



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 4 OF 2016

GEOFFREY KIPNGETICH ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence in Kericho CM Cr. No.9 of 2013

by Hon. G. M. A. Ong'ondo (SPM) dated 31st March 2016)

JUDGMENT

1. 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. The particulars of the offence are that between 22nd January and 1st February 2013, at [particulars withheld] in Kericho West District of the Rift Valley Province, unlawfully caused his penis to penetrate the vagina of E C B, a child aged 15 years.
2. The accused was also charged with the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that between 22nd January 2013 and 1st February 2013, at [particulars withheld] in Kericho West District of the Rift Valley Province did intentionally cause his penis to come into contact with the vagina of E C B, a child aged 15 years.
3. The appellant initially pleaded guilty to the offence but subsequently changed his plea. He was tried and found guilty as charged. In its judgment, the court found the accused guilty as charged and sentenced him to serve a term of imprisonment for twenty years.
4. Dissatisfied with both the conviction and sentence, the appellant filed a petition of appeal in which he raised some 5 grounds of appeal. However, in his submissions placed before the court at the hearing of the appeal, he abandoned the grounds in his petition of appeal and relied on the grounds set out in his submissions. He also set out his arguments in the said submissions. In the interests of clarity and brevity, I will deal with the said grounds in the course of this judgment.
5. The state opposed the appeal. Ms. Keli for the state submitted that the evidence presented by the prosecution through the 5 prosecution witnesses was water tight and the offence of defilement was proved beyond reasonable doubt. The state had proved all the elements of the offence of defilement and the prosecution had discharged its burden and the conviction was safe. It was the state's submission further that the sentence meted out on the accused by the trial court was legal as it is the one provided by law. Ms. Keli urged the court to confirm the conviction and sentence.
6. The appellant argued in his submissions and in his first ground of appeal that the trial court had erred by convicting him without the issue of the complainant's age being clear. In response, Ms. Keli for the state submitted that the complainant's age had been established by the prosecution. That the complainant had stated that she was born in 1999, and was therefore aged 15 at the time of commission of the offence. Further, that the investigating officer, PW3, had confirmed receiving an age assessment report that indicated that the complainant was 15 years old at the time the offence was committed. The clinical officer, PW5, had produced the P3 form that showed that the complainant was aged 15.
7. It was also the state's case that the appellant had acknowledged that the complainant was a minor when he stated in his defence that the complainant was 16 years.
8. The appellant further raised the ground in his defence that the P3 form was not specific and did not coincide with the time the offence was committed in indicating the injuries on the complainant. The state's response is that the clinical officer, PW5, had testified that the complainant's hymen was torn, that she had an old scar, and that she had been repeatedly defiled over a period of weeks. It was the state's

submission that the fact that the complainant had an old scar does not negate the fact that the appellant defiled her. Ms. Keli observed that the complainant had been very candid in her testimony about how the appellant defiled her in his homestead.

9. The appellant further complains that he did not cross-examine other witnesses apart from the complainant and seeks a re-trial to cross-examine the other witnesses. The state's response to this ground is that there is nothing to show that the appellant was denied an opportunity to cross-examine all the witnesses. He had a right to cross-examine all witnesses and was aware of this right. However, he chose to cross-examine only the complainant, and cannot therefore be heard to say at this stage that he did not get a chance as this is an afterthought.

10. Further, that he cannot be heard to seek a re-trial on that basis as no good reason has been advanced. He was able to follow the proceedings. He was not saying that the language used was a language that he did not understand, and a retrial is just an afterthought and not in the interests of justice.

11. The state further observed that the appellant had stated in his submissions that the complainant was huge and had dropped out of school, and he could not therefore imagine that she was under age. The state's response is that this is an issue he ought to have raised in his defence at the trial, not at the appeal stage, if he thought she was of age. Further, that it contradicts what he says in his defence that she was under age. He had also admitted at his trial that he had had carnal knowledge of her.

12. The appellant further argued in his submissions that someone else might have defiled the complainant in view of the fact that she had vaginal scars. The state's response to this argument was that there is evidence that the appellant defiled the complainant for two weeks, and it cannot be presumed that someone else defiled the complainant. In its view, the appeal lacks merit and should be dismissed.

13. As the first appellate court, I am under a duty to re-evaluate the evidence and draw my own conclusions. I must, however, bear in mind that I have not had the advantage of seeing and hearing the witnesses, which the trial court has had-see **Okeno vs R. (1972) EA 32**.

14. The prosecution called 5 witnesses in support of its case. PW1 was the complainant, who told the court that at the time of her testimony, she was 15 years old. Her evidence was that the accused was building a house at her home. On the day she moved in with the accused, she had been in [particulars withheld] centre buying books at about 6.00 p.m. The accused had asked her to accompany him to his home and she had agreed as she wanted to be his wife. In cross-examination by the accused, she stated that she had told the accused that she was not at school.

15. The accused took her to his home on 22nd January 2013, and warned her not to leave the house. She narrated how she and the accused repeatedly had sexual intercourse at his home. The following day, he introduced her to his mother. She stayed with the accused until her father came to the accused's home with 2 police officers on 1st February 2013 and both she and the accused were arrested. She was later taken to hospital and examined.

16. PW2 was the father of the complainant. He stated that his daughter was 13 years old, though he was not sure of her age. She was in class 7 at the material time. She had failed to return home and he started looking for her and found her at the home of the accused. He had gone to the accused's home with 2 police officers and the accused and his daughter had been arrested.

17. PW3, Agnes Nyaboke, was the investigating officer. She had interrogated the complainant, who had been arrested together with the appellant. The complainant had told PW3 that she had met the appellant at [particulars withheld], and he had persuaded her to accompany him home with the promise that he would marry her. She had stayed with the appellant, having sex as husband and wife, till 1st February 2013.

18. PW3 had taken both the appellant and the complainant to Kericho District Hospital for a medical examination. An age assessment report, which was produced in court, showed that the complainant was 15 years old. The appellant did not have any questions in cross-examination for PW2 and PW3.

19. PW4, PC Abdi Nasif, had received the report from PW2 that his daughter was missing. PW2 suspected that his daughter was in the house of the appellant and he and PW4 went there. When the appellant saw them, he started running away and they gave chase and arrested him. He was taken back to his house, where the complainant was found. The accused, again, did not cross-examine PW4.

20. The final prosecution witness, Misoi Isaac, was a clinical officer at the Kericho District Hospital. He had examined the complainant, who was 15 years old and had allegedly been defiled by a person known to her, on 2nd February 2013. His findings were that her hymen was torn and there was an old scar. Laboratory tests showed numerous epithelial cells, and she had a whitish vaginal discharge. The alleged defilement had taken place over two weeks. PW5 concluded that the complainant had been defiled. He produced her P3 form dated 2nd February 2013. He had also examined the accused but nothing abnormal had been noted.

21. When placed on his defence, the accused stated that he knew the complainant, who was aged 16 years at the time. He confirmed that he was with her, that he met her at [particulars withheld] market and took her home. That they lived together as husband and wife, and he had carnal knowledge of her for two weeks. He further stated that she looked like an adult.

22. In his judgment, Ong'ondo PM found that there was no dispute that the complainant was a child. He was also satisfied that penetration had been established, both from the evidence of PW1, but also by the admission of the appellant. He therefore found that the prosecution had proved its case beyond reasonable doubt.

23. I have considered the record of the trial court, the evidence adduced by the prosecution and the accused's defence. I have also considered the appellant's grounds of appeal and his submissions in respect thereto, as well as the response by the state.

24. The appellant's first and second grounds relate to the issue of the complainant's age. He admitted that he seduced her and had carnal knowledge of her, and that she was huge and he could not imagine that she was still in school. He also conceded in his defence that she was 16 years old. He therefore knew that she was a child as defined in the Children Act. Section 8 (3) of the Sexual Offences Act states that:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

25. Accordingly, I find that the decision of the trial court cannot be faulted on this score.

26. The appellant's third ground relates to his failure to cross-examine other witnesses apart from PW1. I have looked at the record and I am unable to find that the appellant was denied an opportunity to cross-examine other witnesses. His cross-examination of the complainant, PW1, from the outset, shows that he knew of his right to cross-examine witnesses, exercised this right with respect to the complainant, but elected not to cross-examine any of the other witnesses. In the circumstances, his plea for a re-trial to enable him cross-examine other witnesses has no basis.

27. The appellant has also argued in his submissions that the complainant was huge, and he could not imagine that she was still in school. He did not, however, make this argument in his defence, bearing in mind that section 8(5) would have afforded him a defence, had it been the case that he was of the view that the complainant was over 18. This section provides as follows:

(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.

28. From the record, however, the appellant knew that the complainant was 16, and therefore under the age of eighteen. He could, therefore, not have been able to advance the defence offered by section 8(5) of the Sexual Offences Act.

29. Accordingly, I am not satisfied that the appeal has any merit, and it is hereby dismissed. The conviction and sentence are upheld.

Dated Delivered and Signed at Kericho this 30th day of May 2018.

MUMBI NGUGI

JUDGE