



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 32 OF 2017

SHEM NYANGI STEPHEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. A.K Mkoross– SRM

dated 17th November, 2016 at the Principal Magistrate's Court

at Kilgoris in Criminal Case No. 1154 of 2015)

JUDGMENT

1. The appellant, SHEM NYANGI STEPHEN, was charged with the offence of defilement contrary to section 8(1) and (4) of the Sexual Offences Act ('the Act'). The particulars of the offence were that on 7th August 2015 at Moita area in Transmara West District within Narok County, he intentionally caused his penis to penetrate the vagina of NKT, a child aged 16 years. He was convicted and sentenced to 20 years imprisonment. He now appeals against conviction and sentence.
2. The thrust of the appellant's appeal is that the prosecution failed to prove its case. He contends that the age of the child was not proved and that his defence was not considered. The respondent supports the conviction and sentence and contends that the prosecution proved every element of the offence.
3. As this is a first appeal, I am enjoined to review all facts of the case and independently reach a decision as to whether to uphold the conviction making allowance for the fact that I neither heard nor saw the witnesses testify (**Okeno v. R [1972]EA 32**).
4. PW 1, the child, recalled that on 9th August 2015 she was going to Ogwedhi when she met the appellant at about 3.00 p.m. She knew him as he was her neighbour. She boarded his motor bike and they proceeded to his home where she slept in his brother's house. She told the court that they had sexual intercourse. On the next day the appellant took her to his sister's home in Mabera and left her there for a few days before the police came and took her.
5. PW 1's father, PW 2, testified that on 11th September 2015, he was called by his other daughter seeking to find out whether he had seen PW 1. She told him that PW 1 had disappeared after church on 9th August 2015. He called the chief to assist him locate the appellant. He was informed that PW 1 had been seen with the appellant, whom he knew as he lived in the locality. He was later informed that the appellant had been arrested.
6. The investigating officer, PW 4, told the court that the appellant was arrested and put in the cells on 13th August 2015 after being found at the appellant's home by the local chief. He also went to Ogwedhi AP Camp where he collected PW 1 and took her to hospital for examination.
7. A clinical officer, PW 3, at Transmara Sub-district Hospital testified that PW 1 was brought to the hospital on 14th August 2015. He examined her and noted that there were no injuries on her genitalia although there was a whitish discharge and an infection. He concluded that the child had been defiled due to the presence of epithelial cells.
8. In his sworn defence, the appellant stated that he was framed as he had a land dispute with PW 2 who called the police to arrest him. He also denied that he knew PW 1.

9. The issue in this appeal is whether the appellant was the one who caused an act of penetration. On this issue the testimony of PW 1 was clear that the appellant took her to his brother's house where he proceeded to sexually assault her. Although PW 1 did not describe in detail what the appellant did to her, she told the court that on the material night, "... *Shem asked me to have sexual intercourse with him which we did. It was the first time I was having sex ...*" In cross examination she was firm that; "*you insisted on having sex with you. You even removed my clothes....*"

10. The child's evidence on its own is sufficient to sustain a conviction under the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if, for reasons to be recorded, the trial magistrate believed the child was telling the truth. In this case though, the trial magistrate who heard PW 1 testify and who wrote the judgment were different. The trial magistrate assessed the evidence and concluded that PW 1's testimony was credible as follows:

"His (the clinical officer) evidence also tallied with that of the complainant and although I did not have the advantage of observing her as she testified, her evidence as recorded is consistent and steadfast and reassures me that she was a credible witness. My reassurance is further increased by the accused's own admission that the complainant had no reason to frame him for an offence he had not committed. In sum, I therefore have no doubt that the complainant was defiled and I find so."

11. On my analysis of the evidence, I find the testimony of PW 1 was firm, consistent and unshaken in cross examination. It was further corroborated by the testimony of PW 2 who confirmed that she was missing from home and he took steps to locate her leading to the appellant's arrest. Second, the medical evidence of PW 3 confirmed the act of penetration.

12. The appellant's defence that he was framed was properly dismissed by the trial magistrate. He did not raise the issue of the purported land dispute with either PW 1 or PW 2 in cross examination and the allegation that he did not know the child was laid to rest by the testimony of PW 1 and PW 2 who were clear that he lived in their neighbourhood.

13. Although the arresting officer and PW 1's sister, who informed PW 2 that PW 1 was missing were not called as witnesses, I do not think the prosecution case was weakened. PW 1 confirmed that she had been lured by the appellant in his home and he was arrested thereafter. The totality of the evidence is that the prosecution proved its case. I affirm the conviction.

14. As regards the age of the child, PW 1's birth certificate was produced showing that she was born on 2nd June 2002. She was therefore 13 years old at the time the offence was committed and the sentence imposed fell within the bounds of Section 8(3) of the Act. It is affirmed.

15. The appeal is dismissed.

Dated and delivered at Kisii this 24th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.