



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 14 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court Sexual Offence Case No. 33 of 2016 delivered by P. Biwott, Senior Principal Magistrate on 15/2/2017)

PETER WAFULA WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Peter Wafula Wanjala** “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 being that the appellant on **diverse dates between 1st July, 2015 and 31st October 2015 within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of S W a child aged 16 years.**

He faced an alternative count of committing an indecent act with a child under the same Act.

2. The case proceeded to full hearing and the appellant was convicted of the principal count and sentenced to serve 15 years imprisonment. Being dissatisfied with the judgment he filed this appeal citing the following grounds:

- i) That the trial magistrate erred in law and fact by failing to note the evidence adduced in court was majorly by PW1 and PW2 who are members of the same family.**
- ii) That the trial magistrate erred in law and fact by convicting the appellant basing on evidence which was wholesome hearsay.**
- iii) That the trial magistrate erred in law and fact by considering the evidence of PW1 that she was pregnant without a medical report to prove the same beyond any reasonable doubt.**
- iv) That the trial magistrate erred in law and fact by failing to note that the appellant was not medically examined.**
- v) That the trial magistrate erred in law and fact by rejecting his defence without any cogent reason hence shifting the burden of proof to the appellant.**

3. During the hearing of the appeal the appellant relied on his written submissions. In as much as he relies on his grounds of appeal he has written submissions on mitigation. He is asking the court to reduce the sentence or give him an alternative sentence.

4. The State through Mr kakoi opposed the appeal. He submitted that the age of the complainant was proved to be 16 years. He further submitted that pw1 very well explained her relationship with the appellant. That he was arrested after they had lived together for 2 months, as they engaged in sex. Infact she claimed to have been married to the appellant. By the time she left she was 6 months pregnant, and she delivered on 5th April 2016. There is therefore a child born out of their actions.

Mr. kakoi reluctantly supported the conviction.

5. The case before the court was that **PW1 (N M)** then aged 16 years was relating with the appellant. In July 2015 she went to the river to wash clothes, when the appellant met her there and asked her to go to his home. She agreed and they went to his mother's house and slept on her bed, where they engaged in sex which was not forceful. When they were through she returned home and did not mention anyone.

6. On 7th August 2015 she again went to the river to fetch water, and met the appellant and his brother Deno. They advised her to throw her water container in the maize farm, and board the appellant's motorbike which she did. He took her to his grandmother's place in Misikhu where they arrived at 9.00 pm and slept. They again had sex and she remained there for 2 months, actually married. One day Deno came and informed them that her mother had reported them to the police.

7. On hearing this the appellant gave her Shs 400/- and she went home to her parents. She was taken to hospital (Exhibit 1) and found to be pregnant. The matter was reported to the police and she was sent to hospital and her age was assessed (Exhibit 2).

In cross-examination she stated that the appellant had married her and his relatives saw them living together as such. Later the appellant told her he already had a wife.

8. **PW2 J N W** is PW1's mother . She testified that PW1 was born in 1999. On 7th August 2015 she noticed that PW1 was missing. She did not return until 1st October 2015. She had first reported the matter to Saboti police on 24th August 2015. PW1 explained where she had been and PW2 knew the person she had been with and she informed the police. It was confirmed that PW1 was pregnant. Statements were recorded and the appellant was arrested.

9. **PW3 Elly Wamalwa** the clinical officer who examined PW1 confirmed that she was 6 months pregnant as at 1st October 2015. (Exhibit 1)

PW4 PC Rose Sabul the investigating officer said she charged the appellant for defiling PW1 who was now pregnant.

10. The appellant in his unsworn defence denied the charges. He stated that between 1st July 2015 to 30th October 2015 he was in his home in Saboti. That PW2 was his neighbour, with whom he had a boundary dispute and was surprised at the allegations levelled against him.

11. This is a first appeal and I have a duty to re-evaluate all the evidence on record and arrive at my own conclusion while bearing in mind that I did not see or hear the witnesses. I am guided by the case of **Boru and Another Vs Republic [2005] 1 KLR 649** where the court of Appeal held:

“ 4. A duty is imposed on a Court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with questions of law raised on the appeal.”

12. I have considered the evidence on record, grounds of appeal plus the submissions by both parties. The issues this court has to determine are:

(i) Whether PW1 was a minor.

(ii) Whether sexual penetration was proved.

(iii) If (ii) is in the affirmative whether it is the appellant who did it.

Issue No. (i) whether PW1 was a minor.

PW1 testified on 22nd June 2016 saying she was 16 years old. Her mother reiterated that and added that she was born in 1999.

PW4 produced an age assessment report dated 22nd February 2016 (Exhibit 2) It showed that PW1 was aged 16 years. The report corroborated the evidence of PW1 and PW2 on age.

Issue No. (ii) whether sexual penetration was proved.

13. When examined after reporting she was found to be pregnant, and gave birth to a child on 5th April 2016. The fact of the pregnancy is a confirmation that there was penetration of her vagina. I wish to however make an observation that at 1st October 2015 pw1 must have been 3 months and not 6 months pregnant as stated by PW3. Had she been 6 months pregnant as stated she could have given birth in December 2015, but she gave birth on 5th April 2016 which falls within the dates given in the charge sheet.

Issue No. (iii) If (ii) is in the affirmative whether it is the appellant who did it.

14. PW1' s evidence is that she related with the appellant intimately. Finally on 7th August 2015 she disappeared from home with the appellant upto his grandmother's home. They lived as husband and wife in a room given to them by the grandmother. She decided to leave when she learnt that the appellant had a wife. She went back to her parents and narrated to her mother (PW2) where she had been. PW2 took her to hospital where it was confirmed she was pregnant.

15. PW1 and PW2 knew the appellant as a neighbour. He took PW1 away to his grandmother's home. The appellant in his defence stated that he was framed up by PW2 because of a boundary dispute. He never put these issues to the witness (PW2) during cross-examination. I take it to be an after thought.

16. The appellant had made PW1 believe that he had indeed married her. There is no reason why PW1 would frame up the appellant, on this.

The appellant did not plead a defence under **Section 8(5) of Sexual offences Act No. 3 of 2006**. His was a total denial of the offence.

17. PW1 was credible and trustworthy. She innocently believed this man to have married her. When he later on after using her told her he had a wife she returned to her parents, she was aged 16 years at the time hence a minor.

18. The proviso to **Section 124 of the Evidence Act** states:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, no reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The evidence of PW1 is sound and solid. It was safe for the trial court to rely on it to convict the appellant who was given the minimum sentence under the **Section 8(4) of Sexual Offences Act No. 3 of 2006**.

19. The upshot is that the appeal lacks merit and it is dismissed.

Orders accordingly.

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

H. ONG'UDI

JUDGE

In the presence of:

M/s Kakoi for Respondent

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

31/8/17