



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 132 OF 2015

BETWEEN

JOSEPH OUMA WESONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Being an appeal from the judgment/sentence of Hon. G.N. Sitati, resident Magistrate delivered on
04.11.2015 in Mumias PMCCR. Case No. 642 of 2014)**

J U D G M E N T

Introduction

1. The appellant herein, Joseph Ouma Wesonga was arraigned before the Principal Magistrate's Court in Mumias on a charge of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006, the particulars being that on diverse dates between 4th April and 10th April, 2014 at [particulars withheld] Koyonzo Location Matungu Sub-County within Kakamega County intentionally caused his penis to penetrate the vagina of C.N.S, a girl aged 13 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the same dates and at the same place, the appellant caused his penis to come into contact with vagina of C.N.S, a girl aged 13 years.
3. The appellant pleaded not guilty to both the main and alternative counts, thereby necessitating the calling of witnesses in an attempt by the prosecution to prove the charge against the appellant. A total of 5 witnesses were called by the prosecution. The appellant also testified in his defence. He called one witness MA who testified as DW2.

Judgment of the learned trial Magistrate

4. Upon careful consideration of all the evidence on record, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on all the relevant issues of age of the complainant, whether there was penetration and whether it was established that the appellant was as the one who caused the penetration. Upon conviction, the learned trial magistrate called for a social enquiry report before sentencing the appellant to 20 years imprisonment.

The Appeal

5. Being dissatisfied with both conviction and sentence, the appellant instructed M/S Mukele & Co, Advocates to file the appeal which they did on 24.11.2015. the appellant raised the following 4 grounds of appeal:-

- 1) The learned Magistrate erred in law as to the burden of proof and failed to consider the case as a whole
- 2) The learned magistrate failed to appreciate that the elements of the offence were not proved as required by law
- 3) The learned magistrate erred in law in convicting the appellant on uncorroborated evidence and on relying on the evidence of a single witness.
- 4) The learned magistrate erred in law in not realizing that the appellant's constitutional rights were trampled.
- 5) The appellant's prays that the conviction be quashed and sentence set aside.

First Appeal

6. As this is a first appeal, this court has the obligation to rehear the case, though without the benefit of seeing and hearing the witnesses, with a view to reaching its own conclusions in the matter. it is only after doing so that this court can determine whether the findings made by the honourable trial court can be left to stand for this proposition, generally see **Mwangi- vs – Republic [2006] KLR 28 and Pandya – vs- R[1957] EA 336.** in the Pandya case above the Court of Appeal for Eastern Africa stated in part: “An appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expectaffirm a conviction on evidence that has been reviewed.”

The Prosecution Case

7. The prosecution case is brief, the complainant, C.N.S is an orphaned child who was living with her grandmother JN (J) who testified as PW2. At the time of the incident, she was about 13 years old and a standard 5 pupil.

8. On 04.04.2014 in the morning C.N.S was on her way to school when the appellant who traded in dried maize called her and told her he wanted to send her. C.N.S responded to the call but when she got to where the appellant was, he got hold of her hand and took her into the maize store, on the pretext that he wanted to get some money therefrom. The appellant locked the door as he pulled CNS towards a mattress that was on the floor. He pushed her onto the mattress with her face down. He then turned her once, pulled up her dress and removed her panty. He also removed his trouser and put it on the ground and proceeded to defile her. CNS stated that when the appellant pushed her penis into her vagina, she felt pain and also bled.

9. When the appellant completed the act he dressed up. CNS also dressed up. The appellant gave her kshs.20/- and told her not to say anything to anyone about what he had gone through. In the evening CNS went home, bathed and washed her panty. She did not say anything to J concerning her experience with the appellant, though she told the court that that whole evening she felt pain in her private parts.

10. CNS also stated that on 10.06.2014, the appellant again defiled her in the same manner and gave her a similar amount of money with a warning that she should not tell anybody about what had gone on between her and the appellant. She thus did not say anything to Josephine, but on 18.6.014, Josephine noticed the complainant's bulging body and suspected CNS was pregnant. That was the day CNS told J that Ouma, the appellant was responsible for what was happening to her. CNS also told J that the appellant had slept with her three times between 04.04.2014 and 10.6.2014.

11. J then reported the matter to the police. The report was receipt by No. [particulars withheld] CPI

Alfred Nyukuri who was the Investigating Officer and who testified as PW4. PW4 accompanied CNS to the appellant's store where she identified the appellant to the police. After gathering medical evidence and further upon taking statements from witnesses, PW4 charged the appellant with the offences.

12. George Watila, a Clinical Officer at Matungu sub-District Hospital, testified as PW5. He is the one who examined CNS but because she was already pregnant by the time he saw her, he did not examine her private parts. According to PW5, assessment (George) CNS was aged 13 years of age as at 20.6.2014 when he examined her. PW2, DB an older brother to CNS testified that his sister was born in 2001 as per the baptismal certificate.

The Defence Case

13. The appellant testified on oath as DW1. He said nothing about 04.04.2014 and 10.6.2014, but he told the court that he was arrested on 19.06.2014 though admitting that he knew J by appearance. He denied defiling the complainant. M A also testified in support of the appellant and stated that she never saw appellant, committing the offence.

Submissions

14. Counsel for the appellant filed written submissions. I have carefully read through the same together with the authority provided. The submissions each of the grounds of the petition and urged this court to allow the appeal and set the appellant free.

15. Prosecution counsel Mr. Juma Ochieng opposed the appeal on grounds that the prosecution had proved beyond doubt the age of the complainant. That there was penetration and that it was the appellant who had caused the penetration. Counsel submitted that since the incident took place during the day on both occasions, there was no doubt as to the identity of the appellant as the perpetrator of the crime against the complainant.

16. Mr. G. Mukele replied by submitting that save for the pregnancy which brought out the secret, the complainant seemed to have enjoyed the adventure with the appellant, further that between 04.04.2014 and 10.6.2014 the complainant could have slept with anyone else and gotten pregnant. Counsel urged the court to allow the appeal.

Issues

17. From all the evidence on record, the issues that arise for determination are the following.

- 1) whether the complaint's age was proved
- 2) whether there was proof of penetration
- 3) whether it is the appellant who caused the penetration

Determination

a) Whether the age of the complainant was proved

18. There is no doubt that this is a critical ingredient of the offence of defilement and without proof of same the case against the complainant must fail from the record, the complainant told the court that she could not remember the year she was born, but then went on to say that from what her brother D told her she was 13 years old. According to D, CNS was born in 2001. He stated that he had seen her baptismal card though the baptismal card was not produced in evidence.

19. George produced the age assessment form as PExhibit 3 in which the complainant's age was given as 13 years. In my considered view all the above evidence proves that the age of the complainant was

proved beyond reasonable doubt Even J, the putative parent of the complainant also testified that the granddaughter was 13 years old. In this regard, the element of age was proved and the appellant's contrary view on the same has not merit and in accordingly dismissed.

b) Whether there was penetration and if it is the appellant who caused it.

20. Counsel for the appellant submitted that penetration was not proved; particularly because the clinical officer did not examine the complainant's private parts. Counsel for the respondent however submitted that the evidence is clear that the appellant defiled the complainant in broad daylight and that as a result thereof she became pregnant. On a careful reconsideration of the evidence, I am satisfied that the appellant defiled CNS on 04.04.2014 and also on 10.6.2014 and even on some other date before 10.6.2014. The fact that CNS did not say that the appellant had defiled her until the pregnancy came out does not in my considered view, mean that she was not defiled. The complainant was 13 years and she had been warned by the appellant not to say anything about what had happened to her. The learned trial Magistrate interrogated this issue and was satisfied that CNS had given clear and credible evidence of how the appellant had lured CNS into his maize store and defiled her there, not once but on three different occasions. The learned trial Magistrate also stated that CNS's evidence as to the defilement was in April, 2014 was corroborated by Josephine's evidence to the effect that CNS was due to deliver her baby in January.

21. What I would like to state here is that the learned trial Magistrate saw the witnesses as they gave their testimonies and she was able to see their demeanor and to make an assessment of that demeanor. It is clear that the evidence of that defilement is the pregnancy.

22. Counsel for the appellant stated that CNS seemed to have enjoyed her sexual escapades and would thereafter go to school. I do not agree with counsel's view mainly because of the circumstances surrounding the life of CNS and the age difference between her and the appellant. Further when the day of reckoning came, CNS gave the appellant's name with her first report to Josephine and also to the police officer. PW4, Cpl Nyikuri stated in part of his testimony: "..... the complainant directed us to the room operated by the accused. She referred to him as "Ouma" and could facially recognize him. We found him selling maize and the girl pointed him out to us. He introduced himself as Joseph Ouma and he said that the girl was his customer who severally bought maize." PW4 also testified that CNS told him that the appellant warned her not to say anything to anybody because if she did he would harm her. All these factors go to explain why CNS remained silent between 04.04.2014 and 18.6.2014 when her grandmother Josephine, found her out.

Conclusion

23. From all the above, I find and hold that the prosecution case against the appellant was proved beyond reasonable doubt. That the appellant defiled CNS and made her pregnant and that the complainant's age was proved to the required standard. The appellant's complaints against the judgment of the learned trial Magistrate have no basis and the same are accordingly dismissed. The appeal is therefore without merit and the same be and is hereby dismissed in its entirety. The judgment and sentence of the learned trial magistrate is affirmed.

24. The appellant has a right of appeal to the Court of Appeal within 14 days from today.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 20th day of September, 2017

RUTH N. SITATI

JUDGE

In the presence of

Mr. Mukavale.....for Appellant

Mr. Juma.....For Respondent

Polycap.....Court Assistant.