



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 17 OF 2016

SAITOTI OLE NKOINGONI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an appeal from the original conviction and sentence in CR. 1786 of 2015 at the Narok Chief Magistrate's Court by Hon. Mr. T.A. Sitati – Senior Resident Magistrate on 8th March, 2016]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. In this court, the appellant has raised six grounds in his petition of appeal. In ground one, the appellant has faulted the trial court both in law and fact in convicting him in the absence of proof of penetration and no spermatozoa noted to confirm the offence of defilement. The evidence of the complainant namely R.K (initials) was that on 12th October, 2015 at about 9.00p.m she was going to church on foot. She then met the appellant who is her neighbour who then took her to a home of a person whose particulars are not disclosed. She then removed her clothes and underwear and thereafter they had sexual intercourse. It was also her evidence that the owner of the home had gone to church. The appellant then released the complainant. The complainant then went home. At home the mother was suspicious. She then took her to hospital for examination. The pregnancy test proved negative.
4. Furthermore, the complainant (PW 1) was examined at Sekenani Health Centre on 14th October, 2015. She was examined by a Clinical Officer namely Gerald Yiaile (PW 3). She told the Clinical Officer that it was her first time that she had sex with the appellant. Her head, neck, chest, upper and lower limbs were found to be normal. Upon examination of her private parts, the Clinical Officer did not see any old or fresh wounds. Additionally, he found that her hymen was torn but not fresh. According to him, this confirmed defilement since there was a whitish discharge from her private parts. He also found no spermatozoa in her private parts. In conclusion, he found there was penile penetration which had taken place repeatedly because it was torn but not new. He then put in evidence the P3 form as exhibit P exb 1, the post rape form P exb 2 and the age report Pmf 3.
5. The evidence of the mother of the complainant N.K (initials) was that her daughter was 15 years old. She also testified that her daughter went to church but came late at home. Because she was suspicious, she took her for a medical examination. She then suspected the appellant who was arrested and charged

with this offence. The basis of her suspicion is that she had come across the appellant and her daughter talking in the bush before the incident.

6. Counsel for the appellant urged this court to reconsider the evidence upon which the conviction was founded. He cited *Kariuki Karanja V. Republic [1986] KLR 190* in support of the proposition that as a first appeal court I am required to reevaluate the evidence and make my own independent findings. He also cited the case of *PKW V. Republic [2012] eKLR* in which the Court of Appeal stated

“Hymen also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases we have dealt with, courts tends to assume that absence of hymen in the vagina of a girl alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.”

7. The prosecution filed written submissions in opposition and they also cited *Section 124 of the Evidence Act (cap 80) Laws of Kenya*. According to the provisions of that section, a court is entitled to convict an accused if it is satisfied that the alleged victim is telling the truth.

8. The defence of the appellant was that the case against him was fabricated. It is also important to note that he did cross-examine the complainant.

9. I have reconsidered the entire evidence of the prosecution and the defence. I have also considered the submissions of both counsels. I find that there is a material evidence of the complainant that she was having sexual intercourse for the first time with the appellant. In this regard, the evidence of the Clinical Officer shows that she had had repeated sexual intercourse before the instant alleged sexual intercourse. It is to be noted that the complainant was subjected to a *voire dire* examination and was found that she did not appreciate the nature of taking the oath. She therefore gave unsworn evidence in terms of *Section 19 of the Oaths and Statutory Declarations Act (cap 15) Laws of Kenya*.

10. This contradiction between her evidence and that of the Clinical Officer has not been explained. It is a material contradiction which in my opinion shows that she is not a credible witness. Furthermore, it was her testimony that she removed her clothes including her underwear. I therefore find after re-assessing the entire evidence that she is not a truthful witness in terms of *section 124 of the evidence Act*.

11. In the light of the foregoing finding, I find that it is unnecessary to consider the other grounds since the appeal succeeds in respect of ground 1.

12. I therefore allow the appeal with the result that the conviction and sentence are hereby quashed.

13. The appellant is hereby set free unless held on other lawful warrants.

Judgement Dated, Signed and Delivered in open court at **Narok** this **19th** day of **June, 2018** in the presence of Mr. Kamwaro for the appellant and Ms. Torosi for the respondent.

J. M. BWONWONGA

JUDGE

19/6/2018