



REPUBLIC OF KENYA
IN THE HGIH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE NO. 91 OF 2013

(Being an appeal arising from *Kitale Chief Magistrate's Court Criminal Case No. 2849 of 2012* delivered by *S.K. Ng'etich Senior Resident Magistrate on 2/8/2013*)

ISAAC WAMALWA INDEGEAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. **Isaac Wamalwa Indege** was charged and convicted of the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006**. The complainant was aged 12 years. He was sentenced to 20 years imprisonment. Being aggrieved by the judgment, he filed this appeal raising the following grounds:

- i) That the learned trial magistrate erred in law and facts to convict the appellant in the absence of any documentary evidence about the age of PW2, the complainant. The age of PW1 was completely doubtful before the court and the prosecution side failed to prove the age of PW2.**
- ii) That the learned trial magistrate erred in law and facts to convict the appellant yet the evidence of PW2, PW1, PW3 and PW4 was completely full of grave contradictions that were unworthy and unreliable.**
- iii) That the learned trial magistrate erred in law and facts to convict the appellant without recognizing**

that the clinical officer's findings after examining PW2 indicated that there was no penetration occasioned by appellant to the complainant (PW2) as per treatment notes.

iv) That the learned trial magistrate erred in law and facts to convict the appellant without noting that PW2 was not found in the house as alleged but in town at Laini Moja whereby PW2 conducted her activities at the same place.

v) That the learned trial magistrate erred in law and facts to convict the appellant yet the evidence from the person who arrested the appellant did not come to court through the summon of the prosecution side to shed light on the arrest of appellant under which the prosecution side failed to prove the case beyond any reasonable doubt.

vi) That the learned trial magistrate erred in law and facts to convict the appellant yet the investigating officer failed to carry out proper investigations including visiting the scene of crime and interrogating neighbours to ascertain the allegations.

2. When the appeal came up for hearing the appellant relied on his written submissions. The first issue he raises is on the age of the complainant where different ages were given by PW1 and PW2. That no reliable document was produced to ascertain the age. He argued that there was no evidence of recent penetration of PW2.

3. He also submitted that the lacerations she had could have been as a result of long walking, or she scratched her genital herself.

He dismissed the clinical officers examination as being sub standard and unreliable. To him PW2 was an unreliable witness. Failure to interview the neighbours and visit the scene was a serious omission by the investigating officer he said.

4. Mr Kakoi for the State submitted in opposing the appeal that age was assessed at 12 years. Above all and for purposes of sentencing PW2 was found to be aged below 15 years. He argued that PW2 was at the appellant's house for 4 days where she was engaged in sex. The mother (PW3) traced her in town and she explained where she had been. The landlord of the house confirmed that the appellant was the tenant. In his view penetration was confirmed by medical evidence.

5. A summary of the case is that PW2 a minor aged 12 years did not come back home on 13th November 2012. The mother (PW3) looked for her in vain. On 18th November 2012 PW3 came to town for an ODM campaign rally. She found PW2 at Laini Moja and she was wearing different clothes. Upon interrogating her she showed her the house where she had been staying. She also told her she had been staying with a boy who had promised to marry her. The house was in "Mitume".

6. **PW3** reported to the police the next day and took her to hospital. Later the appellant was arrested. The witness stated that they had gone back to the appellant's house later and recovered the complainant's clothes. The landlord had also confirmed that the appellant was his tenant.

7. **PW2 (C.N)** the complainant aged 12 years testified that the appellant had been seducing her and promised to marry her. On 13th November 2012 she went to the appellant's house where she stayed for four (4) days as his wife. During the period of stay she engaged in sexual intercourse with him for one day. He would undress her then cause his penis to penetrate into her vagina. PW3 found her on the road and took her to the police and then to hospital. She identified the appellant as the person who took her to his house and had sex with her.

8. **PW1 Kirwa Labatt**, a clinical officer examined PW2 and he found lacerations on the girls lower vagina wall and her hymen was broken but not fresh. Lab tests showed the presence of pus cells in the urine. He produced the P3 as an exhibit (Exhibit 1) plus the post rape case form (Exhibit 2). He clarified that the lacerations confirmed forceful penetration. He stated that a broken hymen could take 2 weeks to heal.

9. **PW4 Dr Ken Ndege** is the dentist who examined PW2 for age assessment. He found her to be 12 years of age (Exhibit 2), and explained that his report was an estimation.

PW5 PC Caleb Yator investigated the case. He received the appellant from the village elder, PW2 and PW3. He sent PW2 for treatment and examination and age assessment. He did not visit the scene but relied on the evidence of the complainant and the medical evidence.

10. The appellant gave an unsworn statement of defence. He testified that he stays in Moi's Bridge and operated a butchery there. He was arrested for causing nuisance in eh Moi's Bridge town. He was taken to a juvenile remand home and later charged. He was surprised to see PW2 as the complainant as he had never seen her nor been in Kitale.

11. This being a first appeal this court has a duty to re evaluate the evidence and come to its own independent conclusion. Its to be borne in mind that this court did not see nor hear the wittinesses. **See Okeno v Republic 1972 EA 32**

Kinyanjui V Republic [2004] 2 KLR 364

12. Having considered all the evidence on record together with the grounds of appeal and both submissions I find three issues falling for determination namely:

- i) Age of complainant
- ii) Whether there was sexual penetration
- iii) Whether the appellant was the perpetrator of the

penetration if (ii) is in the affirmative.

Issue No. (i) Age of complainant

13. PW2 said she was 13 years while the mother (PW3) said she was born on 2nd February 2000 and so was 12 years. An age assessment was done by Dr . Ndege (PW4) who found her age to be 12 years. He added that this was an estimation. The offence is alleged to have occurred on diverse dates between 13th November 2012 and 17th November 2012.

If indeed the child was born on 2nd February 2000 then she was 12 years 9 months and 12 days which is not far from 13 years. The age assessment by PW4 is also an estimation.

For the purposes of this case PW2 was a minor aged between 12 – 13 years. This age falls in the bracket provided for under Section 8(3) of the Sexual Offences Act No. 3 of 2006, under which the appellant was charged.

Issue No. (ii) Whether there was sexual penetration

14. It was PW2's evidence that on the diverse dates she was in the man's house, he had sexual intercourse with her just once. At another point she explained what he used to do to her for the period she was there. She was traced by her mother on 18th November 2012 and taken to the police and hospital. PW1 examined her and did the P3 form .

His findings were:

- No physical injuries.
- Vagina had lacerations on the lower vagina wall
- Hymen broken but it was not fresh.
- Urine had pus cells

His finding confirmed that there had been penetration. This report corroborates PW1's evidence that she had indulged in sex. I therefore find that there was penetration.

Issue No.(iii) Whether the appellant was the perpetrator of the penetration if (ii) is in the affirmative.

15. PW2 explained she had met the man she had stayed with as his wife for four (4) days, and she identified him as the appellant. She testified that he had seduced her and told her he wanted to marry her. So she took herself to him on 13th November 2012.

PW3 bumped into her on 18th November 2012 at Laini Moja, and she was wearing different clothes. She showed her the house she had been living in with a boy who had promised to marry her. The house was in Mitume . She reported the next day, and later went with officers and they found PW2's clothes in the said house. The landlord also confirmed that the appellant was his tenant.

16. In cross-examination by the appellant PW2 gave the following responses which I find to be important - They are at page 12 lines 3-8

“ I know you well. We first met at Mitume stage and started talking to me. We used to meet and talk on the road. I came to your house voluntarily. First I was going to the house of my aunt but seems she had moved out. You then took me to your house. There was close neighbours to your house. I did not shout though I did not like the act. Nobody saw me in

your house. In the four days I would get out to take a walk but came back later. I was found in town by my mother.”

I find these to be very sincere and straight forward answers. She did not mince her words. I agree with the finding by the learned trial magistrate at page 41 lines 17-23 when he states;

“ The evidence of the alleged victim implicating the accused was credible. She demonstrated that she knew the accused very well because he had seduced her before with a promise to marry and finally she voluntarily went to the house of the accused and stayed for four days as the accused's wife until she was found and rescued by her mother. She appeared frank and confident in her evidence even when challenged by the accused during cross-examination.”

17. This child innocently believed the appellant's sweet words. Her clothes were found in the appellant's rental house. This confirms PW2's truthfulness.

- In his defence the appellant denied the charge and explained how he was arrested. He did not say anything about the dates he is alleged to have been defiling PW2 in a house in Mitume. Staying in Moi's Bridge in itself does not mean he could not be renting a house in Kitale for other activities.

18. Section 124 of the Evidence Act provides;

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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 persons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

This was a sexual offence and the learned trial magistrate gave reasons why he believed that PW2 was telling the truth. I have read the record and I am satisfied that he arrived at the correct decision.

19. The 20 years imprisonment is the minimum sentence under Section 8(3) of Sexual Offences Act No. 3 of 2006.

20. The upshot is that the appeal has no merit. I dismiss it and uphold both conviction and sentence.

Orders accordingly.

Delivered, signed and dated on 30th day of August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of:

Ms Kagai for Mr. kakoi for State

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

30/8/2017