



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 74 OF 2013

(Being an appeal arising from Kitale Chief Magistrate's court criminal case No. 2653 of 2011 delivered by J.M. Nang'ea Senior Principal Magistrate on 11/6/2013)

FELIX WAFULAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Felix Wafula** “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 on the diverse days of **13th August 2011 and 19th August 2011 in West Pokot County intentionally caused his penis to penetrate the vagina of EN a child aged 16 years**.

2. The appellant denied the charge and the case proceeded to full hearing. The prosecution called five (5) witnesses while the appellant gave a sworn statement of defence and called no witnesses. He was found guilty, convicted, and sentenced to 20 years imprisonment. Being aggrieved he has filed this appeal citing the following as his grounds of appeal:

i) That the trial magistrate erred in law and facts by convicting the appellant bearing in mind that he to proof his guilt of the alleged offence.

ii) That the trial court did not consider the uncollaborating evidence from PW1, PW2 and PW4 and about the age of the girl.

iii) That the trial magistrate erred in law and facts and by relying on the extraneous evidence adduced.

iv) That the trial court convicted the appellant without cogent and merit reason.

v) That the trial court did not prove the case beyond reasonable doubt hence shifting the burden of proof to the appellant.

3. When the appeal came for hearing the appellant relied on his written submissions in support of the grounds of appeal. He has raised the issue of the age of the complainant. He argues that PW1 was above 18 years at the time of incident. That the prosecution case was not proved beyond reasonable doubt. He pointed out the inconsistency in the dates of his arrest.

4. The State through Mr. Kakoi submitted that the prosecution was able to prove PW1's age as that of a

minor, and that there was sexual intercourse penetration, which was corroborated by the evidence of the clinical officer (PW3) . The only issue he had was on the sentence of 20 years when the minimum was 15 years and the court had not explained the reason for the enhancement.

5. The case presented by the prosecution was that PW1 was a pupil at [Particulars Withheld] Primary School in standard 7 and was aged 16 years. On 13th August 2011 the appellant his neighbour went for her at her school where she was having tuition. He had a motorbike and he took her to her aunt's place. At 8 pm he walked with her to another homestead, where he broke the door to a house and they entered and even spent the night there. She admitted that the appellant was her boy friend, and they engaged in sexual intercourse that night.

6. The next day they went back to the aunt's place. She stayed with the appellant for a week. He then took her to his brother Martin's place, and the next day the appellant came with a Kenya Police Reservist as he was under arrest. PW1 was taken away and they went to Kolongolo police station. She was examined at the hospital and they returned home. The appellant was released and arrested later by police. She confirmed that 13th August 2014 was not the first time for them to have sex.

7. **PW2 SW** is the father to to PW1. He produced the clinic card in respect of the complainant (Exhibit 1). He stated that PW1 used to stay with his sister CL. On 13th August 2011 C called and informed him that PW1 had disappeared from home. A report was made and later PW1 was found, and he found her at the police station with a boy from the neighbourhood.

8. **PW3 Linus Ligale** the Clinical Officer examined PW1 on 8th November 2011. he found that she had been sexually penetrated because of the torn hymen. He produced the filled P3 form (Exhibit 1).

PW4 Dr Kiprof Jonathan a Dentist examined PW1 and concluded that she was 16 years of age with a margin error of + or – 1 (Exhibit 2).

PW5 No. 85456 P.C. William Andayi was the investigating officer. He testified that C and G who are PW1's relatives had arrested the appellant. He investigated the case and charged the appellant.

9. The appellant gave a sworn statement of defence. He stated that on 7th November 2011 he was at home at Kolongolo when some people including a local Kenya Police Reservist (KPR) called Nicholas. They arrested him and took him to Kitale police station. PW1 who is a neighbour was later brought to the station and he was accused of defiling her, an offence he denied.

10. This being a first appeal I have the duty to re evaluate the evidence afresh to arrive at an independent conclusion. I should also bear in mind that I did not see or hear the witnesses and give an allowance for that. *See Okeno V Republic 1973 E.A. 32;*

Mwangi V Republic [2004] 2 KLR 28: Kinyanjui V republic [2004] 2 KLR 364.

11. I have considered the evidence adduced by the witnesses and the grounds of appeal. I have equally considered the submissions by both parties. It is the appellant's case that there are material contradictions in the prosecution case. I wish to analyse the evidence on record in the order of age, sexual intercourse penetration and identification of the culprit.

12. PW1 was living with a sister to her father in [Particulars Withheld]. This sister called C did not testify. PW1 testified that she was born on 27th November 1994. Her father PW2 said PW1 was born on 20th November 1993. He produced a clinic card (Exhibit 1). This card shows that PW1 was born on 28th November 1993. The age assessment done by PW4 showed PW1 to be aged 16 years. He produced the report as (Exhibit 2).

13. The offence complained of is said to have taken place on diverse dates between 13th August – 19th August 2011. If that is the position then the complainant was at that time aged 17 years 9 months and not

16 years as alleged by all the prosecution witnesses. In her own evidence PW1 told the court that the appellant was her boyfriend. On the day in question he picked her from school and took her to his aunt's place, a certain homestead, then his brother's place. They stayed together for a week before the arrest she said. When were they arrested?

14. The charge sheet shows the appellant was arrested on 8th November 2011, and was arraigned in court on 9th November 2011. PW3 Linus Kigale who medically examined PW1 said he did so on 8th November 2011. The treatment notes under OP No. 104118/2011 confirm that PW1 was taken to the facility by her father (PW2) on 8th November 2011, with allegations that she had been living with a boyfriend for more than a month.

15. The P3 Form Exhibit 1 is even more telling. The date and time of alleged offence is over written so as to read

“ 13th August 2011 to 19 August 2011”

It also shows that PW1 was sent to hospital on 8th November 2011, and the date the incident was reported was 7th November 2011, and not August 2011.

16. The only question I am asking is why the report only reached the police on 7th November 2011 when PW2 (as he said) had been alerted on 13th August 2011 by her sister of PW1's disappearance? Where had PW1 and appellant been from August 2011 to November 2011?

There is no evidence that they had disappeared. Persons by the names of Gand C who had allegedly arrested the appellant refused to come and testify.

17. There is no explanation for the arrest of the appellant on 8th November 2011 when according to PW1 they had been arrested in August 2011. There is also no reason why PW1 was being taken to hospital in November 2011 if indeed this incident occurred in August 2011.

18. Having established that PW1 was born in November 1993, I see a deliberate move to give the dates of incident in the charge sheet as August 2011 to show that PW1 was below 18 years. There is no evidence supporting the allegations that the incident occurred in August 2011.

19. By November 2011 PW1 was 18 years of age and was considered an adult. Her conduct of moving around with the appellant, running away, from school from her aunt's home can very well be captured under Section 8(5) of the Sexual Offences Act. That's why she was being taken around by the appellant who was introducing her to his relatives.

20. Having conducted herself in that manner and considering her age that was not 16 years in August 2011 but 18 years in November 2011 I find that the case of defilement was not proved.

21. I allow the appeal. The conviction is quashed and the sentence set aside.

The appellant shall be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated this 28th day of August 2017.

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

18/8/2017