



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.42 OF 2016

BETWEEN

BRIAN OTIENO LAMECK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in original Ndhwa SRM's Court Criminal Case No.355 of 2015 – Hon. B. Rugut Kipyegon, RM, dated 14th May, 2016)

JUDGMENT

1. The appellant **BRIAN OTIENO LAMECK** was convicted on a charge of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act** and sentenced to serve 20 years imprisonment. The charge against him was that on 23/09/2015 in **NDHIWA**, he unlawfully and intentionally caused his penis to penetrate the vagina of **S J O**, a child aged 14 years.
2. **S J O** (PW1) told the trial court that she was 17 years old and on the nights of 22nd and 23rd September she was at the appellant's home where they slept together and had sex. She informed the court that she had known the appellant for a long time and they had been friends.
3. On cross examination **S J O** explained that she had quarrelled with her mother who told her that if she was ready for marriage she should go ahead and do so. In anger she left her parents' home and went to wake up the appellant, insisting that if he did not marry her she would commit suicide.
4. **E A O** (PW3 and mother of **S J O**) claimed that she had gone to visit her brother at 7.00 p.m. and upon returning to the house, she realized **S J O** was missing. She reported the matter to the area Chief and police. Eventually both **S J O** and the appellant were arrested. PW3 claimed **S J O** was born in the year 2000 although she did not have a birth certificate.
5. The clinical officer **JOSEPH OMBEWA** (PW2) produced the medical records on behalf of **STEPHEN KERARIO** (another clinical officer) who carried out an age assessment and found **S J O** to be 17 years old. This witness also produced a P3 form filled by **DR. THADDEUS OKOTH** who assessed **S J O**'s age at 14 years and that she had been defiled.
6. **PC JOSEPH KATUMO** (PW4) who accompanied PW2 in a bid to find her daughter says he found the appellant and **S J O** inside the latter's house – the appellant was in a pair of trousers only while **S J O** was naked. He arrested both of them.
7. The appellant's sworn defence was that while asleep inside his house at 8.00 p.m., **S J O** went to his house crying and woke him up. She said she had been beaten by her mother and chased away, so she had decided to go to him. He reluctantly let her in because she threatened to take away her life. They slept together and had sex. The next day he left home early to go to work thinking that the girl would go back to her home. However upon his return later he found her still asleep, so he allowed her to sleep on. That is how the next day police found both of them inside the house.
8. The trial magistrate in his judgment noted that there was disparity regarding the girl's age but opted to believe the mother's evidence about her age saying it was clear and concise rather than the medical evidence, saying that age assessment was merely an estimate based on speculative considerations.
9. In contesting the findings of the trial court, one of the major issues the appellant raised was that he was not accorded a fair trial because the trial magistrate denied him the opportunity to get an advocate to represent him.
10. He also complained that the trial magistrate did not resolve the issue of the contradictory age of the complainant in a satisfactory manner.

11. Mr. Oluoch on behalf of the state concedes this appeal pointing out that on 5th October 2015, the appellant is on record as requesting for more time so as to hire an advocate to represent him as he had only come out of prison on 1st October 2015, but the trial magistrate ignored his request and proceeded to take the evidence of a witness.

12. Mr. Oluoch admitted that such refusal amounted to a gross violation of the appellant's trial. He also pointed out that a retrial was not viable due to the fact that the prosecution presented two different ages of the complainant as assessed by two different medical personnel who did not testify to confirm the correct version, so a retrial would not cure that gap.

13. I have perused the trial court's record and confirm that on 05/10/2015 the appellant stated:-

“I would wish to have more time so that I can engage an advocate. I only came out of prison on 1/10/15.”

14. The trial magistrate's response was:-

“The accused person shall have time to engage (sic) advocate in the matter any time he wishes. The court cannot however turn away a minor who is present in court and not in school today.”

15. Whereas the trial magistrate had very noble considerations about the complainant's academic well being, it must be pointed out that the girl was the star witness – the complainant/victim and it was crucial that if the appellant was desirous of engaging legal counsel, he should have been accorded that chance especially bearing in mind that the offence carried very harsh sentence upon conviction.

16. **Article 50 (2) (g)** provides that-

“(2) Every accused person has the right to a fair trial which includes the right –

(g) to choose, and be represented by an advocate and to be informed of this right promptly.”

17. Indeed as pointed out by Mr. Oluoch the right to a fair trial is so fundamental that under **Article 25 (1)** of the **Constitution** it cannot be limited.

18. Would a retrial be an option to address the situation? I think Mr. Oluoch was ably showed it up that age is a fundamental ingredient in defilement so it was necessary to satisfactorily resolve the contradiction by calling the two makers of the documents – none of them testified. A retrial will not cure this.

19. Consequently I am satisfied that the appeal is properly conceded and I allow the appeal by quashing the conviction and setting aside the sentence forthwith. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 28th day of March, 2017 at Homa Bay.

H.A. OMONDI

JUDGE