



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 67 OF 2017

(Being an appeal arising from conviction and sentence in Kitale chief Magistrate's court Sexual offence No. 96 of 2016 delivered by M.I.G. Moranga Principal Magistrate on 6/9/2017)

ABEL KOECH SANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.**

The particulars were that on diverse dates between **December 2015 and 18th June 2016, within Trans Nzoia County in the Republic of Kenya, committed an act by inserting a male genital organ namely penis into the female genital organ namely vagina of C.N. A. , a child aged 16 years which caused penetration.**

2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The facts and evidence as presented during trial were as follows:

PW1 C N A testified that she was a form 1 student at [particulars withheld] Secondary school. She was born on 23/6/2000. She testified how on various dates she had sexual intercourse with the appellant who was operating a barbershop. Her sexual intercourse between 2014 and 2015 resulted in her being pregnant. The complainant then ran away from home. As at the date of testifying she was 5 months pregnant. when cross-examined she pleaded for the appellant to be released so that he could help her take care of the pregnancy and herself.

3. **PW2 S N W** testified that the complainant left home on 29/5/2016 at around 5.00 am and left a note that she no longer desired to go to school and that she had found a job. She searched for the complainant all over including the former school and the number of the mobile phone she had left behind in the note. The complainant was later found sick and taken to Cherengany hospital where upon examination she was found to be pregnant.

The appellant was arrested at Murukyuwa. PW2 was issued with a P3 form which was later filled .

4. **PW3 Musa Chepkinyeng** from Cherengany sub district hospital filled the complainant's P3 on 10/7/2016 where she found her to be pregnant and had gonorrhoea infection.

5. **PW4 Sergeant Richard Hamisi** from Cherengani police station carried out the investigations and recorded the witness statement and preferred charges against the appellant.

6. When put on his defence the appellant gave unsworn evidence stating that he was born on 2nd November 2000.

He explained how he was arrested on 10/6/2016 by 3 men dressed in suits. After concluding his evidence he requested that he be taken for age assessment.

Analysis and Determination

7. I have carefully read the proceedings herein as well as the submissions by the appellant and the learned State Counsel.

8. I have no doubt in my mind that the age of the complainant was clearly proved. The certificate of birth showed that she was born on

23/7/2000 so that at the time of the incident she was about 16 years. The question of defilement was established by the pregnancy proven by the production of the P3 form. There was no suggestion that she had sexual intercourse with someone else other than the appellant.

9. What attracted my attention and specifically the backbone of this appeal in particular is the age of the appellant.

10. In his unsworn evidence he stated thus:

“ My name is Abel Koech Sanga. I was born in 2000 in November.”

11. After closing his evidence and when the date of judgment had been set he said:

“ I pray that I be taken for age assessment. I am suffering in custody.”

Then the conversation went on;

“Court: Ask if he has a birth certificate”

Accused: Yes my uncle has. He is at home. He told me I was born in 2000”

Court : Asked why he has never raised the issue earlier as it is now almost a year.

Court: That prayer by accused is suspect as it seems from hindsighed that it could perhaps help him get a favourable outcome if he so alleges that he is a minor”

Nevertheless I order his age assessment be assessed forthwith. Officer in charge prison to facilitate the same.”

12. Thereafter and without any explanation on whether the appellant underwent the age assessment , judgement was delivered.

13. Looking at the judgement of the court, the same issue was captured when the court stated that;

“ The accused did bring about an issue of his age at the end of his case. As noted on record it looked suspect and a look at the proceedings on 27/10/2016, the court did ask the mother of the accused Rose Chepkosgei (as she confirmed herself:)

she clearly said the accused was born on 25/8/1992 and in the court's estimation is an adult.

He may be endeavored with a teenage appearance but his attempt to use that at the end of the case was in the court's view dishonest and unbelievable. The same was merely an after thought since all along his trial he never mentioned that he was a minor. Perhaps it was only meant to hoodwink the court into was treating him as such and affording him a lesser sentence as provided for under the Children's Act.”

14. I have deliberately and extensively quoted the proceedings and the judgment of the court above which in my view respectively misapprehended the issues.

15. First of all the appellant's mother was never called to be a witness. Infact when she said that the appellant was born in 1992, she had no documentary evidence to back up her claim. More importantly she was never subjected to any cross-examination.

16. It must also be noted that the best way to assess age is by way of scientific proof. The court did well to order this. Nobody followed it up. There is no evidence to suggest that the trial court pursued the matter with the prison authorities despite the fact that it had made the order.

17. Taking into account that the appellant was unrepresented, it was imperative for the court or at least the prosecution to pursue the matter.

18. The question of age is crucial in determining defilement offences. The court as a matter of good practice just as it does in ensuring that the complainant age is proved, ought as a matter of necessity to determine the age of the alleged perpetrator. Infact from the evidence of PW2, the complainant's mother kept referring the appellant as a “boy”.

19. Even if the “looks” could be deceptive as the trial court found, the same may not be the best to arrive at a conviction. Infact there should never be a conviction or acquittal based on the looks as sometimes its known that some young teenagers may present themselves as adults, yet in reality they are minors. It is therefore appropriate that their ages be backed up by documentary evidence or at least dental age assessment report as is the practice.

20. Because of this doubt therefore I shall allow this appeal. All that the trial court should have done was to pursue the orders it had issued on the appellant's age assessment. I am also conscious of the plea by the complainant that the appellant be released so that he could help raise up the child together. This of course may be considered a periphery and a moral question . Nevertheless the appellant should thank his gods for the lifeline he has received. This court had the option of ordering a retrial but for the complainant's plea.

The appeal is allowed. The appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 26th day of September, 2018.

H.K. CHEMITEI

JUDGE

26/09/18

In the presence of:

Mr. Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.