



REPUBLIC OF KENYA

IN THE HIGH COURT

OF KAKAMEGA

HCRA NO. 102 OF 2015

HENRY WANYINYA ESHIRAMA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Arising from the judgment of Hon. M.I .Shimenga in Criminal case

No. 304 of 2014 at Senior Principal Magistrate's court at Butere)

J U D G M E N T.

1. **Henry Wanyinya Eshirama** the appellant herein was charged with the offence of defilement contrary section 8(1) as read with section 8(3) of the Sexual Offence Act no. 3 of 2006 . The particulars being that the appellant between April and 20th July , 2014 [*particulars withheld*] Kakamega County intentionally caused your penis to penetrate to vagina of F E a child aged 15 years .

He faced an alternative count of committing an indecent act with a child contrary section 11(1) of the Sexual Offence Act No. 3 of 2006 . Particulars being that between April and 20th July 2014 [*particulars withheld*] within Kakamega County , intentionally touched the vagina of F E a child aged 15 years with his penis

2. He pleaded not guilty and the case proceeded to full hearing after which he was convicted of the alternative count and sentenced to ten (10) years imprisonment . He has appealed against both conviction and sentence . He raised the following grounds ;-

- i. THAT the trial court convicted him yet the evidence on record was uncorroborated, fabricated and had malice .
- ii. THAT there was no proof of age of the complainant.
- iii. THAT the trial court acted without jurisdiction.
- iv. THAT the trial court did not consider his alibi defense which was cogent enough to exonerate him from any wrong doing
- v. THAT the medical report produced was not credible .

vi. THAT the trial court admitted the evidence of a minor unprocedurally .

3. When the appeal came for hearing the appellant relied on written submissions . He discredits the evidence of the complainant(PW1) as being a forced confession by her father (PW2). Further he argues that PW1's age was not established as a baptismal card is not an authentic document .He finally stated that he was not given witness statements prior to the hearing .

4. This appeal was opposed by the State through Mr. Juma , who submitted that their case was proved to the required standard . He argued that age may be proved by oral or documentary evidence and a baptismal card had been produced in this case . That penetration had been proved by the doctor's evidence (PW4) and the PW3 form.

He further submitted that it was the appellant who caused the penetration. The reason was that besides the examination and lab tests the doctor found both to have the same sexually transmitted infection. This therefore confirmed PW1's testimony .

5. A summary of the case is that PW1 and the appellant hail from the same village . The appellant and PW1 (a minor) were friends for a few months and they had become intimate .

They would meet behind the toilet at PW1's home at night and engage in sex. Once before this incident PW1 had gone to the appellants' home at night and they had engaged in the act . PW1 used to sleep in the kitchen .

6. On this night of 20th July , 2014 , PW1's mother was not at home. She was asleep in the kitchen when the appellant went for her and they went to his home , and they had sex in his bed. She was there upto 5 am when the appellant took her back . Unknown to her , her father (PW2) had come looking for her in the kitchen that night and found her missing .

He again checked early morning and found her there . On asking where she had been she explained that she had been at the appellant's home . He called the mother and informed her.

7. Upon being interrogated by the mother she told her of her relationship with the appellant . A report was made to her school and later to the village elder (PW3) . PW2 took her to hosp[ital where she was treated and examined by the Clinical Officer (PW4) . The tests revealed that she had a Sexual transmitted infection and was placed on medication(PEXB 3).

The appellant was later arrested and taken to hospital for examination.It was found that he had a sexually transmitted infection similar to the one found on PW1 (EXB5).He was then charged .

8. The appellant in his sworn defence denied the charge . He said he was framed and the evidence given was false .

He confirmed that him and PW1 were both examined at Butere District Hospital.

9. This is a first appeal and this Court has a duty to reconsider the evidence and arrive at its own conclusion . I should also bear in mind that I did not see or hear the witnesses .

See **Okeno vs R 1972 EA 32, Njoroge vs R 1989 KLR 313.**

The Court of Appeal in **Mwangi vs R (2004) 2 KLR** on the duty of the first appellant court stated thus:

“It is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported . In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness”.

10. I have considered the evidence on record , grounds of appeal and the submissions by both parties . In his ground No.2 the appellant stated that the trial court had no jurisdiction to handle his case. Section 7 (1) (b) of the Criminal Procedure Code provides :-

“ A resident magistrate may pass any sentence authorized by law for an offence under section 278 , 308 (1) or 322 of the Penal Code or under the Sexual offences Act 2006 “.

That grounds fails because the trial Court had jurisdiction to deal with the case.

11. He also complained that he had not been informed of the evidence to expect before hand. This is usually done through the supply of witness statements. The record shows that on the first time the appellant appeared for plea on 24th July, 2014, the Court made an order for him to be supplied with witness statements and documentary exhibits . The appellant never complained to the trial Court of failure by the prosecution to comply with this order. It was and is assumed that these were supplied to him.

12. PW1 and her father PW2 were sure of the minor’s date of birth as 3rd June, 1999. A baptismal card was produced and it confirmed that (EXB1).The appellant has not claimed he believed PW1 to be much older than that . The trial court found the minor to be aged 15 years as at the time of the offence .The issue of age is therefore settled .

13. On whether there was penetrative sex between PW1 and the appellant the answer is in the affirmative even though the learned trial magistrate found otherwise . PW1 said they were friends since April – July, 2014, when the father discovered she was not where she used to sleep . She explained all this to her teacher and PW4 the Clinical officer who examined her. Since this was not the first time they were engaging in sex, not much could be revealed as expected by the trial court. Of significance was the similar sexually transmitted infection which was found in both PW1 and the appellant . It was not a coincidence .

The witness PW4 made a finding , confirming penetration and I fully agree with him. The appellant ought to have been convicted of the principal count since PW1 was a minor .

14. Since the State in its wisdom did not request for the enhancement of the conviction and sentence I cannot enhance it . In such cases the State is expected to file a Notice of such intention and the said notice must be served on the appellant for his information and his necessary action.

15. No evidence was adduced nor was any reason given to show that the charge was fabricated . PW1 explained her relationship with the appellant and what they had been doing . No one coerced her into confessing anything . She was clear from the word go that it is the appellant with whom she had been doing these things – behind their toilet and in his house .

16. I have reconsidered all the evidence on record and I am satisfied that the appeal lacks merit and I dismiss it .

I confirm both the conviction and sentence.

Orders accordingly

Delivered , signed and dated this 31st day of August ,2017 at Kakamega

H.I. ONG’UDI

JUDGE