



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2016

JULIUS SOITA WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment delivered on 15th June, 2012 by Hon. D.A. Orimba (Principal Magistrate) Chief Magistrate's Courts at Thika in Criminal Case No. 3337 of 2011).

JUDGMENT

1. The Appellant, Julius Soita Wanjala was charged with the **offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006**

The particulars of the offence being that the Appellant on the 14th day of July 2011 at around 1900hrs in Gatanga district within Muranga County intentionally and unlawfully caused his penis to penetrate the vagina of RWW a girl aged 17 years.

2. In the alternative **indecent Act with a child contrary to Section**

Indecent Act with a woman contrary to Section 11(1) of Sexual Offences Act No. 3 of 2006.

Appellant on the 14th day of July 2011 at around 1900 hrs in Gatanga District within Muranga County, intentionally committed an indecent act to R W W by touching the genital organs of the said R W W a girl aged 17 years.

3. The prosecution case was that on the material day at about 5.00 p.m., the complainant, RW a 17 year old standard eight leaver was on her way home from the bushes where she had gone to collect firewood. That on the way she met the Appellant. That the Appellant warned her not to scream and threatened to kill her if she screamed. That the Appellant then gagged her mouth then pulled her to a nearby maize plantation. That the Appellant pushed her down to the ground, removed her pants and had sex with her. That the Appellant promised to take her to the disco and to live with her, then gave her two sweets and left.

4. In the meanwhile, people her grandfather's home where she lived were worried as to the whereabouts of the complainant and started looking for her. When the complainant eventually got home she was questioned and explained what had happened. The matter was reported to the village elder. The Appellant was arrested by the village elder and the youth wingers and escorted to the police station. The complainant was taken to the hospital where she was examined and treated. The Appellant was subsequently charged with the offences herein.

5. The Appellant in his statement of defence gave unsworn evidence. The Appellant blamed this case on a salary dispute between him and his employer who was the complainant's grandfather. The Appellant testified that he had worked for the complainants grandfather for a period of six months at Ksh.4,000/= per month. That the said grandfather owed him Ksh.24,000/= which he failed to pay him when he wanted to leave the employment and their relationship deteriorated. That the grandfather slapped him, threatened to kill him and had him arrest, tied up with ropes and escorted to the police station where he spent four days before he was charged.

6. The trial magistrate found that appellant guilty of the main count of defilement and convicted him accordingly. The Appellant was sentenced to 15 years imprisonment.

7. The Appellant was aggrieved by both the conviction and sentence. The grounds of appeal can be summarized as follows:

(a) That the Appellant was held in custody for a longer time than provided by the law.

(b) That crucial witnesses were not called to testify

(c) That the prosecution case was contradictory.

(d) That the Appellant was not medically examined.

(e) That the defence case was not considered.

8. During the hearing of the appeal, the Appellant reiterated his defence case and termed the same as a frame up.

9. The learned counsel for the state opposed the appeal and submitted that the prosecution case was proved beyond any reasonable doubt as per the evidence on record.

10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

11. The complainant (PW1) testified that she knew the Appellant who she had been seeing in the neighbourhood where he worked. The complainant gave the time of the incident at about 5.00 p.m. she explained that it was not at night. The circumstances were therefore conducive for positive identification. The complainant described in detail what transpired between her and the Appellant at the material time. The evidence that the Appellant removed her innerwear and inserted his penis into her genitalia leaves no doubt that there was penetration.

12. The Baptismal card produced as an exhibit reflects that the complainant was born on 21st September, 1993 and was therefore 17 years old at the material time. PW2 JMG and PW3 JMG who are the complainants relatives gave evidence that corroborated the complainant's evidence that the accused was a tea picker in the village where he was employed by one Mugo. The evidence of PW2 and PW3 the uncle and grandfather also confirmed that the complainant had delayed in coming back home and when she was found she explained what had happened to her and named the Appellant as the culprit. Although PW2 described the complainant as mentally unstable, it is noted that the complainant was able to testify and her evidence is corroborated by the evidence of the other prosecution witnesses. The trial magistrate found her sufficiently intelligent and capable of giving evidence which she proceeded to give in a simple and straight forward manner.

13. PW4 APC Bernard Mbugua gave evidence that confirmed the arrest of the Appellant. PW6 PC David Cheruiyot gave the evidence of the investigations carried out including escorting the complainant and the Appellant for medical examination.

14. The doctor, PW5 or Maxwell Murage Maina gave evidence that further corroborated the complainant's evidence that there was sexual intercourse. The doctor's evidence is that there was tenderness and swelling on the complainant's genitalia and that the hymen was missing. The doctor estimated the age of the injuries as one day old. This further corroborates the complainant's evidence in respect of when the sexual activity took place. The doctor confirmed the complainants age as 17 years. The doctor also examined the Appellant who he reflected as 24 years old and was found to have bruises on the forehead, shoulders and elbow inflicted by the mob at the time of arrest.

15. The Appellant blamed his arrest on the grandfather of the complainant Mr. G who he alleged had failed to pay him salary for the six months he had worked for him. However, it is noted that the said grandfather and other witnesses testified that the Appellant worked for one Mr. Mugo as a tea picker. This evidence was not challenged by the Appellant during the prosecution case. The trial magistrate correctly held that the same was an afterthought. The trial magistrate had the benefit of seeing the witnesses testify and observed their demeanour and I have no reason to differ with his findings. If Mr. G had a grudge against the Appellant, there is no reason why the complainant and her uncle PW2 would frame up the Appellant

16. Nothing turns on the issue of delay in police custody and the alleged violation of the Appellant's fundamental rights as provided in the Constitution. That topic is now moot. The Appellant's remedy lies in a civil action (See for example, **Julius Kamau Mbugua v Republic (Criminal App. No. 50 of 2008)**).

17. Having considered both the prosecution case and the defence case, this court is satisfied that the prosecution case was proved beyond any reasonable doubts. I find no merits in the appeal and dismiss the same.

Dated, signed and delivered at Kiambu this 22nd day of June, 2018

B. THURANIRA JADEN

JUDGE