



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.1 OF 2014

EK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement of Ag. Principal Magistrate, Hon. J.M. Irura delivered on 18.12.2013 in Isiolo Court Criminal Case No.421 of 2013)

JUDGEMENT

The appellant was charged with the offence of defilement Contrary to Section 8 (1)(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 10th day of June 2013, at Isiolo County, intentionally caused her vagina to be penetrated by the penis of PK a child aged 15 years. The trial Court convicted the appellant and sentenced her to twenty (20) years imprisonment.

The grounds of appeal are that:-

- 1. That the learned Magistrate erred in law and facts by failing to consider that the alleged minor's evidence was not properly corroborated.***
- 2. That the learned Magistrate erred both in law and in fact by failing to find that the evidence of all the witnesses was highly contradictory.***
- 3. That the learned Magistrate erred in law and fact by ignoring the evidence of the appellant.***
- 4. That the learned Magistrate erred in law and in fact by relying on the evidence of the doctor who produced the P3 form which had no relevance or connection with the alleged offence.***
- 5. That the learned Magistrate erred both in law and in fact by failing to consider the principle of proving a case beyond any reasonable doubt as required by criminal jurisprudence.***
- 6. That the learned Magistrate erred in law and facts by failing to investigate, inquire or interrogate both the prosecution and appellant as to the age of the appellant at time of trial.***
- 7. That the learned Magistrate delivered a judgement against the weight of evidence.***

Mrs Kaume appeared for the appellant. Counsel submitted that the charge sheet indicate that the appellant caused her vagina to be penetrated. The appellant ought to have been the complainant as she was the one who was penetrated. The drafters of the charge sheet ought to have carefully considered their evidence before charging the appellant.

Counsel further submitted that the view of the prosecution and the trial court was that the appellant was an adult. The appellant's birth certificate indicate that she too was a minor when the alleged incident took place. She was 15 years old. The judgment of the trial court indicate that the complainant was a minor who could not have given his consent. The appellant is in the same state of mind as she could also not have given her consent. PW6 referred to the appellant as a woman of 21 years. There was no basis for that allegation. The trial court and the prosecution did not ask the appellant's age. Her age was not assessed. There was unnecessary urgency to have the case heard. The appellant was sentenced to twenty years imprisonment as if she is an adult.

Counsel further contends that the prosecution evidence is full of contradictions. PW1 who was the complainant testified that the appellant was called mama Nelly. The charge sheet does not refer to mama Nelly. No alias name was used. PW1 stated that it was the appellant who was on top of him. Other witnesses stated that it was the complainant who was on top of the appellant. PW3 stated that the two were lying on a mattress while PW1 and PW2 stated that they were on a bed. Other witnesses testified that the appellant came out covered in a lesso while other witnesses gave a different description. The medical evidence by PW7 was not sufficient to prove the charge. The boy had scratches on the neck and this does not prove defilement. The complainant's genitalia was examined and no injuries were noted. The appellant was also examined and no injuries were noted both internally and externally. No spermatozoa was seen. Both parties had no injuries. Penetration was not proved. PW1 made reference to the appellant's husband. There was no evidence that the appellant had a husband. The few epithelial cells found in the appellant's genitalia could be as a result of previous sexual intercourse. Further, the medical officer did not expound on the issue of epithelial cells.

Mr. Odhiambo opposed the appeal. Counsel submitted that the charge sheet was properly drafted. The appellant caused the boy's penis to penetrate her vagina. The particulars of the charge meet the requirements of Section 8 of the Sexual Offences Act. The evidence of PW1 confirms that there was penetration. The appellant forcefully took the boy's penis and inserted it in her vagina. According to PW1, before the sexual act was committed, the appellant scratched him on the neck. That evidence is confirmed by the P3 form.

Mr. Odhiambo contends that PW2 peeped through the window and saw what was happening, whether the two were on a bed or mattress does not affect the evidence. The epithelial cells in the appellants' vagina were caused by the friction. Therefore penetration occurred. Both the minor and the appellant were arrested at the scene and taken to the Police Station. The complainant only knew the appellant as mama Nelly. Mama Nelly is the appellant. The offence occurred during the day. Identification was proper. The minor's age was assessed. The appellant's birth certificate was issued after the conviction.

This is a first appeal and this court is required to evaluate the evidence adduced before the trial court and make its own findings. Before the trial court PW1 was the complainant. He testified that he was 14 years old and was born in 1998. On 10.6.2013 he went to school. While at school one of the teachers sent him away as he had not attended school the previous Friday. He left the school and passed through a quarry where his elder brother (PW 2) was working. While at the quarry, his father passed by and asked him why he was not in school. His father directed his brother to take PW1 back to school.

It is PW1's evidence that his brother went with him to their house as he wanted to shower first before taking PW1 to school. The appellant is their neighbour at the plot where they lived on a rental house. While waiting for his brother to shower, PW1 was hungry as he had not taken breakfast. He entered the appellant's house and was given Githeri. The appellant then asked him to fix her radio. As the complainant was trying to fix the radio, the appellant pulled his short from behind and pushed him on the bed. The appellant then started bringing her mouth into his mouth. The appellant lifted her skirt and had no pantie, she held PW1's penis which was already erect and inserted it into her vagina. She started having sex with him.

According to PW1 the incident took about 30-35 minutes. He started getting tired as she was heavy on him. He pushed her aside and reached for the door but the appellant pulled him back. In the process PW1 suffered scratches on the neck. As they were inside, his brother knocked on the door and asked if PW1 was inside the house. The appellant told him that PW1 was not there. The appellant then started to have sex with him again. The door was knocked again and this time it was the area village elder who asked her to open the door. The appellant pulled her skirt and changed her top clothes. PW1 was still inside the inner room. He had no shirt. PW1 went out and saw the village elder (PW4) they were both arrested and taken to Kulamawe Police post. He was later taken to Isiolo District Hospital where he was treated and a P3 form was later issued to him. He had known the appellant for about two weeks.

PW2 WM is PW1's brother. On 10.6.2013 at about 10.00am he was at the quarry. PW1 went there. He was told by his father to take PW1 back to school. He went home to take a shower while in the company of PW1 and M (PW3). After taking his shower he asked M where PW1 was and he was told that PW1 was in the appellant's home. He went to the appellant's home and the appellant told him that PW1 was not there. PW3 insisted that PW1 was in the appellant's house. PW3 decided to go and inform the village elder (PW5). PW3 and PW5 went to the appellant's home and peeped through the window. PW2 also peeped through the window and saw PW1 and the appellant having sexual intercourse. PW5 pushed the door and the two were pulled out of the house. PW1 came out without his shirt. PW2 had known the appellant for about one year. It is his evidence that the appellant was married.

PW3 GM was with PW2 at the quarry. They went together with PW1 and PW2 at PW2's house. He waited outside as PW2 was inside his house. He saw the appellant asking PW1 to go and fix some wire of her radio. Once the two were inside, the door was closed. He thought that it was pushed by the wind. Once PW2 was done, he asked him where PW1 was and he directed him at the appellant's house. PW2 went back to PW3 and told him that PW1 was not there. It is PW3's evidence that he knew PW1 was still in the appellant's house as he had not come out. He went and informed PW5. They went to the appellant's home and peeped through a hole. They saw the two naked having sex with PW1 on top of the appellant. The village elder pushed the door, the appellant went out wearing a miniskirt while PW1 had no shirt. The two were arrested. Members of public had gathered and wanted to attack the appellant.

PW4 RAEL KARIMI is a community health worker in the area and also a village elder. On 10.6.2013 at about 2.00pm she was in her house when she heard noise coming from the neighbouring plot. She went there and was told that a young boy had been locked inside a house having sex with the appellant. The door was pushed open and PW1 and the appellant came out. The two were taken to the nearby Police Post.

PW5 ISIAH MURIUNGI is also a Community health worker and a village elder. On 10.6.2013 at about 11.00am he was at the quarry. He saw PW2's father asking PW2 to take PW1 back to school. He was later called to the plot and PW3 told him that PW1 was inside the appellant's house. The house was locked from inside. He peeped inside the house through a gap near the window and saw the boy on top of the appellant having sex. The door was pushed open and the two were taken to the Police post. They were referred to hospital where the two were examined. It is his evidence that the house is made of timber and there was enough light which enabled him to see the two having sex. The appellant was wearing a white bra and was naked downwards.

PW7 PC CYRUS WAHOME was stationed at the Isiolo Police station. On 10.6.2013 at about 2.30pm they were informed about the

incident. They went to the scene and found that the two had been taken to Kulamawe Police post. They were told that a 15 year old boy was defiled by a 21 year old woman. They went to the Police Post and took the two. They escorted PW1 and the appellant to Isiolo District hospital and later took them back to the Police station. He investigated the case and caused the appellant to be charged with the offence.

PW8 KARAIYU JILLO is a Senior Clinical officer who was stationed at the Isiolo District hospital. On 10.6.2013 attended to PW1. He examined his genitalia which had no lacerations. The appellant was also examined. She did not have any injuries on her genitalia, both external and internal. No spermatozoa was seen. Urinalysis was done and it was normal. A few epithelial cells were seen. The epithelial cells are produced when there is contact with the smooth muscles of the vagina. PW1 age was assessed and was estimated to be 15 years old.

In her unsworn evidence, the appellant testified that she works at the quarry. She was taking care of PW1 as he did not have his mother. On the material date she returned from the quarry at about 11.30am. PW1 went there and he gave him food. After 30 minutes PW1 went there running while being chased by his brother. PW1 entered the house and wanted to close the door. His brother pushed the door and they started fighting. She entered the house and separated them. PW1's brother took the padlock and locked them from outside. He left them and returned after ten (10) minutes with the village elder. PW1 refused to get out of the house. The door was opened and they were put in a vehicle and taken to Kulamawe Police Post. Thereafter they were picked by a Police vehicle and taken to hospital. She was later charged with the offence.

The issues for determination are:-

- 1. Whether the prosecution proved beyond reasonable that the offence of defilement was committed***
- 2. Whether the appellant defiled the complainant.***
- 3. Whether the appellant was under the age of 18 as on 10.6.2013.***

The submissions by the appellant's Counsel is to the effect that the appellant could not have penetrated PW1. The charge sheet is defective as the appellant could not penetrate PW1. According to Mrs. Kaume, it is the appellant who was to be the complainant. 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 organs of another person”

Section 8(1) of the Sexual Offences Act states as follows:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

From the above provisions, it is established that defilement is not only committed when a male person penetrates a female person. Section 8(1) penalises an act which causes penetration with a child. Such an act can be committed by a male or a female person. The prosecution's case is that the appellant caused her vagina to be penetrated. If the appellant caused her vagina to be penetrated, then that could amount to an act which causes penetration and would fall under the provisions of Section 8(1) of the Sexual Offences Act. The contentions by the appellant's counsel that it is the appellant who was penetrated and therefore ought to be the complainant cannot stand. If that is taken to be the case, the result would be that female persons may not be charged with the offence of defilement. It is the act which causes the penetration which is penalized and not penetration per se. that act can be committed by a female person.

The evidence of PW1 is that it is the appellant who pulled his short trouser, pushed him on the bed and fell on top of him. According to PW1, the appellant then pulled her skirt and inserted his penis into her vagina. The first incident took about 30-35 minutes. When PW1 tried to go out he was pulled once again and they started to have sex again. PW2, PW3 and PW5 peeped through the house and saw the two having sex. This time around the boy was on top of the appellant. The appellant's defence is to the effect that no such sexual act took place. She only separated PW1 and his brother who were fighting and the two were locked inside the house.

The medical evidence is to the effect that PW1 had no injuries on his penis. He only had scratches on the neck. Counsel for the appellant contends that the scratches on the neck did not prove the offence of defilement. According to PW7, a few epithelial cells were seen after samples taken from the appellant's genitalia were subjected to laboratory tests.

The prosecution evidence shows that the incident took place during the day. PW1 had known the appellant for about two weeks. They were living in the same compound. It is not a case of mistaken identity. The evidence of PW1 is supported by that of PW2, PW3 and PW5. The three other witnesses saw the appellant and PW1 having sex.

That is why PW3 decided to go and call PW5 since PW3 was quite certain that PW1 had not left the appellant's house. The evidence on record proves that indeed the appellant had sex with PW1. The defence evidence does not raise any doubt on the prosecution case. The minor contradictions as to whether the two were on the bed or mattress or whether PW1 was the one on top or the appellant was on top does not raise doubt on the prosecution's case. The sequence of events show that the incident took quite some time. According to PW1, it took about 50 minutes. PW5 estimated the entire time taken as two (2) hours.

From the evidence on record, I do find that the prosecution proved that an offence of defilement was indeed committed. I also find that it is the appellant who defiled PW1. The evidence of PW2, PW3 and PW5 confirms that they saw the appellant having sex with PW1. The medical evidence could not find much as PW1 is a minor. No spermatozoa could be found on the appellant's genitalia as the complainant could not release any spermatozoa due to his age. The complainant's evidence is corroborated by that of PW2, PW3 and PW5. The prosecution evidence sufficiently proved the offence of defilement.

The next issue involves the appellant's age. Counsel for the appellant contends that the appellant was a minor when the offence was committed. A birth certificate was brought into the Court record. The birth certificate was brought in by way of an application dated 27.11.2015 seeking leave of the court to adduce further evidence. The further evidence was the birth certificate. The state did not oppose the application subject to their verification of the authenticity of the birth certificate. The birth certificate was issued on 5th June, 2015. This was over one year after the appellant was convicted and sentenced on 18.12.2013.

This court directed that the appellant be taken for age assessment. A report by Dr. Njuguna, a dentist, dated 24.7.2017 indicate that the appellant is between 20-21 years old. This estimated

age is as on the 24.7.2017. The offence took place on 10th June, 2013. In essence therefore, the appellant was below the age of 18 years when she committed the offence in June 2013 as per the age assessment report. The birth certificate indicate that the appellant was born on 16.6.1997. That would mean that she was 16 years in 2013. There is evidence that the appellant had a child and was married. PW1 made reference to the appellant's husband. PW1 had known the appellant for two weeks and may not have known whether the appellant was married or not. It is possible that the person PW1 used to see at the appellant's house was her boyfriend. The evidence on whether the appellant had a child came from PW3. The witness stated that the child the appellant had in court on 20.9.2013 was with her sister. The appellant in her defence confirmed that she had a child. The appellant was therefore sexually active despite her young age. I saw the appellant and she has a big physical body though her appearance evidently shows that she is still a young girl. The age assessment report is based on the appellant's dental set up. I have no good reason to doubt the expert opinion of the doctor who conducted the age assessment. The doctor's report corroborates the appellant's age on the birth certificate. Counsel for the appellant did inform the court that the prosecution was at liberty to carry out investigations on the authenticity of the birth certificate. I am satisfied that the appellant was a minor when she committed the offence. The trial Court simply relied on the allegation that the appellant was 21 years old without ordering for an age assessment.

The appellant was therefore a minor as of 10.6.2013. *Section 190(1) of the Children Act states that **no child shall be ordered to imprisonment or be placed in a detention camp.*** Section 191 provides for methods of dealing with child offenders. These include among others *Probation, placing children under the care of fit persons, Rehabilitation school, Payment of fine, Counseling, Community service or outright discharge.* The record of the trial Court shows that the appellant was granted bond of Ksh.500,000 on 12.6.2013 when the plea was taken. She remained in custody until when she was convicted on 18.12.2013. She has been in custody ever since and has by now served four (4) good years in prison apart from the six (6) months she was in remand prison.

Given the period already served of four years, I do find that the appellant who is now an adult has already suffered enough punishment. The twenty (20) years imprisonment imposed by the trial court is hereby set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed at Marsabit this 20th day of December 2017

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Meru this 18TH day of January, 2018

A.MABEYA

JUDGE