3 form filled. S was however treated as a prosecution witness and released after recording his statement. He however escaped and his whereabouts remained unknown.

16. When cross examined by the Appellant he said that the Appellant together with one Michael and another broke into his house and stole some money but the Appellants grandfather intervened and the case was withdrawn from Kwanza police station. He denied that he had any grudge against the Appellant.

17. **PW5 P.C FAITH MWENDWA** carried out investigations and preferred charges against the Appellant. She recorded the statements and issued the Complainant with the P3 Form. She recorded statements from Samuel Opiyo who had since vanished.

18. Appellant. She recorded the statements and issued the Complainant with the P3 Form. She recorded statements from SO who had since vanished.

19. When cross examined she said that she interrogated both the Appellant and SO but they both denied the offence.

20. When placed on his defence the Appellant gave sworn evidence denying the charge. He said that on 20th may 2017 PW 4, P and one J removed him from his house and told him to give them the money he had stolen. He was taken and locked at the store till the following morning. He said that there existed a grudge between him and pw4 from May 2016. He said that pw4 owed him kshs.8000.

21. He went on to state that he was arrested on 20/5/2017 and locked at Kwanza police station till 23rd May 2017 when his brother SO was also brought in a company of a girl. Pw4 came into the cells and demanded Kshs 60,000 but Kshs30,000 was raised by his parents and S was released. The appellant was on the other hand not released because he was unable to raise the balance of kshs 30000.

22. On cross examination he denied that the Complainant was his girlfriend and that it was not true that he had been arrested because of carnally knowing the Complainant.

ANALYSIS AND DETERMINATION

23. The courts duty is to analyse afresh the evidence as presented as was stated in the case of **OKENO V. REPUBLIC 1972 E. A 32**. The court said;

“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.”

24. The court has perused the evidence on record as well as the submissions by both the Appellant and the learned state Counsel. The State Counsel submitted that the Respondent was able to prove beyond any shadow of doubt that the Appellant committed the offence. He said that the three ingredients of the offence namely, the age of the victim, the identity of the assailant as well as penetration was well proved. He urged the court to dismiss the appeal.

25. The Appellant on the other hand has poked holes into the Respondent case arguing that the Complainant was untruthful and that there was every probability that she may have been defiled by the said Samuel Opiyo. He also said that there was no evidence on how she was handed over that morning to his father from the place she had spent the night.

26. Without going into the entire fabric of the matter, this court shall be inclined to allow the appeal for the following reasons.

27. First of all, there was no eye witness to the incident. This consequently brings in the element of whether the Complainant's evidence was truthful as envisaged by Section 124 of the Evidence Act Cap 80 Laws of Kenya which states as follows;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

28. The ready admission by the Complainant about her sexual intercourse without any resistance shows that she may not be trustworthy. This is so for the reason that even in the medical notes produced it was not conclusive that there was penetration. The doctor concluded in her p3 notes that the hymen was torn and old looking and that there were no bruises on the labia.

29. Against this backdrop is the Complainant's relationship with one SO the uncle to the Appellant. It was him who escorted her to Mswahili's house that night. There is no evidence that she slept in the house of the said Rahima whom the court believes was the mswahili. This missing link was critical taking into consideration the Complainant's character. It would have been also necessary to have the said Rahima testify so as to prove that the Complainant indeed spent the night in her house.

30. More importantly the said Samuel after recording his statements with the police disappeared yet he was to be the prosecution witness. There was no evidence that the police were unable to trace him. The efforts by the investigating officer to produce his statements were rightly thwarted by the court.

31. The above background is critical taking into account the evidence of PW4, the Complainant's father who readily admitted that he had issues with the Appellant who at some point attempted to break into his house to steal some money. The Appellant also in cross examination said that the said witness owed him some money amounting to KShs. 8,000 in respect to use of some tractor and which PW4 had promised to pay. Clearly, in a serious case like this such mundane factors and relationships between parties must be taken into consideration.

32. There was also one teacher E who told PW4 that the Appellant had carnal knowledge of the Complainant. She called him to school where it was alleged that the complainant escaped when she saw her father. The said teacher did not attend court to testify. Who told her that the Complainant had sexual liaison with the Appellant? Did she come across them? Did C who appeared to have been rivaling each other with the Complainant over the Appellant told her?

33. She was in my view a crucial witness for she is the one who investigated the whole process. By extension also, the Complainant's friend C equally ought to have been called to testify. There seemed to have been an apparent jealousy between the young girls over the Appellant. Suspicion alone is not however sufficient.

34. The other element of age was proved of course by the production of the Dental Age Assessment which showed that she was 16 years old. The trial court however missed this during sentence as it ought to have considered the same and sentenced the Appellant for a period not exceeding 15 years as provided under Section 8(4) of the Sexual Offences Act.

35. In regard to the identity of the assailant, much as the act may have happened during the day, this court casts doubt whether it was the Appellant or Samuel Opiyo who defiled the Complainant. As stated above the character of the Complainant invites this court to doubt her credibility. In fact, the defilement may have occurred during that night.

36. The above conclusion is probable as there was no independent witness of where the Appellant was arrested as well as where the minor spent the night.

37. In the premises, the Appellant should have been granted the benefit of doubt considering the glaring loopholes in the Respondent's case.

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

Dated, Signed and delivered at Kitale this 22nd day of October 2020.

H. K. CHEMITEI

JUDGE

22/10/2020

In the presence of:-

Mr. Omooria for the Respondent

Appellant – present

Court Assistant – Kirong

Judgement read in open court.