



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 2 OF 2016

(Being an appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 3888 of 2014 delivered by C.N. Mugo Resident Magistrate on 21/01/2016)

KENNEDY WAFULA WANJALAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. **Kennedy Wafula Wanjala** was charged and convicted for the offence of **defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 OF 2006**. The particulars were that the appellant on **4th day of October 2014 [particulars withheld]** within **Trans-Nzoia County, intentionally caused his genital organ namely penis penetrate the genital organ namely vagina of B.N.S. a child aged 17 years.**

2. He had denied the charge together with an alternative count of indecent act with a child contrary to Section 11(1) of the same Act. The case proceeded to full hearing and he was found guilty, convicted of the principal count and sentenced to 15 years imprisonment.

He has appealed against the judgement citing the following grounds:

i) That the learned trial magistrate erred in law and facts to convict the appellant without recognizing that the appellant was a minor aged below 17 years at the commission of offence, and at sentencing which violated Children's Act as well as the Sexual Offences Act Section 8(3) which denote 16-17 years as minors age group.

ii) That the learned trial magistrate erred in law and in facts to convict the appellant yet the medical /clinical examination findings clearly indicated no signs of alleged penetration and age of PW1 was completely doubtful.

iii) That as per the evidence adduced through the clinical report , the main charge of defilement is deemed non-existent making the charge sheet fatally defective under Section 214 (1) (2) (3) of Criminal Procedure Code.

iv) That the trial magistrate erred in law and in facts to convict the appellant within grave contradictions and inconsistencies of the prosecution witnesses.

v) That the trial magistrate erred in law and facts to shift the burden of prove to the appellant yet the evidence adduced in court was completely doubtful especially PW1, PW2,

PW3 PW4 and PW5.

vi) That the learned trial magistrate erred in law and in fact to convict the appellant yet the prosecution side failed to prove their case beyond any reasonable doubt as required by the law.

3. When the appeal came for hearing the appellant relied on his written submissions. He submitted that the first issue he raised when he appeared for plea was that he was aged 17 years. This was never pursued by the trial court, to safeguard his rights. He argued that the complainant was over 18 years by all standards. That it took a long time before pw1's age was assessed, and the court had to intervene, for that assessment to be done.

4. It was his submissions that pw1 was examined 2 days after the alleged incident and there was no sign of recent penetration and there were no spermatozoa traced in the tests done.

Finally he submitted that there were major contradictions in the evidence of PW1 and PW2.

5. Mr Kakoi for the state submitted that there was clear evidence of penetration in the appellant's house. PW1 was rescued by her brother (PW2). He was arrested while in the act so identification was not an issue. The State had a problem with age as the only document produced was an assessment report which normally has a margin of error. He asked the court to invoke Section 179 of Criminal Procedure Code and convict for rape.

6. The prosecution called a total of 5 witnesses.

PW1 B.N.C. testified that on 4th October 2014 at 7 pm she was sent to the shops by her mother. She met the appellant on the way and he took her to his house by force, and had sexual intercourse with her. She screamed and her brother (pw2) and Mark Wafula came and pushed the door open. The appellant had pushed her under the bed as he tried to hide behind the door. PW1 stated that PW2 and Wafula took her and the appellant to her home where both of them were beaten. She then went for treatment the next day and reported the incident to the Police. She testified that she was 16 years at the time of incident.

7. **PW2 C O** is a brother to PW1. He stated that on the date in issue he was at home and his mother who was sick had been taken to hospital. He went to see her and he was at the hospital until midnight. When he returned home he did not find PW1 there.

He started looking for her, when he heard a girl screaming in the appellant's house. When he knocked he found PW1 and the appellant sitting on the bed. This was around 2.00 am and he went with PW1 home. The next day he got a letter from the headmaster of the school where PW1 was studying and he took it to the police. He denied beating either PW1 or appellant.

8. **PW3 Pharis Silali** who examined PW1 for age assessment estimated her age to be 17 years. (Exhibit 3)

PW5 Francis Barchebo is the clinical officer who produced the P3 form (Exhibit 2) and treatment notes (Exhibit 1) on behalf of Dr. Kahindi. He said the girl PW1 was found to be aged 14 years, had a broken hymen as a result of penetration. There was also vaginal discharge.

9. The appellant in his unsworn statement of defence denied the charge. He testified that on 15th October 2014 8.00 am three (3) boys came to their home screaming and demanding for money. They beat him and his neighbour came. He went to Endebess police station to report and he was arrested and later charged. He stated that PW2 was one of the boys who had beaten him.

10. This is a first appeal. The duty of a first appeal court was clearly stated in the case of **Kiilu & Another v Republic [2005] 1 KLR 174** where the court of Appeal stated as follows:

“2 - An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

3- It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; 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 has had the advantage of hearing and seeing the witnesses.”

11. I have considered the evidence on record, grounds of appeal and the submissions to enable me arrive at my own conclusion. The issues to be determined are;

i) Whether PW1 was a minor

ii) Whether the appellant was a minor

iii) Whether penetration of PW1's vagina was proved.

(iv) If (ii) is in the affirmative whether it is the appellant who did not.

Issue No. (I) whether PW1 was a minor

12. It was PW1's evidence that at the time of the incident on 4th October 2014 she was 16 years. The charge sheet shows that she was 17 years by 4th October 2014.

The P3 form indicated her age as 14 years. An age assessment was done and her age was estimated at 17 years (Exhibit 3)

PW1 did not appear to know her date of birth as none was given. When she went to the hospital she gave her age as 14 years. In court she said she was 16 years, but the charge sheet talks of 17 years. The age assessment is not a conclusive determination of age. It has a margin of error. In brief the exact age of PW1 is not documented, in view of the contradictions.

Issue No. (ii) - Whether the appellant was a minor

13. When the appellant appeared in court on 8th December 2014 he informed the court that he was 17 years of age. The court ordered that he be taken for age assessment, which was done. A report was filed showing that he was 18 years old. This report formed part of the record as at 10th December 2014.

Issue No. (iii) Whether penetration of PW1'S vagina was proved.

14. PW1's evidence is that she was sexually penetrated on the night of 4th October 2014.

The treatment notes (Exhibit 1) show that PW1 was seen at Endebess District Hospital on 5th October 2014.

The tests done were all negative including presence of spermatozoa. The P3 form which was filled upon examination at the Endebess District hospital showed that she had a broken hymen and creamy discharge. This was on 6th October 2014.

This is also reflected in the treatment notes. It does not however show that the hymen was freshly broken.

The treatment (Exhibit 1) notes also show that there were no tears in PW1's genitals, but there were few

epithelial cells seen.

My finding is that there was sexual penetration of her vagina.

Issue No. (iv) If (iii) is in the affirmative whether it is the appellant who did not.

15. PW1 testified that she had been sent to the shops by her mother at 7 pm. The evidence of PW2 (her brother) is that their mother was sick and had been taken to hospital. PW2 went to hospital and they were there upto late in the night. Upon his return he did not find PW1 at home.

16. From this brief narrative its clear PW1 was not truthful about what she went to do in Sokomoko, at the shops. Her mother did not send her because she was not at home.

Why was she going to the shops at 7 pm when it was already dark? How did she move from the road to the appellant's home ? Its not explained . She says

“ I screamed and C found me at the house of the accused.”

17. PW2 heard screams and went to the appellant's house and found both PW1 and appellant sitting on the bed. This was around 2 am. He was alone when he went, there. PW1 had said PW2 went with one Wafula and she was found under the bed as the appellant hid behind the door. She also stated that both her and appellant were taken to her home where they were both beaten. PW2 disputed all this though the appellant said PW2 had beaten him.

18. It is therefore not clear as to who to believe between PW1 and PW2.

The Court of Appeal in the case of Kiilu V Republic [2005] 1 KLR 174 ..stated this of such a witness:

“ The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

19. I found PW1 to have lied about her age and being sent by her mother to the shops at 7 pm. Its not clear who between PW1 and the appellant was lying on the issue of rescue by PW2 and Wafula and the beating of both PW1 and the appellant . These may appear small matters but they go to the credibility of the witnesses.

20. PW1 stated the following at page 15 lines 3-7;

“I screamed and C and Mark Wafula came and pushed the door and they held the accused and Put him outside, they found us in the act but he had pushed me under the bed and tired to hide behind the door. They took us to my home where we were both beaten.”

When pW2 testified he refuted all this. These two witnesses are the key witnesses in this case but it appears there was something they hid from the court. I find them to be unreliable witnesses.

21. It is noted that PW2 did not mention anything about PW1's age. Why had PW1 to lie that she had been sent to the shops by the mother? The mother never confirmed or refuted it. The truth is that PW1 came to the shops that night for reasons best known to her.

22. Mr Kakoi asked the court to find that due to the uncertainty of age an offence of rape had been committed and the court should so find. I could only have agreed with him had I found that the penetration of PW1's genitals was forceful. The results from the hospital tell it. There were no tears, the breaking of the hymen was also not fresh. These with the other circumstances mentioned herein above make me come to the conclusion that PW1 could have been 18 years at that date of offence. Even if she

was not yet 18 years, she conducted herself in a manner that falls under the defence in Section 8(5) of the Sexual Offences Act No. 3 of 2006. She may not even have screamed but her brother (PW2) got wind of her presence at the appellant's house, hence the conflicting evidence between the two of them. I dismiss them as untruthful witnesses.

23. The upshot of all this is that the appeal has merit. It is allowed. The conviction is quashed and sentence set aside.

Appellant to be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on 29th day of August 2017.

H. ONG'UDI

JUDGE

In the presence of;

M/S 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

29/8/2017