REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.42 OF 2017

(Being an appeal from the decision and sentence by Hon. S. Mokua (CM) in Kericho S. O. No.86 of 2016)

VINCENT KIPROTICH RUTTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted in the Chief Magistrate's Court at Kericho of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment.

2. The particulars of the offence were that on diverse dates between 17th and 21st October 2016 at Sigowet Sub-county within Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of CCM a child aged 16 years.

3. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal in 2017 and later filed amended grounds of appeal, which he relied upon. His amended grounds of appeal are as follows:-

> **a) That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the fact that evidence from the prosecution witnesses clearly revealed that the appellant was totally deceived to believe the complainant was an adult contrary to the provisions of section 8 (5) (a) (b) of the Sexual Offences Act No.3 of 2006.**
>
> **b) That the learned magistrate erred in law and facts by convicting the appellant without considering the entire evidence of the prosecution side constituted mere speculations theorizing conspiracy.**
>
> **c) That the learned magistrate erred in law and fact by dismissing his defence without proper consideration that it was just a cover-up of assault against the appellant.**
>
> **d) The learned trial magistrate erred in law and facts by allowing the case to proceed without proper consideration of the rights of a fair trial specifically Article 50 (2) (j) of the Constitution of Kenya.**

4. The appellant also filed written submissions which he relied upon. He added orally in court that he was assaulted by the complainant who later became a prosecution witness. He also complained that he was not supplied with copies of prosecution witness statements at the trial.

5. Mr. Ayodo, the learned Assistant Deputy Public Prosecutor in response opposed the appeal and stated that there was no record that the appellant tried to establish the age of the complainant under section 8 (6) (b) of the Act. With regard to the weight of the evidence, counsel submitted that the prosecution evidence against the appellant was not speculative, but consistent and corroborative. According to counsel the evidence was clear that the appellant promised to marry the complainant and detained her for one week and defiled her and threatened to kill her, if she raised alarm, as was stated in the evidence of the complainant and her mother PW2. In addition, counsel submitted, PW3 the medical practitioner confirmed penetration.

6. With regard to the age of the complainant, counsel submitted that PW5 the investigating officer produced the child health card of the complainant which established that she was 16 years old at the time of the incident.

7. With regard to the defence of the appellant, counsel submitted that the defence of the appellant was considered by the trial court. With regard to fair hearing under Article 50 (2) (j) of the Constitution, counsel submitted that the record did not show that the appellant was not availed witness statements.

8. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and

inferences. See the Case of **Okeno –vs- Republic [1972] EA 32.**

9. I will start with the technical ground that the appellant was not accorded a fair hearing as required under Article 50 (2) (j) of the Constitution. This ground has no basis, as the record does not show at any point, including the defence that the appellant, that he complained of failure to be supplied with witness statements. I dismiss that ground.

10. With regard to penetration, the appellant stated in his defence that he lived together with the complainant PW1 as husband and wife for some days. He did not deny sexual intercourse. I agree with the trial court that sexual penetration of the complainant was proved. The medical evidence I note merely broadly stated that complainant had sexual activity before, but without stating that it was connected to the alleged incident. However, the evidence of the prosecution and defence of the appellant confirm sexual intercourse.

11. On the age of the complainant, the child health card of the complainant was produced by the investigating officer PW5. It was recorded therein that the complainant was born on 16/12/2000, while the incident occurred on 17th October 2016 about 16 years thereafter. As the child medical card was not disputed nor challenged, I find that the prosecution proved the age of the complainant as being below 18 years and specifically at 16 years at the time of the incident. Thus, I agree with the learned magistrate that the age of the complainant was proved by the prosecution beyond any reasonable doubt.

12. I now turn to the defence of the appellant. The appellant tendered sworn testimony, and called two witnesses DW2 and DW3. His defence was that the complainant and himself lived as husband and wife for some days. That the complainant infact had a 5 years old child and that he believed that she was an adult. The trial court dismissed this defence as insufficient to exonerate the appellant. The trial court relied on section 8(6) of the Sexual Offences Act.

13. The relevant part of section 8 which provides a defence in defilement cases is 8(5) and (6) which states as follows:-

> *"8(5) It is a defence to a charge under this section if-*
>
> *(a) It is proved that such a child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and*
>
> *(b) The accused reasonably believed that the child was over the age of 18 years.*
>
> *(6) The belief referred to in sub-section (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."*

14. In the present case, the complainant was not in regular school, but already in a tertiary training institution. From the circumstances of the case, it was clear that she went on her own and lived with the appellant as a wife for some days. Though she gave evidence that she was forcefully sexually penetrated by the appellant, her brother PW3 who went to rescue her said she was fast asleep with the appellant in the house in circumstances that did not show any forceful confinement of the complainant. In addition, though the complainant said that she did not know the appellant, both her mother PW2 and her brother PW3 confirmed that they knew him. In addition, it was not disputed that the complainant has a 5 years old child, which means any reasonable man would unless otherwise told earlier, believe that she was an adult. There is no evidence that the appellant was an old man or had married before.

15. In my view, therefore, it was not reasonable for the learned magistrate to find that the appellant had no reason to believe that the complainant was an adult. Both the appellant and the complainant were first attempts persons on marriage. I find that the defence of the appellant satisfied the requirements of section 8 (5) of the Act, in the particular circumstances of the present case, bearing in mind that the sentence in sexual offences is very severe. On that ground, this appeal will succeed.

16. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 26th day of November 2019.

George Dulu

JUDGE