



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 43 OF 2016

WILLIAM OMONDI ALIAS LOKETO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. K. B. Kiptoo RM) dated 8th September 2016 in Maseno SPMCCRC No. 1798 of 2015]

JUDGMENT

The appellant was convicted and sentenced to serve fifteen years imprisonment for defiling a child aged 16 years Contrary to Section 8(1) and 8(4) of the Sexual Offences Act.

The charge reads that on diverse dates between August to 12th October 2015 at [Particulars withheld] area within Vihiga County he intentionally caused his penis to penetrate the vagina of **S N W** a child aged 16 years. The charge also has an alternative charge of indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.

The complainant then aged sixteen years and in class six at [Particulars withheld] Primary School stated that she met the appellant, a musician, in her home area and that he asked her to become his wife and to accompany him to his home in [Particulars Withheld] . She agreed and they went to his home where they stayed for four days within which they had sexual intercourse as would a married couple. Her stay ended on a Sunday when she accompanied the appellant's mother to Church where she met one Mercy who asked her to go to Maseno with her. When they went the said Mercy abandoned her.

She then met a boy called Ounga and they went to his home. It was there that they were arrested. She ended up being taken to Court as a child in need of care and protection where she disclosed what had happened. On 14th October 2015 police officers took her to Emuhaya Sub-County Hospital for examination. According to John Shikhali ((PW2), the Clinical Officer who produced her P3 form, the examination revealed that she had a sexually transmitted disease (STD) and that she had indeed been defiled. She was also eighteen weeks pregnant. After the examination she seems to have been taken back to a Juvenile Remand Home because according to the the Clinical Officer she was taken back to the hospital on 20th November and upon examination it was discovered that she had had a miscarriage. It was established that she had taken some tablets in the juvenile home. The Court also heard that upon being arrested on 13th October 2015 the appellant was taken to the same hospital for examination and it was found that he too had the same sexually transmitted disease (STD) as the complainant. Apart from the P3 forms (of the complainant and the appellant) this witness produced treatment notes prepared by a colleague who could not be called or procured without causing undue delay to the trial.

On being put on his defence the appellant who made an unsworn statement narrated how on 11th October

2015 police officers went to his house at 10PM and after saying who they were forced their way in and arrested him. They took him to the police station and four days later took him to Emuhaya Hospital for examination. He asked the doctor what he was testing after which he was taken back to Luanda Police Station and then to Court. He denied the charges.

His grounds of appeal are -

“1. That I pleaded guilty to the charge.

2. That the learned trial magistrate erred in both laws and facts to convict me without considering tht section 198(4) of the C.P.C. was not complied with.

3. That the learned trial magistrate erroneously convicted me by failing to find that the facts of the matter were not read to me before the sentence.

4. That the learned trial magistrate erred in law by failing to give me adequate time to prepare my defence.

5. That the decision was harsh and excessive as a whole.”

It is however noteworthy that he did not plead guilty to the charge. To the contrary he was convicted after a trial in which the prosecution called three witnesses and as I have stated he made an unsworn statement.

At the hearing of this appeal he relied on some home made written submissions where he admits taking the complainant for a wife but states that he believed she was older as she was already pregnant. He reiterated this in his oral submissions.

The prosecution opposed the appeal. Mr. Muia, Prosecution Counsel, submitted that the ingredients of the offence were proved and that an age assessment report was produced to prove the victim's age. He urged this Court to dismiss the appeal.

By his own submissions the appellant admits that he defiled the complainant which makes it unnecessary to go into the veracity of the evidence tendered. I must nevertheless state that like the trial magistrate my finding would have been that the appellant indeed defiled the complainant. However the issue for determination in this appeal, given the appellant's submissions, is whether he was indeed misled into believing that she was above eighteen years hence capable of giving consent.

Section 8(5) of the Sexual Offences Act affords a defence to an accused person if -

“a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) the accused reasonably believed that the child was over the age of eighteen years.”

Sub-section 6 provides that the accused's belief must be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

At the trial the appellant vehemently denied defiling the complainant and clearly his allegation that he believed she was much older is just an afterthought. In any event for there to be a defence under Section 8(5) there must be evidence that the child deceived the accused person into believing she was over eighteen years and that the accused reasonably believed her. There is no such evidence in this case. Even though she was pregnant when he went with her this does not fit the description of deception in section 8(5)(a) referred to above. Moreover he has not told this Court that he took any steps to confirm her age. If there was any deception regarding her age he would have brought this out at the trial. He did not raise it even in cross-examination and I find that it is an afterthought. Even had he raised the issues he raises

now at the trial it would not have been a defence because as I have stated there is no evidence the complainant deceived him. His petition of appeal also made no reference to this.

Accordingly, I find the appeal has no merit and dismiss it. The sentence of fifteen years imposed for the offence is upheld.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Accused in person

Interpretation: English/Swahili

Court Interpreter: Serah Sidera