



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 221 OF 2015

BETWEEN

ERICK WEKESA AUGUSTINE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in S.O Criminal Case Number 294 of 2014 in the Principal Magistrate's court at Sirisia by Hon. Kimani Mukabi (RM) on 13.11.15)

JUDGMENT

The trial

1. **ERICK WEKESA AUGUSTINE (hereinafter referred to as the Appellant)** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the main count are that

On 22nd March, 2014 at [particulars withheld] village in Bungoma West District within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of C.N.S a girl aged 17 years

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. PW1 **M.M.W**, the complainant stated that she was born on 04th May, 1997 as shown on the certificate of birth **PEXH. 3**. It was her evidence that on the material date, she arrived at [Particulars withheld] secondary school late and when the gateman threatened to report the matter to the deputy principal, she decided to go back home. She stated that she met a man whom she identified as the Appellant whom he had previously seen and who had a shop about 20 metres away from the school and he called her to his shop from where he pulled her into the shop and defiled her. It was her evidence that as she ran away from the shop, she met her mother with whom they went back to the Appellant's shop and a commotion ensued as a result of which Appellant attacked her mother who was later rescued by the landlord. In cross-examination by the Appellant, the complainant conceded that unlike in her 2nd statement, she did not in her 1st statement record that she was defiled. **PW2 G M S**, the complainant's mother recalled on the material date, she went to complainant's school after she received information that she wasn't in school. It was her evidence that the school gateman informed her that the complainant had gone into a nearby shop. She stated she went to the shop and while there the complainant emerged from the shop and when she asked the Appellant what he was doing with complainant he attacked her and members of public who arrived at the scene arrested him and handed him over to the police. **PW3 M K I W**, a security guard at [Particulars withheld] secondary school stated that the complainant opted to go back home after she arrived at school late on the material date. He confirmed that the Appellant owned a shop near the school and that he saw complainant come out of Appellant's shop. **PW4 J K K** a village elder rescued the Appellant from a mob that wanted to beat him and handed him over to the police. **PW5 PHILEMON YOMBA**, a clinical officer produced the complainant's P3 form **PEXH. 1** filled by his colleague Dr. Shivachi. The doctor stated in the P3 form that there were no injuries in complainant's genitalia since the act was consensual. He however noted epithelial cells and few spermatozoa which depicted sexual encounter.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence. He conceded that he owned a shop at near [Particulars withheld] secondary school and stated that it was the complainant's mother who took complainant to his shop and alleged that he had defiled her an allegation he denied.

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 15 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 20th November, 2015. From the 5 grounds of appeal and written submissions filed by the appellant on 06.11.18, I have deduced the following issues: -

1. That there were omissions, failures and contradictions in the prosecution case

2. The trial court overlooked obvious fixing of the Appellant by recording of two statements by the complainant and there being two P3 forms with different contents

6. When the appeal came up for hearing on 05th August, 2019, Mr. Sichangi submitted that he was wholly relying on the written submissions. Ms. Nyakibia, learned Counsel for the state opposed the appeal and submitted that the complainant's age was proved by way of a certificate of birth, penetration by way of a P3 form and that complainant's mother saw complainant leave Appellant's shop. The state conceded that complainant recorded two statements.

7. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

- i. Age of the victim.
- ii. Identity of the offender
- iii. Penetration.

8. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

i. Age of the victim

9. The complainant's certificate of birth **PEXH. 3** shows that she was born on 04th May, 1997 was therefore 17 years old at the material time.

ii. Penetration

10. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

11. Penetration was proved by complainant's P3 form **PEXH. 1** filled by Dr. Shivachi which shows that no injuries were noted in complainant's genitalia since according to him the act was consensual. He however noted epithelial cells and few spermatozoa which depicted sexual encounter.

iii. Identification of the appellant

12. The complainant in her first statement to the police denied she was defiled but in her second statement stated that she was defiled. She was the only witness to the encounter. The Appellant denied that he defiled the complainant.

13. A complainant whose sole evidence the state wholly relies upon in support of its case should not raise any doubt in the mind of the court that he or she is an untruthful witness.

14. The complainant's conduct of initially denying in her first statement that she was defiled and a subsequent implication of the Appellant in her second statement should have raised judicial antenna in the mind of the trial court that complainant was being economical with the truth and ought to have rejected her evidence.

15. The fact that she even told the doctor that examined her that she consented to the act complained of explains the reason why she denied she was defiled until at a later time when she appears to have been coerced to implicate the Appellant.

16. In **Bukenya & Others versus Uganda [1972] EA 549**, the predecessor of the Court of Appeal placed an obligation on the prosecution to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. A corresponding obligation was placed on the court to call witnesses whose evidence is essential for the just decision of the case. That power donated in the **Bukenya case** (supra) exists solely for purposes of calling witnesses as are sufficient and necessary to establish the charge to the required threshold. (See **Joseph Kiptum Keter v Republic [2007] eKLR**). Evidence in the form of spermatozoa was available which would have been subjected to examination to sufficiently establish the charge to the required threshold of prove beyond reasonable doubt. The prosecution however opted to abdicate the obligation placed on it to avail this evidence that was essential for the just decision of this case.

17. The Appellant having denied defiling the complainant and the complainant having proved to be an untruthful witness leads to a

conclusion that the evidence against the Appellant was not watertight to sustain the charge.

18. *Having said that*, I find that the defence cast a reasonable doubt on the prosecution case and the Appellant ought to have been given the benefit of doubt. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts.

19. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

DATED AND DELIVERED IN BUNGOMA THIS.....09th.....DAY....August....2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brendah

Appellant - Present

For the Appellant - Mr. Sichangi

For the State - Mr.Okello