



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KAKAMEGA**

**HCRA NO. 130 OF 2015**

**MOSES OMRONO.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**(Arising from the Judgment of Hon. M.I. Shimenga criminal case No. 96 of 2015 at Principal Magistrate's Court at Butere)**

**J U D G M E N T**

1. **Moses Omrono** hereinafter referred to as the appellant was charged and convicted Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars being that he defiled S.A a child aged sixteen (16) years of age. Upon conviction he was sentenced to 15 years imprisonment. He has appealed against the conviction and sentence citing the following grounds:-

- i. THAT the evidence given by PW1 who was the complainant amounted to rape but not defilement.
- ii. THAT the trial magistrate did not consider the fact that the complainant was not a minor.
- iii. THAT the trial magistrate did not consider the fact that the complainant did not report to her mother of any irregularities when the offence was committed.
- iv. THAT the trial magistrate failed to consider that the realization of the pregnancy of the girl is what prompted the mother to implicate me in this matter.
- v. THAT the trial magistrate erred in law and fact convicting him basing on the evidence of the doctor who only gave his evidence of testing pregnancy but not defilement.
- vi. THAT the trial magistrate erred in law and fact by convicting him without proper findings thus fully based on belief and hearsay not warrant by the evidence on record.

2. The prosecution case as presented by its four (4) witnesses is as follows. PW2 (S.A) was born on 16<sup>th</sup> April, 1998 and was therefore 16 years 8 months 6 day, when this offence allegedly took place. Her evidence was that she had met the appellant at the river where she had gone to fetch water at 6 pm. She had seen the appellant with a panga and a sack cutting grass. The appellant grabbed her hand as she fetched water and took her to the bush nearby, and threatened to kill her if she screamed. He removed her clothes and had sex with her for about 5 minutes. When he was through he warned her not to say anything. She said she bled as a result of the ordeal.

3. She went home and took a bath and even washed her pants . That the appellant kept coming to her home when the parents were not there and would take her to his employer's house and they'd have sex . This was on about four (4) sundays. Later the appellant came and confessed to her uncle on what he had done which had led to disagreements with his wife. It was then that action was taken and it was confirmed that she was three (3) months pregnant .

4. PW3 **R O M** who is PW2's aunt with whom she lived testified that on 4<sup>th</sup> March , 2015 I pm the appellant came to their home and called her husband Alfred to the road . The road was 5 M away from the home. She then over heard the appellant telling her husband how he was responsible for PW2's pregnancy and this had caused him problems with his wife . The next day they took PW2 to Khwisero health Centre where it was confirmed that she was 3 months pregnant .

5. PW1 **Belinda Malanya** the clinical officer who examined PW2 confirmed that the girl was 3 months pregnant as at 4<sup>th</sup> march , 2015 (EXB 1 & 2).Pw4 PC **Immaculate Ogutu** was on 9<sup>th</sup> March ,2015 instructed to investigate this matter. She confirmed that both PW2 and the appellant had been examined at the health facility ( EXB 1-4 ). She then charged him with this offence.

6. In his sworn defence the appellant stated that he was at his place of work when police officers came and arrested him for an offence he did not commit. He was taken to hospital and examined through he did not understand. He denied the charge. In cross examination he admitted knowing the complainant and her parents.

7. When the appeal came for hearing the appellant in both his written and oral submissions , stated that no DNA analysis was done to determine the father or PW2's child. He also took issue with the fact that no voire dire examination was conducted in respect of PW2.

Finally he submitted that his defence was never considered by the trial court.

8. The appeal was opposed by the State through Mr.Juma , who submitted that the elements of penetration as provided for under section 8(1) of the Sexual offences Act No.3 of 2006 were proved .That the time of offence was 6 pm and PW2 was able to see the appellant who was known to her very well . Further he submitted that as at the time of examination of PW2 she was pregnant . That the fact of pregnancy was known to the appellant and later by PW3 and her husband .

9. It was Mr. Juma's submission that the absence of medical evidence does not negate the fact of penetration. On the issue of DNA he submitted that the test could not be done as the child was born afterwards. He further submitted that the appellant continued defiling PW2 even after the incident complained of that it was the appellant who approached PW2's uncle to report himself .

**10.** This is a first appeal and this court is called upon to re- evaluate the evidence afresh and arrive at its own conclusion . It also has to bear in mind that it did not see or hear the witnesses . See **Okeno VS R 1972 E.A 32 ,Boru & Another VS R (2005) 1 KLR 649 ; Kiilu & Another VS R(2005) 1 KLR 174.**

**11.** I have considered the evidence, grounds of appeal , submissions by the appellant and the respondent . What I find falling for determination is whether it is the appellant who defiled PW2 on 22<sup>nd</sup> December,2014 .

From the evidence adduced by PW2 and PW3 and the birth certificate (EXB 5) it is established that as at 22<sup>nd</sup> December, 2014, PW2 was aged 16 years 8 months and 6 days . She was therefore a minor in terms of section 2 of the Sexual offences Act No.3 of 2006.

**12.** There is no dispute that PW2 was found to be heavy with child as at 4<sup>th</sup> March 2015 when she was examined by PW1 . The pregnancy was said to be three (3) months old. My finding on this is therefore that PW2 was a minor and she had been defiled.

13. It is on record that the appellant is a person that was well known to both PW2 and her parents. It is also a fact that PW2 did not report this incident to anyone, not even her parents . It further noted that even after this incident PW2 continued to engage herself sexually with the appellant . This is what she states at page 7 lines 20- page 8 – line 1-2 .

**“He kept coming home for at least four Sundays to disturb me when my parents weren’t home . He would come and take me to his employer’s house and have sex with him, at his employer’s house. We were never discovered by anyone. The last time he took me there I told him I don’t want anything to do with him I wanted to go to school”.**

14. From this narrative the immediate question that comes to my mind is exactly when was PW2 defiled leading to this complaint? When she was examined on 6<sup>th</sup> March, 2015 she was three(3) months pregnant. When she testified on 15<sup>th</sup> May , 2015 she was six(6) Months pregnant. If indeed the dates in the charge sheet are correct she should have been three(3) months and six(6) months pregnant on 22<sup>nd</sup> March ,2015 and 22<sup>nd</sup> June, 2015 or thereabout respectively . From the presented report she delivered in August , 2015 ( exact date not given).

15. One is left to wonder whether indeed PW2 was defiled when she says she was on 22<sup>nd</sup> December,2014 or it was on an earlier date. Failure to report the defilement until it was discovered three (3) months later is another issue. As if that was not enough she says this man would come for her and she would go with him yet she knew very well what he was going to do to her. Could this with all due respect be the only person she was having an intimate relationship with?.

16. I did not see this witness, but from the above summary I find PW2 not to be a trustworthy witness, and yet she is the complainant. In the case of **Kiilu vs R(2005) 1 KLR 174** the court of Appeal said the following about such witness:

**“4. The witness upon whose evidence 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”.**

16. In the present case this court would require other evidence to corroborate the evidence of PW2. The prosecution sought such corroboration in the evidence of PW3, whose evidence was that she overheard a conversation between her husband Alfred and the appellant: According to her , the appellant confessed to Alfred that he was responsible for PW2’s pregnancy. Alfred is the one who was allegedly told this, but was not a witness in this case.

17. It was not explained why Alfred was never availed as a witness before the trial court. PW3 herself says the appellant and Alfred were on the road 5 M when they were talking .

How far was PW3 from them for her to overhear what they were saying ? The evidence of PW3 would also require corroboration for it to pass the test. It cannot therefore be corroborative of PW2’s evidence as it too requires corroboration.

18. There is clear evidence that PW2 gave birth to a child suspected to have been fathered by the appellant. When PW2 testified on 15<sup>th</sup> May , 2015 she was six(6) months pregnant . This court does not understand why the lower court could not wait for her to deliver before taking her evidence. This would have made it possible for the investigator to have a DNA test done on the new born baby . The DNA could have provided a conclusive proof of who the father of PW2’s child is.

19. A DNA test would be conclusive because so far the only evidence on record is that of PW2 . I have already explained above the loopholes in PW2’s evidence. From her conduct this court finds it challenging to wholly rely on her evidence to found a conviction against the appellant. In his submission in the appeal the appellant had expressed his willingness to undergo a DNA in respect of this child.

20. This court cannot order for a DNA test to be done at this point as doing so would be re-opening the lower court case. My finding is that the prosecution failed to prove its case beyond reasonable doubt, and the appellant will benefit from that. The appeal is hereby allowed, conviction quashed and sentence set aside.

21. I further in the interest of PW2's child whose paternity is yet to be established direct the County children's officer to open a file in respect of the appellant and the said child. This is for purposes of establishing whether the appellant is the father and if found to be then appropriate action be taken as relates to the child's rights and appellants responsibilities.

22. The appellant should be released soon after the County children's officer takes his particulars which should be in not more than six (6) hours of the reading of this judgment.

Orders accordingly.

Delivered, signed and dated this 18<sup>th</sup> day of August ,2017 at Kakamega.

**H.I. ONG'UDI**

**JUDGE**