



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HCCR. APPEAL NO. 15 OF 2016

BENEDICT NZIOKA KIMEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against a conviction and sentence in Principal Magistrates Court at Mutomo on 23/3/2014 by Hon. S.K. Ngii Resident Magistrate)

JUDGMENT

1. Benedict Nzioka Kimeu, the Appellant, was charged as follows;

Count 1

Giving false information to a person employed in the Public Service Contrary to **Section 129 (a) of the Penal Code.**

Particulars of the offence were that on the **31st day of August 2015** at **Divisional CID office Mutomo** in **Mutomo Sub county** within **Kitui County**, informed **PC ALEX MUGO** a person employed in the public service, as a policeman that **P M** was demanding money from him by claiming that he was having sexual relationship with a student, information he knew or believed to be false, intending thereby to cause the said **PC ALEX MUGO** to arrest and charge **P M** which ought not to have done if the true state of facts respecting which such information was given had been known to him.

Count 2

Defilement Contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual offences Act 3 of 2006.**

Particulars of the offence were that on diverse dates between **December 2013 and 19th of August 2015** in **Ikutha Sub County** within **Kitui County** intentionally caused his penis to penetrate the vagina of **L V K**, a girl aged **16 years**.

Alternative count

Committing an Indecent Act with a **child** contrary to **section 11 (1) of the Sexual Offences Act 3 of 2006.**

Particulars were that on diverse dates between **December 2013 and 19th day of August 2015** in **Ikutha Sub County** within **Kitui County** intentionally touched the vagina of **L V K**, a girl aged **16 years** with his penis.

2. The case as presented by the prosecution was that **PW1 L K**, a school girl fell in love with the Appellant and had a sexual relationship with him from the **year 2013 up to August 2015** when her relatives discovered that she was engaging in penetrative sex with him. On the **30th day of August 2015**, the Appellant reported to **PW7 NO. 73335 P.C Alex Njogu** that **PW2 P M M** was demanding money from him following allegations that he had defiled his niece. After booking the report the Appellant led him to the shop of **PW2**. He interrogated **PW2** and investigated the matter. He caused the complainant to be taken to **Mutomo Health Centre** where she was examined by **PW6 Daniel Mulwa**.

3. When put on his defence the Appellant gave evidence under oath. He stated that he was the tenant of **PW2** and his friend since **2012**. That **PW2** approached him and told him that he had a problem which he wanted him to help resolve. He proposed to betroth to him his niece, a proposal that he rejected. As a result **PW2** threatened him. He reported the matter to the police as **PW2** wanted to marry off a school girl. He admitted knowing the complainant but denied having had any sexual relationship with her. After recording his statement he went with the police to **PW2's** shop then the complainant's school where she was interrogated. Thereafter it turned out that he was the one to blame and

was charged.

4. The learned trial Magistrate analyzed evidence adduced and found both counts having been proved beyond any reasonable doubt. He convicted the Appellant on the Principal charges and sentenced him thus;

Count 1

To serve one (1) year imprisonment

Count 2

To serve fifteen (15) years imprisonment.

5. Aggrieved by the conviction and sentence in the amended petition he appealed on the following grounds that;

- ***The Court casually dismissed the Appellants defence of having been framed up.***
- ***The age of the Complainant was not proved.***
- ***There was no medical evidence to establish a case of defilement.***
- ***The charge of giving false information to the police was not sufficiently proved.***

6. The appeal was canvassed by way of written submissions. It was submitted by the Appellant that evidence adduced in regard to the offence of giving a false information did not support the allegations in the charge sheet.

7. In respect of the offence of defilement it was stated that PW2 assumed the role of an investigating officer by interrogating the complainant and Appellant and when he denied the allegations of an alleged affair he told his niece to disassociate herself with him being a married man with a child. He did not report the matter to the police until the Appellant lodged a complaint. That there was a possibility of PW2 having colluded with the complainant to frame up the Appellant since he was the one paying for her school fees.

8. On **ground 2, 4 and 5** it was argued that the Birth Certificate of the complainant was acquired for purposes of registering for KCPE Examinations. That if her younger brother was 17 years old there is no way she could be 16 years old. An issue that the court should have considered and reached a finding that the complainant was not aged 16 years and that medical evidence adduced did not establish penetration.

9. In response the State/Respondent opposed the appeal. It was submitted that the Appellant admitted knowing the complainant and her uncle. That the complainant testified how a relationship developed between them. That the complainant's age was proved by evidence of the birth certificate. The Respondent cited the case of ***William Odhiambo Siara Where Muchelule J. Stated thus:***

“...“.....It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a Doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation.”

10. Regarding the offence of giving false information to a person employed in public service, it was submitted that the Appellant made a report but after investigations it turned out to be false.

11. This being a first appellate court my duty is to analyze and re-evaluate evidence adduced at the Lower Court and come up with my own conclusions on evidence adduced without overlooking the conclusions of the trial Court. I must also remember that I did not have the opportunity of seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

12. To establish whether the Appellant gave false information to the police I must consider whether he defiled the complainant.

13. The case being of defilement the prosecution was duty bound to prove;

1. The age of the complainant

2. The act of penetration

3. Positive identification of the Appellant as the perpetrator of the offence.

14. To prove a case of defilement the age of the complainant must be proved beyond any reasonable doubt. It is an ingredient of the offence. In the Case of ***Hillary Nyongesa –Vs. Republic HC CR. Appeal NO. 123 of 2009, Eldoret, Mwilu J. (as she then was) stated that;***

“Age is such a critical aspect in sexual offences that it has to be conclusively proved...”.

15. The prosecution adduced in evidence a **Birth Certificate NO. [particulars withheld]** issued to the complainant which was proof of age.

Per the birth certificate, the complainant was **born on the 18.06.1999**. This means that as at **2013 she was fourteen (14) years old** and by **2015 she was sixteen (16) years old**. It is argued that the complainant's age could not have been **16 years** because **PW5 K K** her younger brother told the court that he was **seventeen (17) years old**.

16. In the case of *Francis Omuroni –VS- Uganda, Criminal Appeal NO. 2 of 2000 the court of Appeal held that;*

“In defilement cases, Medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

17. In *Cardon Wagner VS. Republic HCCRA NO. 404/2009 Nairobi Warsame J. (As he then was) held that;*

“In defilement cases, the age of the complainant is proved by either medical evidence as through other evidence since sexual offences act have different categories of ages and sentences of different ages”

18. PW5 told the court that he was 17 years old and in Standard 8. This witness did not state the date of his birth. The issue of age did not arise in the lower court where the Appellant was represented by an **advocate, D.M. Mutinda**. PW5 referred to the complainant as his sister while the complainant referred to him as her brother.

The allegation that **PW5** was the complainant's younger brother was introduced in evidence by counsel for the Appellant. It is common knowledge that a younger sibling can be in a higher class as compared to an older sibling if one of them happened to be a slow learner.

19. This is a case where a birth certificate issued to the complainant was adduced in evidence. Counsel who appeared for the Appellant in the Lower court did not cast any doubt to the certificate. Circumstances in which it was issued could have been questioned in the lower court by calling the Registrar of Persons to answer questions regarding the same. This did not arise. The allegation that the certificate was issued for purposes of registering KCPE Examination brought up by counsel for the Appellant at the Appellate stage does not suggest that the document could have been falsified.

20. Evidence of the birth certificate issued to the complainant was cogent proof of her age.

21. The complainant was examined by **PW6 Daniel Mulwa a Clinical Officer three (3) weeks later**. The examination done did not reveal anything significant other than the fact that the complainant was having menses and her hymen was missing.

22. In the case of *George kioji –Vs. Republic CR. Appl No. 270 of 2012 (NYERI) The court of Appeal stated that:*

“ Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person on a prosecution including a sexual offence, on the evidence of the victim alone, if the court believes the victim and records reasons for such belief”

23. The fact that the complainant's hymen was absent is a suggestion that she could have indulged in sex. And having stated so herself, there was penetration of her genital organ.

24. The Appellant herein was PW2's tenant. He was well known to the family of the complainant. The complainant testified that she had a consensual sexual activity with the Appellant as both of them willingly participated in it. There had been communication between them. The relationship went on as both of them pursued their passions. The complainant had imaginary expectations of being married by the Appellant. The complainant felt loved therefore consented to the act.

25. None of the witnesses who testified found the complainant and the Appellant in the act of coitus but there was the evidence of **PW3 M M** who sent the complainant her niece to the shop. She took long therefore she decided to follow her. She was not at the shop and on getting information from neighbours she went to the rear part of the building only to see her coming from the Appellants house. Her explanation was that she had taken a torch to the Appellant.

26. **PW4 Jacob Nguta Muasya, a pastor and watchman** who used to guard the place of residence that the appellant resided. He testified that on the **19/8/2015 at 11.00 p.m.** he saw the Appellant in company of the complainant entering his house. At 2.30p.m he saw some three (3) lads from L home towards town, soon thereafter he saw the Appellant and L leaving.

27. PW5 stated that on the **19.8.2015** he saw the Appellant sitting with the complainant at 4.00p.m. At midnight his grandmother woke him up to go in search of the complainant. They went to the Appellant's house but he could not let them enter.

28. The complainant stated that on the night of **19/8/2015** she had coitus with the Appellants. That she heard PW5, their cousin and a worker as they were looking for her. Thereafter she went home alone.

29. The Appellant denied having engaged in sexual intercourse with the complainant though he was familiar with her. He alleged that the gist of the problem was a proposal by PW2 to betroth the complainant so as to assist him in payment of school fees, a proposal that he declined to accept. On cross-examination PW2 stated that on learning of the relationship between his niece and the Appellant he confronted him where

he admitted being the complainant's friend but denied having engaged in coitus with her. It was not suggested to him that he made an immoral proposal to the Appellant considering the age of the complainant. This must have been an afterthought.

30. The learned Trial Magistrate who had the opportunity of observing the demeanor of the complainant was satisfied that the complainant's evidence that she used to have sexual intercourse with the Appellant was truthful.

31. The Appellant claimed that the complainant was intimidated by PW2 her guardian to implicate him. But, this was evidence of PW4, an independent witness who saw the two (2) enter the house and stayed therein from 11.00 pm to 2.30 a.m.

32. From the foregoing the Trial Magistrate did not misdirect himself on reaching the finding that indeed the Appellant did engage in coitus with the complainant.

33. The complainant having been a minor was incapable to consenting to the act of sexual intercourse. Therefore she was defiled.

34. On the first Count, it is admitted that the Appellant made a report to PW7. His report was that a certain individual was demanding from him money following an allegation that he was having sexual intercourse with his niece. PW7 is a police officer a person employed in the public service.

In the case of *Mbogo Samwel Mungai HCR Appeal No. 57 of 2004*, it was held that:

“To constitute an offence of giving false information as defined in Section 129 of the Penal code, the giver of the information must personally be knowing or having reason to believe that what he is reporting is false, if he is convinced that the information is true and after investigations it is found that the information is factually incorrect, the charge of giving false information cannot be sustained”.

35. At the point of making the report to the Police Officer, the appellant had been confronted by relatives of the complainant who accused him of defiling her. PW2 had opined that he would refer the case to the complainant's mother, his sister. On cross-examination he denied the allegation that he threatened to ensure the Appellant lost his job if he did not pay fees for the complainant.

36. The report made by the Appellant prompted the police to investigate the case whereby they established that the Appellant and the complainant were lovers and were engaging in sexual intercourse.

37. Therefore he made the report knowing that it was false. The report he made caused PW7 to act by commencing investigations in the matter. The report made was intended to cause the officer to take action against PW2 but he ended up arresting him (Appellant) following investigations carried out. Therefore he gave false information to PW7, a person employed in the public service.

38. From the foregoing the appeal lacks merit and is dismissed in its entirety.

39. It is so ordered.

Dated, signed and delivered at Kitui this 20th day of March, 2018.

L.N. MUTENDE

JUDGE