



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 139 OF 2017

BONIFACE SAITOTI NTOIKA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 19th December, 2017 in the Principal Magistrates Court at Kilgoris in Criminal Case NO. 237 of 2015, Republic versus Boniface Saitoti Ntoika.)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years imprisonment in respect of the offence of having an indecent act with a child contrary to section 11 of the Sexual Offences Act No. 3 of 2006. He was acquitted on the main charge of defilement.
2. The state supported both the conviction and sentence.
3. The appellant was convicted solely on the evidence of the complainant (PW1) - DS- (initials of her name). PW1 was aged 16 years at the time the offence was committed. She testified that on 21/2/2015, she went to [particulars withheld] Secondary School and left that school at around 5pm, because she was suspended for not sweeping the classroom. As a result her father (PW2) - PLM (initials of his name) was called to her school. He went there and in the process of finding out what had happened, he quarrelled with the complainant in front of the principal. He threatened the complainant telling her that she should not go home, because he would kill and bury her.
4. Following the threat by her father, she went to a friend where she slept. In the following morning she proceeded to Kilgoris, where she slept until 26/2/2015. Thereafter, she went to the home of the appellant, who was her boyfriend. The appellant wanted to have sex with her but she refused. In the end his father discovered that she was at the appellant's home. He went there and upon seeing the complainant's father the appellant escaped. The complainant produced her witness statement as exhibit 2.
5. The complainant was then taken for medical examination at Transmara District Hospital. The examining clinical officer, Festus Kurgat (PW.4) in that hospital found her to be 16 years old. He found her labia majora and minora were intact. He also found her hymen was broken but not fresh. At the conclusion of his examination he prepared a medical report namely P3 form which was put in evidence as exhibit 3. He also put in evidence the treatment notes of the complainant as exhibit 4.
6. Upon being placed on his defence, the appellant gave sworn evidence. He testified that the complainant went to his house to sleep at the request of his brother-in-law, Patrick Sirengo. He accepted to accommodate the complainant in his single roomed house. He further testified that he did not have sexual intercourse with the complainant. Later he was arrested along with the complainant. He was eventually charged with defilement, being the main charge in respect of which he was acquitted and indecent act with the complainant.
7. The appellant through his counsel, Mr. OM Otieno raised 4 grounds in his petition of appeal to this court. He later condensed these four grounds into one ground. In that one ground Mr. OM Otieno faulted the trial court both in law and fact by convicting and sentencing the appellant on the alternative charge in the absence of adequate evidence, which conviction was unsafe.
8. Mr. OM Otieno filed written submissions in support of the appeal. He faulted the trial court for convicting the appellant on the statement of the complainant which was put in evidence as exhibit Pexh 2. According to the complainant she was forced to write this statement. In that statement she stated that during the night, when she was with the appellant, the appellant kissed, touched her breasts and private parts. Both the appellant and the complainant denied having sexual intercourse. The medical evidence of the clinical officer Festus Kurgat (PW4) supports their evidence that there was no evidence of sexual intercourse. It is on that basis that the appellant was acquitted on the charge of defilement.
9. However, the trial court convicted the appellant solely on the statement of the complainant, who testified that she was forced to write that statement. In law according to section 33 of the Evidence Act (Cap. 80) Laws of Kenya. The statement ought to have been produced by its maker namely No. 78983 PC. Shabaan Chiringa (PW3). In this regard it is important to point out that the complainant ought to have been

found to be a hostile witness, whose evidence carries very little weight. In that regard Mr. Otieno cited *Patrick MACHARIA alias MACHAA v. Republic [2004] eKLR*, in which the court held that the evidence of a hostile witness is of little value and a conviction and sentence ought not to be based on it.

10. Furthermore, Ms. Nyaroita the prosecution counsel while conceding the appeal cited *Republic v. Pacifica Kinyansa Samuel & 3 others [2016] eKLR*, in which the court pointed out the procedure for declaring a witness hostile, which is provided for under sections 161 and 163 (1) (c) of the Evidence Act. The court in that case judicially approved the procedure of producing documents in court by their makers and not through the complainant. The prosecution counsel also cited *Elly Otieno Ogwang v. Republic [2018] eKLR*, in which the court pointed out the differences between a hostile witness and a refractory witness. The court pointed out that a refractory witness is one who either refuses to be sworn or refuses to answer questions, while a hostile witness is one who disowns her statement, which he had earlier on made.

11. I have re-evaluated the evidence as I am required to do as a first appeal court according to *Okeno v. R. [1972] EA 32*. Having done so, I find that the state rightly conceded the appeal. The evidence does not support the conviction. It is unsafe to uphold.

12. The upshot of the foregoing is that the appellant's appeal succeeds with the result that the conviction and sentence are hereby set aside.

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

Judgement Delivered in open court at **Narok** this **24th** day of **July, 2018** in the presence of Ms. Nyaroita for the state/respondent and Mr. Onduso holding brief for Mr. O.M. Otieno for the appellant.

J. M. BWONWONGA

JUDGE

24/7/2018