



REPUBLIC OF KENYA



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**Ntimamaleparu v Republic (Criminal Case 116 of 2017)
[2018] KEHC 7129 (KLR) (18 April 2018) (Judgment)**

Paul Ntimamaleparu v Republic [2018] eKLR

Neutral citation: [2018] KEHC 7129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE 116 OF 2017
MM KASANGO, J
APRIL 18, 2018**

BETWEEN

PAUL NTIMAMALEPARU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L Mutai – Chief Magistrate dated 31st March, 2017 in Nanyuki Chief Magistrate Court S. O Case No. 14 of 2016)

JUDGMENT

1. Paul Ntimamaleparu was convicted on a charge of defilement of a girl Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Being convicted he was sentenced, by the Nanyuki Chief Magistrate, to 20 years imprisonment. Being aggrieved of that conviction and sentence he has preferred this appeal.
2. The duty of the first appellant court, which this court is, was wells stated in the case, John Irungu Macharia – v- Republic Criminal Appeal No. 23 of 2008 where the court of appeal stated:

“... the appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and to have this Court’s decision on that evidence. But as we do so, we must bear in mind that we have not had the advantage (which the Learned Judge had) of hearing and seeing the witnesses and give allowance for that (see OkenoVs Republic[1972] E.A. 32 & Mwangi vrs Republic [2006] 2 KL 28,)”
3. The prosecution’s case was that the appellant, who was a neighbour of J R, a 13 year old girl, used to sneak to J R’s home at night when her family was sleeping and have sexual intercourse with her. J



R stated in evidence that her relationship with the appellant began in December 2015. She stated in evidences in respect to that relationship:

“He (appellant) is my neighbour. He was also my boyfriend. The accused (appellant) started to visit me at home. I live with my mother and two siblings... The accused used to visit at night ... there is a door to the bedroom from outside which accused used to use. Whenever accused came home we used to make love.”

4. From the above evidence it is clear that J R was a willing participant. Indeed it was not until May, 2016 when a pregnancy examination was conducted at J R's school, and it was found that she was pregnant, that J R revealed that the appellant had persistently defiled her.
5. Julit Malimo (PW2), a doctor at Nanyuki Teaching and Referral Hospital examined J R on 8th September, 2016. On examining her she found her hymen was not intact, otherwise she found her genitals to be normal. The doctor also determined that J R was Pregnant.
6. J R's father produced J R's birth certificate which shows that J R was born on 15th August, 2002. It follows that by December, 2015, when she stated the appellant began to defile her, J R was 13 years old. She was still 13 years when she testified before the trial court.
7. The appellant in his sworn defence denied defiling J R. He stated in that defence that on 16th May, 2016 he was arresting alongside another person called Johana. He further stated that in 2014 J R's father informed his father that he wanted the appellant to marry J R. The appellant said that he declined to marry her.
8. Tarita Rartalpo (DW2) the father of the appellant in evidence stated that J R's father approached him and informed him that he was willing to marry off J R to the appellant since he had impregnated her. This witness responded by saying that if indeed the appellant had impregnated J R he would then have to marry her.

Analysis and Determination

9. The appellant by his grounds of appeal has raised the following issues for consideration by this court:
 - (a) Was the age of JR proved:
 - (b) Was the appellant 17 years at the material time;
 - (c) Was the broken hymen due to the previous relationship J R had with another man; and
 - (d) Did J R engage in consensual sexual affair.
10. The age of J R was proved firstly through her testimony and secondly through the production of her birth certificate. The birth certificate produced by J R's father shows that J R was born on 15th August, 2002. It follows the appellant erred to argue that the age of J R was not proved to the required standard. J R, in accordance with that birth certificate was 13years old when the appellant began to defile her.
11. The second issue identified above is with respect to the appellant's age. The appellant in evidence, while defending himself, stated he was 17 years old. After he was convicted by the trial court the appellant again alleged he was 17 years old. This prompted the trial court to send the appellant for age assessment. The age assessment report, from Nanyuki Teaching and Referral hospital dated 17th July, 2017, showed the appellant was 23 years or above. The appellant, just before he was sentenced, produced a birth certificate in the name N T which indicted the date of birth as 2nd January, 2000.



12. The trial court , when confronted by the age assessment and a birth certificate, rejected the birth certificate. The rejection of the birth certificate was primarily because it bore different name to that of the appellant and because the appellant’s age was assessed by a consultant radiologist.
13. I find I cannot fault the trial court’s rejection of the birth certificate because I am in agreement with its finding that the birth certificate referred to a different person other than the appellant and more importantly because the appellant was personally subject to an actual examination by a consultant radiologist who determined the person being examined, the appellant, was 23 years old or over. It is for that reason I reject the appellant’s submissions that he was a child. The appellant’s learned Counsel tried to introduce evidence not adduced during trial, that the Maasai culture of naming does not conform to the normal manner. That evidence is rejected.
14. The appellant denied having sexual relationship with J R and attributed her broken hymen to the previous relationship J R had with another person named as Johana.
15. In this regard I can do no better than reproduce what the learned trial Magistrate stated in her considered judgment. she stated thus:

“The complainant testified that she was involved sexually with the accused person after dropping a Johana her former lover. That their relationship started from December, 2015 to May 2016, when she became pregnant. She testified that accused used to visit her and made love to her at night when her other siblings were sleep. That this went on for a while until when the said pregnancy was detected. She testified that the accused could touch her breast then proceed to remove her lower wear before making love to her, in that he could push his penis in her vagina. I believed in the a foregoing that she understood what a vagina meant and that she knew what a penis was and what penetration of the penis into her vagina was which she described as making love. Her evidence was clear that the sexual ordeal did not just happen once but severally. I believed that she knew the accused well as the person, who sexually penetrated her from December 2015 all through to May, 2016. This period was long enough for positively identification of the accused person by the complainant.”
16. Although the appellant denied defiling J R, this court, just like the trial court, rejects that denial in view of the clear evidence of J R. There was overwhelming evidence of the appellant’s defilement of J R.
17. The final issue for consideration is whether J R engaged in consensual sex with the appellant.
18. As stated before J R was 13 years old from December, 2015 up to the date of the appellant’s arrest, in May, 2016. It follows J R was a child as defined under the children’s Act. She was under 18 years of age, the age of majority.
19. More importantly however is the fact that as a child she was incapable of appreciating the nature of the sexual act. Section 43 (1) of the Sexual Offences Act provides that an act is intentional and unlawful if it is committed in respect to a person incapable of appreciating the nature of an act which causes the offence. Sub section (4) of Section 43 sets out when a person is incapable of appreciating the nature of the act such as when a person is asleep, unconscious under influence of medicine drugs or alcohol and if a child, amongst others. J R was a child and it follows the act of her defilement was intentional and unlawful.
20. In view of the above finding the appellants submission that J R consented to her defilement is wholly rejected.



21. For the above reasons the appellant's appeal against conviction fails. His appeal also against sentence fails because J R was a child within the age bracket of twelve and fifteen years, and as per Section 8 (3) of the Sexual Offences Act the sentence provided is not less than twenty years. The trial court's sentence does not, therefore, invite any interference of this court.
22. The appellant's appeal is dismissed and the trial court's conviction is upheld and the sentence is confirmed.

DATED AND DELIVERED AT NANYUKI THIS 18TH APRIL, 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Paul NtimamanLeparu

For state:

Language

Court

Judgment delivered in open court

MARY KASANGO

JUDGE

