



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 3 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court

in Sexual Offence case No. 193 of 2015 delivered by

G.N. Sitati Resident Magistrate on 18/1/2017)

KENNEDY KIPCHUMBA KOSKEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was convicted and sentenced to 20 years imprisonment for the offence of **Defilement of a child contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the diverse dates between 1st April 2015 and 13th November 2015 at [particulars withheld] Estate within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of L.R.S. a child aged 15 years.**

2. The alternative charge was **Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were **on the diverse dates between 1st April 2015 and 13th November 2015 at [particulars withheld] Estate within Trans Nzoia County, intentionally caused the contact of his genital organ namely penis and the genital organ namely vagina of L.R.S. a child aged 15 years.**

3. The appellant through M/S Arunga & Company Advocates has filed this appeal citing several grounds. Before dealing with the same it is appropriate to summarise the evidence as presented during trial.

4. **PW1 the complainant** told the court that she was working at a Saloon and was born on 9/1/2000 and that the appellant was her husband whom they became friends as from January 2015. They stayed together from 1/04/2015 where they engaged in sexual activity. They stayed together till November 2015 when both of them were arrested. When taken for examination at Kitale District Hospital she was found to be about 8 months pregnant. In fact as at the time of testifying she had given birth to a baby boy. She insisted that the appellant should be set free so that they could both take care of their child as her father was deceased and her mother not working.

5. **PW2 C K M** is the complainant's mother. She stated that on 23/3/2015 the complainant disappeared from home after going to church. She reported the matter to Kitale police station on 17/4/2015. In May 2015 the appellant called her and told her that he was a friend to the complainant and that they were together in Eldoret. In June 2015 he spoke with both the complainant and the appellant. Later she heard that they had rented a house at Umoja and he reported to the chief. 4 vigilantes went and arrested them. They were taken to Kitale Police station. The complainant was taken to the hospital where she was examined and found to be 8 months pregnant.

6. **PW3 Kirwa Labatt** clinical officer from Kitale District hospital examined the complainant and filled the P3 form and found that the hymen was torn and old looking and that she was 33 weeks pregnant.

7. **PW4 Wilson Kaylende Kiprop** the village elder at Mti Moja Tiwani led in arresting the appellant as well as the complainant. He said that the complainant was in the appellant house.

8. **PW5 Rose Sabul** from Kitale police station children's office carried out the investigations after the matter was reported there. He also produced the statement by the appellant which he said that the complainant was his wife.

9. The appellant gave a sworn testimony where he blamed one Juma who had allegedly taken the sum of Kshs 11,000/- for rentals and did not refund the money and instead wanted to beat him up. He was arrested and taken to the chief's office. He generally denied the charges and that the real person who ought to have been charged was one Ken Simiyu. He did not call any witness.

Analysis and Determination

10. I have perused the entire evidence as presented during trial. Although I did not have the benefit of the submissions by both parties in this case as at the time of writing this judgment they had not been filed, I think there is no doubt that the 3 ingredients of defilement were clearly established by the prosecution. The age of the complainant was proved by the production of the birth certificate.

11. The identity of the perpetrator in my view was not in doubt. The evidence on record clearly showed that both stayed as husband and wife as confirmed by PW1, PW2 and PW4. Infact PW4 led in arresting both of them.

12. The question of defilement was clearly established by the clinical officer and more importantly the pregnancy and the child born thereof. I did not find any evidence to suggest that the complainant engaged herself in sexual activity elsewhere or with other multiple sexual partners.

13. Nonetheless, I find that this is a classic case where Section 8(5) of the Sexual Offences Act clearly comes into play. The same state as follow:

8(5) "It is a defence to a charge under this Section if-

(a) It is proved that such 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 nearby behind that the child was over the age of eighteen 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. Obviously it would not be very usual to expect that an appellant (accused) would for instance insist on seeing the complaint's birth certificate or such other document to validate her age. However the surrounding circumstances depending on each case would ordinarily be taken into consideration .

15. It appears from the facts at hand that the complainant was well aware of her situation, and environment and was never shy to state so.

16. For instance she told the court that;

" I know Kennedy Kipchumba he was my husband -----"

" ----- I had left my clothes at Shikhendu, he refused me to go pick them but on 4/4/2015 when he went to work I went and picked clothes -----"

" ----- I pray for Kennedy to be released so that we take care of our baby, my mother is not working and my father is deceased so am suffering taking care of our child."

16. Further there was no evidence produced to suggest that she was a class 8 pupil or at all. Cross examination by the appellant clearly demonstrated that she knew that she was a wife to the appellant.

17. Infact PW2 testified that she spoke to both the appellant and the complainant whom they inform her of their whereabouts. The appellant informed her that he was living with the complainant.

18. During cross-examination of PW2, she stated that ;

" ----- you came with Lilian to visit me and told me you had married her."

19. In the premises I do find that the complainant acted in a manner to suggest that she was of a marriageable age. The appellants defence however did not help much but nonetheless, all along it appears that he believed that they were staying as husband and wife.

20. The appeal for the foregoing reasons is hereby allowed.

Delivered, signed and dated at Kitale this 12th day of April 2018.

H.K. CHEMITEI

JUDGE

12/4/18

In the presence of:

Mr Kakoi for the State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.