



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 81 OF 2018

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Sexual offence No. 113 of 2016 delivered by M.I.G. Moranga Principal Magistrate on 27/9/2018)

DANCAN KIPTARUS KEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of **defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 6th August 2016 and 8th August 2016 Kisawai location within Trans Nzoia County, intentionally caused his penis to penetrate into the “vagina of MCC a child aged 16 years.**

2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. He has raised several grounds of appeal which essentially attacks the findings of the trial court, namely that the entire thread of evidence as advanced by the prosecution did not meet the threshold of conviction. Secondly that the appellant's evidence was not taken into consideration.

3. The summary of the evidence as presented during trial was as hereunder.

PW1 the complainant stated that she was 17 years old and a student at [particulars withheld] high school and in form 2.

She told the court that on 6/8/2016 together with her friend SJ they went to see their boyfriends. The appellant was her boyfriend while David was a boyfriend to her friend SJ. They did not come home for 3 days till they were busted by the area chief while at the house of David.

4. She admitted that while there she had several rounds of unprotected sexual intercourse with the appellant. Her friend as well had sexual intercourse with her boyfriend David.

5. She said that she had not told her parents where she was. When arrested, they were taken to the Chief's Office and later to Kitale police station where she stayed for 2 days. She was later taken to Kitale District hospital where she was tested for HIV and pregnancy.

6. **PW2 John Koima** a clinical officer from Kitale County Referral hospital examined the complainant and filled the P3 form which she produced.

7. **PW3 ACC** is the father to the complainant. He testified that his daughter disappeared for 3 days and was only called when she was at the Chief's camp at Saboti. He found her at Kitale police station where he recorded his statement.

8. **PW4 Dennis Kwemoi** testified that he ran a bar called “Embakasi Pub”. He said that he saw PW1 and her friend SJ heading to a place called Pango area from Kasarani.

He said that he shared a room with the appellant which was next to a bar. He said that the area Chief had come to the bar and carried off a crate of beer. He went to see the Chief and was arrested. He found the complainant and her friend as well. He was arrested and brought to Kitale police station and he recorded his statement.

9. **PW5 Fredrick Makhombe Mucheri** testified that he was a police reservist (KPR). He was called by the chief Kisawai called Daniel Samburumo on 7/8/16. They went and arrested the appellant as well as the complainant.

10. **PW6 Sergeant Joseph Kibowen** took over the investigation from Corporal Felicity Rono who recorded the statements and preferred charges against the appellant.

11. When put on his defence the appellant gave unsworn evidence denying the charge. He said that on the material day his late father had sent him to get a cow. He said that his house was near a bar and he knew the complainant to be drinking. He said he slept in the next house next to the house where the girls slept with their boyfriends. He said that he was arrested in the morning and the boy who slept with the complainant ran away to Uganda.

12. **DW2 Felister Cherotich Kwemio** the mother to the appellant stated that her son on the material day had been sent by his father to get a cow from his grandfather. She said that she heard of the appellant arrest as she took tea. He rushed to the Chief's place and found the complainant dressed in trousers. He said that in the case of time her husband died and it was only the appellant they relied on.

Analysis and Determination

13. There are three ingredients to the offence of defilement which must be established. The first is the age of the complainant. I think in respect to the matter at hand, the complainant's age was established through the production of the birth certificate by the prosecution.

14. Secondly, the question of whether she was defiled. I find the answer to this on the affirmative through the testimony of the complainant as well as PW2, the clinical officer.

15. As to whether the appellant defiled the minor is what ought to be interrogated. I am satisfied that based on the testimony presented, both the appellant and the complainant are known to each other. It was the evidence of the complainant that the appellant was her boyfriend, while David was a boyfriend to Sharon her friend and school mate.

16. The question however is whether the appellant had sexual intercourse for 3 days as she alleged. The appellant has given an explanation (alibi) on where he was for 3 days and the evidence of his mother suggest that he went to get a cow from his grandfather.

17. There was no independent witness especially Sharon her friend to back up the evidence as presented by the complainant. What was difficult in getting her evidence yet both were friends and school mates? As a matter of fact both were arrested together.

18. The issue of the arrest by the chief was not very clear in my view. Pw5 who arrested the youth and the appellant suggested that there were more rooms and people in the scene. He said ;

“ They opened both doors. When we entered we found inside one room 11-13 years old they were boys. The second room had beds but no people. We realized 2 girls had hidden at the back of the bed under the bed next to the wall. The third room had noise some voices were heard but we realized they were under the chairs after they emerged.”

19. Clearly there were more people inside the room. There was loud music with several rooms.

20. PW1 said in cross-examination that there were other girls who included SJ, R and C and herself as well as David. She further claimed that there was another one called Apolos.

21. There was equally Denis Kwemio who was within the vicinity and runs a pub. There was suspicions whether he had sexual intercourse with the complainant or the other girls.

22. The sub total of my observation is that I find that the evidence of the minor leaves great doubt on its veracity. It is obvious that she had engaged herself in sex prior to this date as she admitted.

23. More importantly, none of her friends were called to testify. The alibi by the appellant, though not tested in cross examination was barked by that of DW2 his mother.

24. All in all I find that with the character of the complainant, the appellant should have been granted a benefit of doubt. I find the complainant and her friends truants teenagers who were young and experimenting their bodies. This explains why she disappeared from home for 3 days. It would have been necessary for SJ to have testified to back the complainant's case.

25. I shall therefore grant the appellant the benefit of doubt, allow the appeal and set him free unless lawfully held.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/2019

In the presence of:

Mr Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.