REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 110 OF 2017

(FORMERLY NAKURU HCCRA 303 OF 2015)

ZACHARIA KIPCHIRCHIR CHANGWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Eldama Ravine

Principal Magistrate's Court Criminal Case No. 1129 of 2014

delivered on the 24th day of November, 2015 by M. Kasera, PM]

JUDGMENT

The issue before the Court in this appeal is whether the appellant did defile the complainant herein, a girl allegedly aged 15 years according to the charge. Consequently, the age of the complainant is crucial in determining the offence of defilement itself contrary to section 8(1) as read with 8 (4) of the Sexual Offences Act, as well as for purposes of the sentence applicable to the offence.

In accordance with ***Okeno v. R*** (1972) EA 32, this Court, as a first appellate court will examine the evidence before the trial court and make its own conclusions, giving deference to the fact that it did not as the trial court observe or hear the witnesses, before considering whether the finding of the trial court is to be upheld or otherwise.

Having considered the evidence before the trial court as recorded in the Record of Proceedings, I have no doubt that the appellant penetrated the complainant PW1. The evidence of the complainant was that the appellant had, while she had gone for her milk can from the appellant's hotel, pulled her into a room at the back of the hotel where he closed her mouth with her hand so that she could not scream, tore her pantie and had sexual intercourse with her, after which she had reported the matter to the Chief and later to her grandmother PW2 and her uncle's wife Lucy who was not called as a witness.

Medical evidence by way of a P3 report produced pursuant to section 77 of the Evidence Act by the Investigating Officer, showed the examiner's findings as follows:

> "*Lacerations on labia majora, minora, hymen raw and ruptured."*

I would find corroboration of PW1's evidence in the medical evidence of laceration on her labia majora and minora and ruptured hymen. It, however, does not matter that the hymen was broken or not nor that there was no evidence of spermatozoa, as penetration for purposes of the Sexual Offences Act includes *partial* penetration.

The appellant accepted that the complainant had delivered milk to his hotel but alleged in his unsworn statement that she had then gone off with the container. There was no issue of mistaken identity. The appellant was known to the complainant who had previously overtime delivered milk to the appellant's hotel for her grandmother PW2, who also knew the appellant and who confirmed that the complainant had informed her that she had been assaulted by the appellant on the very day of the incident.

The evidence of the environment following the circumcision celebrations to which the local people had gone, confirms the lonely circumstances in which the appellant pulled the complainant to the room at the back of the hotel and raped her. The appellant's own witness confirmed the existence of the room contradicting the appellant as follows:

"The accused is a village mate. I go to his hotel. There is a private room there. I know the hotel is not a single as accused said. [I]t had some room also."

However, there is no need for corroboration in cases of sexual offences where the court believes the complainant to be telling the truth. In this regard, the Appellate Court must defer to the observation of the trial court which saw the complainant referred to section 124 of the Evidence Act whose proviso allows the court to convict on the uncorroborated evidence of the victim of a sexual offence if, it finds that the victim was telling the truth. The trial Court gave the reason for so finding because there was no reason on record why the complainant could frame the accused. It is clear that the court was relying on the provisions of section 124 of the Evidence Act to convict the appellant when it said:

"I find that the accused took advantage of the complainant because people were not in the hotel as circumcision celebrations were on. I am alive to section 124 of the Evidence Act ***"provided that in cases involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

There is no reason on record why complainant could have framed up the accused. I find the accused guilty of the offence of defilement contrary to section 8(1) as read with 8 (4) of the Sexual Offences Act."

Age of the complainant

There, however, appears to be an unresolved uncertainty about the complainant's age. Although there was evidence from an alleged age assessment placing her at between 14 -16 years, the complainant's own evidence as to her age and date of birth is contradictory, stating that she is aged 15 years as at the time of her testimony on 3/3/2015 yet she gives her date of birth as 1995, which the trial court notes is *"approximately 20 years."* This would make the complainant about 19 years at the time of the offence on 1/12/2014. It is not much help that the complainant stated that she was in Primary School at class 6 as over age pupils are known to exist sometimes.

That the doctor who made the assessment was not called as a witness, and the assessment did not give the basis of the determination, the apparent inconsistency on the age as stated by the complainant and the computation of the years since her given date of birth, makes it unsafe to conclude with certainty the age of the complainant for purpose of both the conviction and sentence of the appellant for the offence of defilement of a child as charged.

This Court did not see the complainant and can only rely on the record of the trial court which clearly suggests that the complainant was over the age of 18 years at the time of the offence and, therefore, not a child within the meaning of section 2 of both the Sexual Offences Act and The Children Act.

Conviction for a Lesser Offence

However, it is quite clear that in the proved act of sexual intercourse with the complainant, whatever her age, the appellant will have committed rape because of lack of consent which is apparent in the forcible pulling of the girl, covering her mouth to prevent her screaming and the tearing of her pantie to facilitate the sexual intercourse. The offence of rape was, however, not charged but the appellant may, in accordance with the principle of conviction for lesser offence be convicted under section 179 of the Criminal Procedure Code, the offence of rape under section 3 (1) of the Sexual Offences Act which, with a sentence of ten (10) years which may be enhanced to life sentence, is a lesser offence to that of defilement under section 8(4) of the Sexual Offences Act with its minimum sentence of imprisonment for fifteen (15) years.

The law allows conviction for lesser offence which is proved but not charged. The applicable section 179 (2) of the Criminal Procedure Code is in the following terms:

"179. When offence proved is included in offence charged

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

Conclusion

I find that the offence of defilement contrary to section 8 (1) as read with 8(4) of the Sexual Offences Act, was not proved because of the contradictory evidence on the correct age of the complainant. However, the acts of the appellant proved by the evidence before the court reveal a complete lesser offence of rape under section 3 (1) of the Sexual Offences Act.

Orders

There shall, therefore, be an order of this court allowing the appeal, quashing and setting aside the conviction and sentence for the offence of defilement contrary to section 8(1) as read with 8 (4) of the Sexual Offence Act and substituting therefor a conviction for the lesser offence of rape under section 3(1) as read with 3 (3) of the Sexual Offences Act. The appellant is sentenced to imprisonment for ten (10) years from

the date of conviction and sentence in the trial court, that is to say, the 24th November, 2015. The appellant was released on bail on the same day of plea taking in the trial court and, therefore, no period of remand awaiting trial is to be reckoned in the sentence pursuant to section 333 Proviso of the Criminal Procedure Code.

DATED AND DELIVERED THIS 27TH DAY OF JUNE, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Chebii for Mr. Ogolla for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.