



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE NO. 130 OF 2013

(Being an appeal arising from Kitale Chief Magistrate's Court criminal Case No. 490 of 2014 delivered by C.C. Kipkorir – Resident Magistrate on 28/11/2014)

ANTHONY BARASA LUGOVANIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. Anthony Barasa Lugovani “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 were that the appellant on the 26th day of April 2013 in Trans -Nzoia County, **intentionally caused his penis to penetrate the vagina of P. N. a child aged 17 years.**
2. He faced an alternative count of **committing an indecent act with a child contrary top Section 11(1) of the Sexual Offences Act NO. 3 of 2006**. The particulars were that on the 26th day of April 2013 in Trans -Nzoia County **intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of P.N. a child aged 17 years.**
3. He denied the charges and the case was heard. He was found guilty, convicted and sentenced to 15 years imprisonment.

Being aggrieved, he filed this appeal citing the following grounds:

- i) **That the trial magistrate erred in law and facts by convicting the appellant without observing the numerous contradictions from the evidence adduced in court by the prosecution witnesses.**
- ii) **That the trial magistrate erred in law and facts by convicting the appellant relying on the evidence of PW1, PW2 and PW3 which came from the same family.**
- iii) **That the trial magistrate erred in law and facts by convicting the appellant in the absence of the essential witnesses.**
- iv) **That the medical officer did not mention anything relating to the appellant with the alleged offence.**
- v) **That no DNA test was done to the child delivered by PW1 to prove the case beyond any**

reasonable doubts.

vi) That no mentioned clothes of PW1 was produced in court as the exhibit of the alleged offence.

vii) That the trial magistrate erred in law and facts by rejecting my defence without a cogent reason.

4. In his written submissions the appellant argues that the age of the complainant (PW1) was not established. That the number 0728***** alleged to be his was not authenticated, as he denied relating with PW1.

The appellant goes on to analyse pw1's evidence and submitted that she was not reliable and was a girl who went out to meet boys/men. She never screamed if at all she was forced. That what she told the court were lies because if she was a virgin as claimed then she should have bled.

5. He dismissed PW2's evidence as not being of much assistance. PW1 lied with her parents. PW2 (Mother of PW1) lied when she said she did not know of PW1'S pregnancy until October 2013, on 9th October 2010. PW3 (Father of PW1) only became aware of this pregnancy issue on 11th October 2013 8 pm when pastor Kajita told him. It was his submission that these witnesses were not truthful, and so asked the court to dismiss PW1's evidence as it has very many gaping holes.

6. Mr Kakoi for the State submitted that PW1's age was estimated at 17 years which is a borderline age. He argued that the prosecution needed more evidence e.g a birth certificate, school documents or clinic card. It was his submissions that age was not clearly proved.

Counsel stated that he had considered the conduct of the complainant who would make calls to the appellant. There was therefore a real girl/boy relationship. He submitted that the conduct of the complainant could be inferred to fall under Section 8(5) of the Sexual Offences Act .

7. A summary of this case is that PW1 who claims to have been born on 14th November 1996, met the appellant in October 2012, when she had been sent to a posho mill. They talked and he gave her his telephone number, 0728 *****. She used to call him using her mother's phone. In November 2012 they met at night in [particulars withheld]. They talked but the appellant was with friends, so she left for home.

8. On 26th April 2013 she was sent by the mother to buy fire wood, oil and baking powder at the shop. When at the shop she met the appellant and they talked and he told her to go to his house, and he would follow. Later he said he would go first. He did so as she waited for an hour. She went walking upto his house as she knew where it was and she found him in his one bed roomed house. She identified him using the light from his mobile phone.

9. He then held her hand, undressed her underpant and asked her to sleep which she did. He forced open her legs after pushing her skirt up. They had sex and he kept telling her not to scream. This was her first time to have sex, and she bled. She wore her pantie and they left. She never told anyone about this encounter, though her periods stopped coming. The pregnancy only started showing in September 2013. She was taken to the police station to report and to hospital for treatment. She delivered on 23rd December 2013. The appellant was arrested in March 2014.

In cross-examination she said the appellant forced her to have sex, with him.

10. The mother to PW1 who is PW2 said she only learnt of PW1's pregnancy in October 2013. PW1 never told her about it.

PW3 KW reported this matter to the police on 30th October 2013 and he took PW1 to Kitale District

hospital. She was seen and treated (Exhibit 1 & 2). Her age was also assessed (Exhibit 3) at 17 years. The appellant was then arrested on 3rd February 2014, at [particulars withheld] near a Video place. PW1 was present when he was arrested.

11. **PW4 Corporal Andrew Masai** and **PW5 APC Simion Busailey** confirmed the appellant's arrest.

PW7 Kirwa Labbat testified that when he examined PW1 on 31st October 2013 she was 28 weeks pregnant. He filled and signed the p3 (exhibit 1).

12. In his unsworn statement of defence the appellant testified that on 26th April 2010 went to his house, from a video shop where he worked and there had been no issues.

One day at 10.50 pm he was arrested by police officers who took him to the police station then to the court. He denied the charges, that were read to him.

13. This is a first appeal and this court has a duty to re-evaluate the evidence and arrive at its own conclusion. It has to be borne in mind that this court did not see nor hear the witnesses.

See Okeno V Republic 1972 EA 32, Soki V Republic [2004] 2 KLR 21, Kinyanjui V Republic [2004] 2 KLR 364.

14. I have carefully considered the evidence on record together with the grounds of appeal. I have equally considered the submissions by both parties. The issues I find to be falling for discussion are the following.

(i) Age of PW1.

(ii) Whether there was sexual penetration.

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

Issue No.(i) Age of PW1.

15. PW1 said she was born on 14th November 1996, while PW2 said she was born on 29th November 1996. PW6 present an age assessment report (Exhibit 3) showing that she was 17 years. In cross-examination he said the age assessment is usually an approximation. It is clear that the date of birth given by PW1 and PW2 is not the same. PW3 did not attempt to give any. There fore what is before the court is an approximate age of PW1.

16. I agree with Mr Kakoi that the court should have sought for more evidence e.g birth certificate, clinic card or baptismal card. Without that it is difficult to make a concrete determination on what the exact age of PW1 was at that time. I will address the issue later in the judgment.

Issue no. (ii) Whether there was sexual penetration.

17. The clear fact of pregnancy is a confirmation that PW1 was penetrated. So the answer to this issue is in the affirmative.

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

18. PW1 explained how her relationship with the appellant started in July 2012. She would meet the appellant every time she was sent to the shops by the mother. The appellant has denied any of the claims by PW1.

She would call him using her mother's phone on the telephone number he had given her. Since the

appellant denied all this there, one would have expected the Investigating officer to get data from the service provider to show whether indeed those calls had been made.

19. On 26th April 2013 is the day PW1 says she had her first ever sexual intercourse encounter. That this was with the appellant. When he asked her in cross-examination if she bled she responded saying that she did not know if she bled or not what an answer !

Further more she did not tell anyone about this encounter and her pregnancy. It is so surprising because she lived with her parents, and PW2 says she only discovered this two months before delivery.

20. PW3 said he reported this matter to the police in October 2013 and even the P3 was filled on 1st November 2013. It was not until February 2014 that the appellant was arrested and charged. It is not clear why it took a long time before the police acted, after receiving the report in October 2013. Further more PW1 gave birth on 23rd December 2013. Could the police have been waiting to have a DNA conducted on the newborn baby? This could not be the cause of the delay because it is no where indicated that a DNA test was ever done. Its also not stated that the appellant had fled and they were looking for him.

21. If indeed PW1 conceived on 26th April 2013 as she alleges what would have been her expected date of delivery? The delivery should have been in mid or late January 2014. It has not been indicated that she had a premature delivery. I find unanswered questions around that date of 26th April 2013.

22. By the time PW1 was testifying on 26th June 2014 she had already delivered. Why was a DNA test not done to confirm if indeed the appellant was the father? This is because he has denied paternity. More critically is the conduct of PW1 during the time she was relating with the appellant. She would make calls just to tell him she had chosen him, etc. Secondly when she was sent to the shops she would pass by him at the shop.

23. On this particular date of complainant, she was invited to the appellant's house. She remained at the shops late into the night just because she thought she had to go to his house. There is none who forced her to go there and she cannot say the appellant forced her to have sex with him. Her conduct was not the conduct of a minor and more so when the prosecution did not avail sufficient evidence to assist the court determine her correct age.

24. Upon considering all the circumstances of this case I have come to the conclusion that this case falls under the provisions of Section 8(5) of Sexual Offences Act No. 3 of 2006.

The said section provides:

“ Section 8(5) - It is a defence to a charge under this section 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.”

25. The appellant was PW1's boyfriend. Her conduct from what I have stated above would not make him suspect that she was a minor. Adding this conduct to the fact that her exact age could have been 18 years I find that she led him to believe she was 18 years and above. There is also no evidence of forced sexual intercourse. The issue of the product of their actions should be taken up by the children's department.

26. The upshot is that the appeal has merit and I allow it.

The conviction is quashed and sentence set aside.

Orders accordingly.

Delivered , signed and dated on 28th day of August 2017 in Kitale.

H. ONG'UDI

JUDGE

In the presence of;

M/s Kakoi for the Respondent

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

H. ONG'UDI

JUDGE

28/8/2017