



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO.2 OF 2017**

**NICHOLAS NJUKI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in Criminal case No.244 of 2013 of the Senior Principal Magistrate's Court at Siakago)*

**JUDGEMENT**

The appellant was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 1<sup>st</sup> day of May, 2013 at Siakago township within Mbeere North District in Embu County intentionally caused his penis to penetrate into the vagina of L.K.N. a child aged 14 years.

The trial Court convicted the appellant and sentenced him to serve 20 years imprisonment. The grounds of appeal are that: -

- 1. The appellant pleaded not guilty to the charge.***
- 2. The trial Court erred by failing to consider whether the appellant was aware that the complainant was below the age of 18 years thus violating Section 8(5) of the Sexual Offences Act.***
- 3. The birth certificate was not produced to the Police when the first report was made.***
- 4. The trial Court failed to consider that it is the complainant who went to the appellant's home and not the other way round.***
- 5. The prosecution did not prove its case beyond any reasonable doubt as required by the law.***
- 6. The trial Court erred by failing to observe that it was not the duty of the appellant under Section 8(5) of the Sexual Offences Act to investigate on the age of the complainant before they engaged in love.***

The appellant submit that the evidence shows that the complainant was living with the appellant as a husband and a wife. There is no evidence that force was used upon the complainant. The complainant did not explain to the appellant that she was under the age of 18 years. It is not the appellant who went to look for the complainant. The complainant told the Court that she met Ann and went to her place at 7.00pm and slept. Ann asked her to go and live with her cousin which she accepted. Ann's cousin is the appellant. The complainant's evidence shows that she had left school before the incident. The complainant's father did not inform the Court that PW2 was a student. The trial Court found PW2 quite intelligent and allowed her to give sworn evidence. PW2 was already seeking to be married.

The appellant further submit that PW2 in her voire dire evidence testified that she was not studying. The complainant went to Ann's place and then stayed with the appellant. Her father went to look for her and the appellant informed him that PW2 had told him that she was not studying. PW2 was released to her father and the appellant promised to call the father when PW2 went to visit Ann. According to the appellant, he called PW2's father when the complainant went back to A'nnes place. Even the complainant testified that she was not arrested in the appellant's house. PW1, the complainant's mother testified that even after the complainant was taken back home, she fled home and got remarried at another place.

The appellant submit that although medical evidence showed that both the appellant and the complainant were found to have had urinary track problems, it is not indicated for how long the complainant had that problem. The type of infection was not disclosed. The evidence did not prove that it is the appellant who infected the complainant. Ann was not called to testify.,

Miss Nandwa, prosecution Counsel, opposed the appeal. Counsel submit that it is not true that the appellant did not know the age of the complainant. He did not take time to ascertain her age. He did not take any other steps to ascertain whether she was in school or not. A birth certificate was produced. PW2 was 14 years old. She was born on 21.7.1999. She was below 18 years old. The incident was reported to the Police. The investigating officer was informed of PW2's age. PW2 explained how she got into the appellant's house. She explained how the appellant defiled her without her consent. The complainant's mother testified that PW2 disappeared from home and school. She reported at Kiritiri Police station on 4.3.2013.

It is submitted that the prosecution proved its case beyond reasonable doubt. Penetration was proved. **PW4, a Clinical officer** confirmed that there was penetration. Both the appellant and PW2 were found to have urinary track infection. PW2 did not deceive the appellant about her age. All the vital witnesses were summoned. The appellant's defence was considered.

This is a first appeal and this court is required to re-evaluate and re-assess the evidence afresh and make its own conclusion while taking into account the fact that this court did not see or observe the witnesses. **PW1 R. N.** is the complainant's mother. PW2 is her first born and was in class 8. PW2 was born on 21.7.1999. On 1.5.2013 she got a call from one N who informed her that PW2 was at Katitu. She had been searching for PW2 since she had absconded school and was not at home. She informed her husband. They reported at Kiritiri Police station and went with the Police officers. They found PW2 at the appellant's place. The Police arrested the appellant and they went back to the Police station with PW2. PW2 got married to another place. She is not aware if the appellant had married PW2. PW1 had reported at Kiritiri Police station the disappearance of PW2.

PW2, the complainant, gave sworn testimony. She testified that she was not studying. On the 1.5.2013 she was with one Ann. They went to Ann's aunt's place at about 7.00pm. They slept. The following day Ann asked her to go to her cousin's house. Anne's cousin is the appellant. She was left with the appellant. The appellant moved her to the bed, undressed her and forced her to have sex with him. She tried to get out but the appellant threw her back. It was about 11.00pm. They slept. At night the appellant did it again. She saw a white discharge. In the morning she went to Ann's aunt's neighbour. At about 2.00pm the area chief and two Police officers went there and they were taken to Kiritiri Police station. They stayed at the station for two days. She was taken to Kiritiri health centre. She was 14 years old by then. She was issued with a P3 form by the Police. It is her further evidence that the appellant is Ann's aunt's son and they live in the same compound with his mother. There were no other people in the compound. She did not tell the appellant that she wanted to be married.

**PW3 SNN** is the complainant's father. On 1.5.2013 his wife (PW1) informed him that one N had seen PW2 at Gatitu. They went to inform the area sub-chief. They then went to Kavundori Police station and were given two Police officers. The Police went and arrested the appellant. It is his evidence that PW2 was fourteen (14) years old. PW2 was taken to hospital. It is PW3's evidence that the appellant was living with PW2 as a husband and wife. They left with PW2 but she went back to the appellant again. The appellant called PW3 when PW2 went back to his place. The appellant was arrested on 4.5.2013. They had gone to the appellant's home on the first occasion on 1.5.2013.

**PW4 FRANCIS MWANTHI** is a clinical officer at Kiritiri health centre. PW2 was referred to the health centre on 6.5.2013. He examined PW2 who had no injuries. Her hymen was broken. PW2 had foul smell and her urine had pus cells. He concluded that PW2 was defiled. PW2 had urinary track infection and the appellant had the same infection. The infection was more advanced in the appellant than in PW2.

**PW5 PC VICTOR OMOLLA** was stationed at the Kiritiri Police station. The matter was reported on 4.5.2013 by PW1. PW1 reported a missing child who was in class 8. PW1 told him that PW2 had gone missing from 11.4.2013 and was seen with the appellant at Siakago on 23.4.2013. On 24.4.2013 PW1 went to the appellant's home at Gititu and found the appellant with PW2. PW1 left with PW2 and warned the appellant and her daughter. On 30.4.2013 at 7.00pm PW2 went missing. On 2.5.2013 PW1 learnt that PW2 was with the appellant. PW1 was asked by the appellant's uncle to go and collect the complainant. On 4.5.2013 PW1 and PW3 were given two Police officers and went to the appellant's home. The appellant and the complainant were arrested. They were both taken to Kiritiri health centre for medication. PW2 informed him that she had gone to visit her friend Ann when the appellant convinced her to have sex with her. They had sex twice. PW2 was born on 21.7.1999. PW5 is not one of the arresting officer.

In his unsworn defence, the appellant testified that the complainant went to their place with his cousin. He talked to PW2 who told him that she was not attending school. They discussed about a relationship since he had reached a point he wanted to get married. As he was with PW2 he saw her parents. They introduced themselves and asked why PW2 was in the appellant's home. PW2 told him that she had been married. PW2's parents left with their daughter. After about three days the complainant went back to his place. He looked for a phone and called PW2's parents and informed them that she had gone back to his place. They were arrested with PW2 and detained at Kiritiri Police station. He was later charged with the offence.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. From the prosecution evidence as well as the appellant's evidence, it is confirmed that the appellant had sexual intercourse with pW2. According to PW2, she went to Ann's place on 1.5.2013 and slept there. The following day, that is 2.5.2013, Anne took her to the appellant's place. Ann asked her to live with her cousin – the appellant. She slept there that night, that is 3.5.2013. The appellant was arrested the following day, 4.5.2013 together with the appellant.

There are two versions to the prosecution evidence. The investigation officer clearly captures the entire incident in his evidence. His evidence is that PW2 went missing on 11.4.2013. This is about 23 days before the date of arrest on 4.5.2013. On 24.4.2013, thirteen days after PW2 had disappeared, PW1 went to the appellant's place. PW1, the complainant's mother left with her daughter. One week later, on 30.4.2013 PW2 disappeared once again from home. On 2.5.2013 the child's mother learnt that PW1 had gone to the appellant. This evidence displaces the complainant's evidence that she only went to visit Ann on 1.5.2013 and was defiled by the appellant on the night of 3<sup>rd</sup> May, 2013. PW2 did not tell the court that she had earlier been living at the appellant's place. This is the period when she went missing from 11<sup>th</sup> April 2013 to 24<sup>th</sup> April, 2013. What happened during that period was she defiled or she simply lived with the appellant without the two having sexual intercourse. This is the second version by PW2.

The Prosecution evidence is to the effect that pW2 disappeared from home on 11<sup>th</sup> April 2013 until 24<sup>th</sup> April, 2013. This was the first incident. PW2 did not tell the court where she was all that time. Was she with Ann? If she went to the appellant's house within that period,

who took her there? Was she defiled during that period. The appellant testified that PW2 told him that she was not going to school. PW2 told the court that she was not going to school. The appellant also testified that PW2 told her that she had been married. Although this was unsworn testimony, the appellant's evidence does not differ very much from the prosecution evidence. The complainant's mother during examination in chief stated as follows:

**“Karimi got married to another place”.**

If PW2 got married to another place, where was that place. The trial court recorded that evidence and did not seek further information. Is it true that PW2 got married? The appellant testified that PW2 told him that she had been married. Where was PW2 from 11<sup>th</sup> April, 2013 to 24<sup>th</sup> April 2013. It could be possible that she went to the appellant's place after having lived elsewhere with another man. PW2 did not testify that she was having sex for the first time when she was with the appellant. Section 8(5) (a) and (b) and section 8(6) of the Sexual Offences Act states as follows –

**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 reasonably believed that the child was over the age of eighteen years.**

**8(6) The belief referred to in subsection (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.**

If PW2 told the appellant that she had been married, then that would have led the appellant to conclude that she was above eighteen years old. The appellant was not required to find out who PW2's husband was. I did not see PW2 to verify whether physically she appeared to be an adult. The trial Court found that PW2 was quite intelligent. What comes to my mind is the question as to why after having been taken back home on 24<sup>th</sup> April, 2013, PW2 decided to go back to the appellant's home on 2<sup>nd</sup> May, 2013. According to the investigating officer, PW2 left her home for the second time on 30<sup>th</sup> April, 2013. Where was she on that date as PW2's evidence is that she went to Ann's place on 1.5.2013 and slept there. Why would PW2 leave her parents, go all the way to Anne's place which is over five kilometers away as per PW2's evidence without informing her parents. Further, PW2 decided to sleep over at Ann's place on 1<sup>st</sup> May, 2013 without her parent's consent or knowledge. If she was defiled on the night of 2<sup>nd</sup> May, 2013, where was she the whole day of 3<sup>rd</sup> May, 2013. Why didn't she go back home and inform her parents. She was arrested on the following day of 4<sup>th</sup> May, 2013 together with the appellant. According to PW3 she stayed at Ae's aunt's place. The said aunt is the appellant's mother. This is after the alleged defilement.

The appellant's evidence is that when PW2 went to his place for the second time, he decided to call PW2's parents and informed them that PW2 had gone back to his place. This evidence is confirmed by the evidence of the investing officer who told the court that PW1, the complainant's mother was called by the appellant's uncle and told to go and collect PW2. If PW2 had been defiled in the first instance, that is between 11<sup>th</sup> April, 2013 to 24<sup>th</sup> April, 2013, why would she go back to the same defiler and live with him. Why was PW2 not going to school in the 1<sup>st</sup> week of May, 2013.

It is the intention of the Sexual Offences Act to punish defilers who lure young children and defile them. The law is intended to protect young children from engaging in Sexual intercourse. It is intended to punish those who violently and forcefully defile young children. In most cases threat and fear is used upon the victims. The drafters of the Sexual Offences Act were well aware that there will be situations where young children will engage in sex with adults without revealing their age. What is important in such situations is for the court to examine the circumstances of the case. In the current case, PW2 told the appellant that she was not in school. PW2 testified two years later on 4.5.2015 and she told the Court that she was not studying. She knew what happened and decided not to reveal her whereabouts between 11<sup>th</sup> April, 2013 and 24<sup>th</sup> April, 2013. She didn't tell the court why she decided to go back to the appellant's home. Can it be taken that PW2 was indeed lured by the appellant and later defiled. According to the circumstances of the case PW2 was not lured by the appellant. She was not promised money. She was not violently or forcefully pulled into the appellant's house. She told the appellant that she was not in school and had been married. That information could not have made the appellant to find out PW2's age. I do find that it is PW2 who deceived the appellant that she was an adult. Since the appellant did not know that she was a minor, he released PW2 to her parents when they went for her. When PW2 went back to the appellant's home for the second time, PW2's parents were informed. Instead of going for their child, the parents got fed up and had the appellant arrested.

From the evidence on record, I do find that pW2 was not a credible witness. She kept on disappearing from home without her parents' knowledge. According to her parents she was in class eight but she got married. Her behavior is not that of a child. She already enjoyed sex. The circumstances of the case do not call for any form of punishment upon the appellant. Initially the appellant did not know that PW2 was a minor. When he knew about it, he caused PW2's parents to be informed. It is clear to me that when PW2's parents took their daughter on 24<sup>th</sup> April, 2013, they did not report to the Police. PW2 had been away from home for almost two weeks, from 11<sup>th</sup> April, to 24<sup>th</sup> April, 2013. I have noted that the trial court did not capture the dates properly but this period of 11<sup>th</sup> April to 24<sup>th</sup> April, 2013 is confirmed by the record. Having been arrested and taken to the Police, PW2 decided to alledge that she had been defiled. The medical evidence does confirm that indeed she had sex. However, I do find that it is PW2's own behavior which led to the sexual act. She told the appellant that she was not in school and had been married. Her own mother testified that PW2 got married.

I am satisfied that the circumstances of this case does prove that pW2 took herself as an adult. She would disappear from home and sleep out for two weeks without her parents knowledge of her whereabouts. She would run away from home even after having been warned by her parents. I do find that the defence under Section 8(5) of the Sexual Offences Act applies in favour of the appellant.

The upshot is that his appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated and Signed at Marsabit this ..... day of May 2018**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Embu this 31st day of May, 2018**

**F. MUCHEMI**

**JUDGE**