



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 60 OF 2018

STERLON KIMUTAI NAIBEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the original conviction and sentence on 27/2/2018 by Hon.L.Kiniale, SRM in Sirisia Criminal Case No. 15 of 2017)

J U D G M E N T

The Appellant STERLON KIMUTAI NAIBEI 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 charge were that on diverse dates between 28th and 9th September 2017 in Bungoma county, intentionally caused his penis to penetrate the vagina of BN a child aged 14 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that on the night of 8th and 9th September 2017 in Bungoma County, intentionally inserted his penis to the vagina of BN a child aged 14 years.

The evidence before the trial court was that Pw1 BN the complainant was 14 year old and a student at [particulars withheld] primary school. She testified that in June 2017 she met appellant during games at Cheptais and he made advances to her and that he wanted to marry her but she refused. Again on the 28th July 2018 Appellant went to Pw1's home and they met while she was going to church and he stated he still made advances to her and he took complainant to his brother's house and had sex with there the whole night and she returned home the next morning. complainant further testified that Appellant had sex with her on the 17/08/2017 and 2/09/2017 at his home and they stayed together for 7 days and they had sex on all those days but after the 7 days her father came and picked her and she told her father everything who then reported to village elder and reported to Kanganga police station where officers appellant and they took complainant to hospital for treatment.

Pw2 the RM the mother to complainant. She stated that complainant was born in 2003 and that on the 9/08/2017 complainant did not return home and when they found out from the pupils they told her that she was in Chesiro. They reported the matter to village elder Bramwel who together with complainant father proceed to Chesiro and found B at home of appellant who informed them she had gotten married and they took complainant.

Pw3 is Bramwel Cheimakech the Village elder at Kabarok and he testified that in the early days of September he was called by Ayub Ngeywo who informed him that someone had been arrested with a student. She was arrested at home of appellant and he found an AP and they took him to the police station.

Pw4 is the investigation officer PC. Francis Chumaywo attached to Kanganga Police Post. He testified that on the 9/9/2017 at around 4.00am CPL. Khaemba informed him that there was urgent duty and he went to the station and they proceeded to Chesiro village where CPL. Khaemba had received information that Appellant had married a student 14 years old. He recalls on arrival they asked the door to be opened but the Appellant did not open the door and they broke into the house and found appellant with his wife and the complainant and they arrested the appellant and escorted the minor to Cheptais Hospital for examination and they were issued with P3 form and age assessment form. He stated that per his investigation the offence was carried out on diverse dates between 28th July.

Pw5 Fredrick Lumbasi a farmer in Kanganga village. He testified on the 8/9/2017 he received information of a missing school girl and inquiries showed she was living with appellant as a 2nd wife. He stated that on the following day at 5am he accompanied police officers to appellant's home and found a girl inside appellant's house and they arrested both of them.

Pw6 is David Kimengich a clinical officer at Cheptais Sub-county hospital. He testified that on 9/9/2017 he examined complainant who explained to him that she has been in a continuous sexual relationship and on examination she was in a fair general condition and on vaginal

examination she was on her menstrual periods and her hymen absent. She was also HIV negative not pregnant and non-reactive on VDRL however she had a yeast infection and she was given medication and he confirmed he had already been defiled. He also testified that he assessed her age using dental formula and found he was around 15 years.

In his defense the appellant denied the charges and opted to give sworn evidence calling one witness. He testified that he comes from Chesiro and he is a boda boda rider. He stated that on 8/9/2017 he left home for work and returned at 8pm and found a visitor in the house and asked his wife who she was and the wife informed her she was a friend they met at posho mill but since it was dark she was afraid to return home and she prepared a place for her to sleep and they had supper together and he stated that he went to bed with his wife but next day at 6.00am CPL. Khaemba came knocking on his door and he wanted some money for motorbike but appellant did not give and he was arrested and taken to a police station.

Dw2 Naomi Nekesa the wife of the appellant testified that on 8/9/2017 she was going to the posho mill and it was dark and late. She recalls on her way she met complainant who claimed it wasn't safe for her to go home and she went to spend the night at her place and her husband came at 8pm and she informed him that complainant was a friend and prepared beddings for her on the floor. She recalled CPL Khaemba came in the morning and arrested appellant and complainant.

It is upon this evidence that the trial court convicted and sentenced the appellant to 20 years imprisonment. Having been dissatisfied with that decision the appellant preferred this appeal on grounds that: the trial magistrate erred in law and fact in his finding on not collaborated and inconsistent evidence, that no birth certificate was produced to confirm age of complainant, the trial magistrate erred in law and fact by rejecting alibi defense raised, the trial magistrate erred in law of failing to evaluate the strong cross examination, that his constitutional rights to fair hearing were violated he was not served with evidence prosecution relied on during trial and not accorded an interpreter.

He equally filed his written submissions which he submitted that he was charged on defective charge and there was contradiction in prosecution witnesses evidence adduced in court and court failed to take into consideration credibility of prosecution PW2 and no evidence was tendered to prove complainant age. He submitted that this matter was a frame up because of the existing bad blood between the appellant and the complainant's kins.

The state counsel Mr. Akello opposed that appeal. Counsel submitted that it was evidence of PW1 that Appellant persuaded her severally and took complainant as his wife. She submitted that there was penetration and that PW2 confirmed that PW1 did not return home from school and she was found in Appellant's house. She submitted that the age of complainant was proved by producing age assessment form and that his alibi defense was properly rejected. He also submitted that court reviewed charge and within its powers and he was not prejudiced and he finally submitted that the appellant never raised issue of having an interpreter during trial and he chose to speak in Kiswahili and gave sworn evidence and he prayed court to dismiss his appeal. The Appellant responded by stating that he didn't get statement of the mother to the complainant.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose Vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

On the age of the complainant, the prosecution produced an age assessment Form as an attempt to prove her age. The same was issued on 12/9/2017 Ministry of Health at Bungoma County. It contains the assessment based on dental formula and indicated the appellant is approximately 15 years. I have also seen the treatment notes from Cheptais Sub-District which indicates the complainant's age as 14 years old and of more paramount importance is the complainant's P3 Form the Clinical Officer indicated that the complainant's age to be 14 years. Further when Pw2 was testifying in Court on this issue he indicated that the victim was born in March 2003.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as "**The Sexual Offence Act (Rules of Court) 2014**" which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the foregone evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration of the Complainant's private parts, 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 organ of another person."

This position was fortified in the case of **Mark Oiruri Mose Vs R (2013) eKLR** when the Court of Appeal stated thus:

"...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the

surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...." (emphasis mine).

This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

In demonstrating this particular ingredient of the offence, PW5 was the Clinical Officer who filled in the P3 Form. He was the one who examined the complainant. He recorded the following notes as appearing in P3 form:-

"Hymen was absent, no tear and lacerations noted"

Going by the foregoing evidence it is clear that the complainant engaged in sexual acts prior to her examination and her evidence that the appellant had penetrated her on several occasions was credible.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

The offence was allegedly committed diverse dates between 28th and 9th of September 2017 in a house belonging to the appellant. It is the evidence of the complainant, that appellant took her to his house and they had sex on all days they were together and he claimed to have married the complainant. Also Pw4 informed the court that they found complainant with the appellant in his house during the arrest. Also Pw5 who accompanied the officer to appellant's home testified they found appellant with the complainant in his house. Complainant's evidence was effectively corroborated with that of Pw4 and Pw5. Indeed Dw2 the appellant's wife confirmed that the complainant slept in their house. The complainant also testified that she knew the appellant as boda boda rider within their area. In Lesarau – v- R, 1988 KLR 783, Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. The identification of the appellant as the perpetrator of the offence was free from error.

The appellant was charged with offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act instead of Section 8(3) of the Act. The Section has difference in the age of the complainant which affect the sentence. The trial magistrate rectified this error and stated in his Judgment; ***"Lastly the court wishes to note that the charge sheet in the offence section recorded Section 8(1) as read with Section 8(2) which refers to defilement of a child under the age of 11 years. The accused person knew and understood that he faces an offence of defilement with a girl aged 14 years. Section 8(2) is put there only for purposes of prescribing sentencing which differs on account of age. I find that he suffered no prejudice having been charged under Section 8(1) as read with Section 8(2) as opposed to Section 8(1) as read with the Section 8(3)."***

In the result, I do not find merit in this appeal which is hereby dismissed.

Dated, Signed at Bungoma this 30th day of January, 2019.

S.N. RIECHI

JUDGE