



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 61 OF 2012

(Being an appeal arising from Kitale chief magistrate's court criminal case no. 219 of 2011 delivered by J.A. Owiti Senior resident Magistrate on 30/4/2012)

JULIUS KIBERENGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Julius Kiberenge** “the appellant “ faced a charge 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 diverse dates between **16th January 2011 and 18th January 2011** at **[Particulars withheld] Farm in Trans Nzoia County** internationally caused his penis to penetrate the vagina of **W O a child aged 16 years**.

2. The case proceeded to full trial and he was convicted and sentenced to 15 years imprisonment. Being aggrieved he filed this appeal citing the following grounds of appeal:

i) That the learned trial magistrate erred in law and in facts to convict, the appellant yet the evidence adduced in court by the clinical officer indicate clearly there was no penetration at all.

ii) That the learned trial magistrate erred in law and in fact to convict the appellant yet according to ground No. 2 above the charge sheet is fatally defective contrary to section 8(4) to attempt contrary to section 9(1) (2).

iii) That the learned trial magistrate erred in law and in fact to rely on erroneous and suspicious particulars of the offence in the criminal case whereby the dates of the offence are a misdirection and doubtful.

iv) That the learned trial magistrate erred in law and fact to convict the appellant in the absence of age documents for PW1 and more so there was no age assessment conducted by assessment of age expert or doctor to prove the age of PW1 beyond any reasonable doubt.

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

vi) That the trial court did not consider the time he spent in remand prior to passing judgement and sentencing.

3. On the date of hearing of the appeal the appellant through his written submissions argued that there was no penetration proved. He referred to the findings by the clinical officer. He also submitted that age was not proved as necessary documents were not produced. He further argued that there were contradictions in the evidence of the prosecution witnesses, which the trial court, did not consider. Finally he stated that he had a grudge against PW2 who had refused to pay back his money. That he had testified on this before the trial court.

4. The State through Mr Kakoi opposed the appeal. He stated that age had been proved through the evidence of PW1, PW4 and age assessment (Exhibit 1). That the act of penetration had also been proved by PW1, PW3 and PW5. He explained that pw3 had found the two in the act and PW5 had done the examination. On identification he submitted that the appellant was a herdsboy to PW1's family. The act was done in broad daylight. He submitted the appellant had been given the minimum sentence.

5. The case presented to the court was that, the appellant was a herdsboy for PW4 who is PW1's mother. PW2 is the house help of PW4. On 14th January 2011 PW1 who was then aged 16 years was at home with the appellant. The two of them agreed to have sexual intercourse. They chose to do it behind the house near the banana plantation. She explained how they went about it.

PW2 Getrude Wanjala found them in the act and reported to the mother (PW4).

6. **PW2** explained that on 18th January 2011 she was at PW4's home, and PW4 had gone to work. She was left home with PW1 and the appellant. She was going to get some soil and while at the gate she heard A (PW4's daughter) crying. She went back and A told her that PW1 had left her alone. She went behind the house and she found PW1 and the appellant having sex (the appellant was lying on top of PW1. She went away but followed it up with PW1 who never responded. She however reported the matter to PW4.

7. **PW3 No. 32315 Police Corporal Jairus Mutoro** received a report from PW4 to the effect that PW1 and the appellant had eloped. He asked Kenya Police Reservists (KPR'S) to look for them. On 19th January 2011 he received information they had been found. PW1 was taken to Kwanza Health Centre then Kitale District Hospital for medical examination.

8. **PW4** received the report on 18th January 2011 when the incident occurred. She asked the parties concerned about the report and both of them disappeared. She reported their disappearance to a police reservist. Later the appellant who was his herdsboy was arrested. **PW6 Stephen chepkoross** is the clinical officer from Kwanza Health Centre who examined PW1. He said shewas defiled on diverse dates. On examination it was revealed that her hymen was torn and was old looking. Her urine was and was found with pus cells. He produced the P3 form (Exhibit 2) . The examination was done on 19th January 2011. Pus cells are caused by injury or disease he said. PW3 produced an age assessment report (Exhibit 1).

9. When placed on his defence the appellant elected to make a sworn defence. He stated that between 2006 – July 2010 he worked for PW1's father. He got married and left employment to work as a carpenter in Kokongolo. On 19th January 2011 4.30 am two armed people came to his house, searched it and arrested him with his wife, but the wife was released, from Kwanza Health Centre.

At 11 am PW1 was brought to Kwanza police post. They were placed in cells and later charged on 22nd January 2011. he denied defiling the complainant (PW1)

10. This is a first appeal, and this court has a duty to re evaluate the evidence afresh and arrive its own conclusion. An allowance should be given for the fact that it did not see nor hear the witnesses.

See Okeno V Republic 1972 EA 32; Patrick & Another V REPUBLIC [2005] 2 klr 162.

I have considered the evidence, grounds of appeal and the submissions by both counsels. The issues that need to be determined are whether there was sufficient evidence to prove

I) Age of PW1

ii) Sexual intercourse penetration.

iii) Who the culprit was if (ii) is proved.

11. In her testimony PW1 told the court that she was born in 1994. Her mother (PW4) confirmed she was born in August 1994. She did not produce any documents to prove age. PW3 produced an age assessment report from Kitale District Hospital (Exhibit 1) showing that PW1 was 16 years of age. I have keenly observed this assessment report. It is done by a Mr Masika Wandabwa for the Dental Officer In charge. Mr Masika is not a Doctor, and he was not called to testify. The report is also very sketchy and I believe it because it was not done by a qualified person. The trial court may not have observed this. Besides this, there is no other document to prove age.

12. **Section 134 of the Criminal Procedure Code** provides for what should be contained in a charge sheet. It states ;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The charge and particulars are a guideline to what the court will expect to hear from the witnesses. In this case the particulars are as follows:

“The appellant on diverse dates between 16th January 2011 and 18th January 2011 at [Particulars withheld] Farm in Trans Nzoia County intentionally caused his penis to penetrate the vagina of W O a child aged 16 years.”

13. The words I capture here are **“ diverse dates between 16th January 2011 and 18th January 2011.”** These words simply mean that in this particular bracket of dates the appellant was committing this offence. Are these particulars supported by the evidence before the court?

PW1 in her evidence stated that the incident took place on 14th January 2011. There is no mention of any other date. PW2 and PW4 say it was on 18th January 2011 and not on any other date. PW3 received the report on 18th January 2011 at 10,30 am. PW4 was not a witness to this incident. She received a report in respect of this matter from her house help (PW2) on 18th January 2011 at 6 pm when she arrived from school. She is the one who reported.

14. PW3 testified that it was PW4 who had called him at 10 am. There appears to be some missing link somewhere. She could not have been reporting the incident on 18th January 2011 at 10.30 am when she only learnt of it on 18th January at 6.00 pm.

PW1 who is the alleged victim was clear that the incident occurred on 14th January 2011 and on no other date. This date does fall among the diverse dates mentioned in the charge sheet.

15. The P3 form (Exhibit 2) shows that the report was made to the police on 19th January 2011 at 12.20 pm. The history given is that PW1 was defiled from 16th January 2011 to 18th January 2011. This is not borne by any other evidence on record. The P3 form further concludes that the genitalia had “ old healed hymenal scar.” She was examined on 19th January 2011. If indeed she had been defiled from 16th to 18th January 2011 where was the time for the healing that left a scar? Could healing have taken place in a day leaving a scar?

16. There is no dispute that the appellant worked for PW4 as a herdsman. In his defence which was sworn

he said he had left PW4's employment in July 2010. Soon thereafter he got married. He was arrested with his wife on 19th January 2011 4.30 am but his wife was later released when PW4 told the police she was not her daughter. It was PW4's evidence that when she called PW1 to ask her about the report the child ran away. She then asked the appellant about the incident and he denied. She requested him to go and look for PW1. This was a person she she believed had raped /defiled her daughter and she sends him to go and look for the girl! Quite interesting!

17. PW3 received a report of defilement and elopement on 18th January 2011 10.30 am. On 19th January 2011 he received another report from Rosalid, Samuel Kirwa and Martin Karani to the effect that PW1 and the appellant had been traced. Where were they traced from? None of the arresting officers testified. It was important for the court to have this evidence on record since the appellant raised an issue about his arrest. He also alleged that he had left the employment of PW4 way back in July 2010. Where was PW1 traced from? All these questions have not been answered by the evidence on record. I do find that the

unanswered questions and the other gaping holes in the evidence of the prosecution casts credibility issues on the evidence of the witnesses herein.

18. In the case of ***Kiilu V Republic [2005] 1 KLR 174*** the court of Appeal heard this to say about an unreliable 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 not 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.”

I find the credibility of the evidence by PW2, PW3, PW5 to be in doubt.

19. The evidence adduced leaves no doubt in my mind that documents showing the correct age of PW1 were deliberately kept away from the Court. The particulars in the charge showing the date/dates of incident were a deliberate cover up of the truth. There was something about PW1 and the appellant which the court was not told. I have come to the conclusion that the prosecution case was not proved to the required standard.

I allow the appeal. The conviction is quashed and sentence set aside. The appellant shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on 28th day of August 2017 at 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