



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 47 OF 2017

[From the original conviction and sentence dated 20/5/2016 In Criminal Case No. 28 Of 2015 In Senior Principal Magistrate's Court at Narok, R. V. Emmanuel Openda Wafula.

EMMANUEL OPENDA WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 15 years imprisonment in respect of the offence of defilement contrary to section 8 (1)(4) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. The appellant was convicted mainly on the evidence of the complainant namely L. N. (her initials). The defence of the appellant was a bare denial.
4. The appellant has raised 7 grounds in his petition of appeal to this court. In ground 1, he has faulted the trial court both in law and fact for convicting him, when his trial was not fair. He has expanded this ground by stating that he was denied access to the prosecution witness statements. I have perused the record of the proceedings and I find that this complaint was not raised in the trial court, it is coming up for the first time in the appellate proceedings. I find that it is an afterthought and it is for this reason that this ground of appeal lacks merit and is hereby dismissed.
5. In ground 2, the appellant has faulted the trial court both in law and fact for failing to find that the evidence adduced was unsatisfactory and did not prove the offence of defilement. In this regard, the evidence of the complainant was that the appellant was allowed to give evidence on affirmation following a *voire dire* examination. She testified that she was 16 years old and was in class 6 at [particulars withheld] Rehabilitation school. Her further evidence was that she was staying with her father and step mother. She further testified that she used to talk with the appellant, who lived in her neighbourhood. She asked the appellant as to why he had sent away his wife. The response of the appellant was that he had issues with her. Additionally, the appellant told her that she was going to replace his wife, to which she responded that she was in school. She further testified that in December 2014, her father had gone away from their home, leaving her with her Kalenjin step mother, with whom she never used to agree at times. She further testified that at one time when they disagreed with the step mother, she got annoyed and went to the house of the appellant which was some metres away from their home. This was on 3/12/2014. On that day she slept with the appellant while his friend slept on the seat. Again the

following morning she went to her home and later went to the house of the appellant on 31/12/2014. It was also her evidence that her father told her that if she had decided to get married to Emmanuel there was no problem, as at that time, she was staying with Emmanuel as a wife.

6. On 7/1/2015 when she was dressing, she heard a knock at the door. She opened the door and found her father with police. They said that they wanted the appellant to wake up. Both the complainant and the appellant were arrested. It is also her evidence that between 30/12/2014 until 7/1/2015 they used to have sexual intercourse. In particular she testified as follows:

“ At night we were sleeping naked. We could hold each other all over the body. He was even holding my vagina. He was putting his penis in my vagina and we play sex.”

7. In the light of the foregoing evidence, it is clear that there was credible evidence that supported the charge of defilement and for this reason this ground of appeal lacks merit and is hereby dismissed.

8. In ground 3, the appellant has faulted the trial court both in law and fact for convicting him on contradictory evidence, which he also submits was fabricated. In his submission, the father of the complainant testified that the complainant disappeared from his home on 15/12/2014, whereas the evidence of the complainant is that she left her home on 15/12/2014. Going by the appellant's submission, it appears that there is no contradiction. The evidence of the complainant in re-examination was that on 16/12/2014, she was at her friend's place. The evidence of her father is that on 15/12/2014, he was told by his wife that the complainant was not in their home. Even if there were contradiction in respect of the dates, those contradictions are not material. I therefore find no merit in this ground of appeal and is hereby dismissed.

9. In ground 4, the appellant has faulted the trial court in convicting him in the absence of vital exhibits which should have been produced in court. In his oral submission in this court, he submitted that the exhibits he was referring to are the clothes of the complainant and the P3 form of the complainant. I find that it was not necessary to have the clothes of the complainant as exhibits. They were not relevant to the charge of defilement. I find that the P3 form of the complainant was produced as exhibit 2A in the trial court. The P3 form also indicates that the complainant was aged 16 years old. It also shows that there was a whitish discharge from her private parts. Finally, it also shows the absence of her hymen. In the circumstances, I find that this ground of appeal lacks merit and is hereby dismissed.

10. In ground 5, the appellant has faulted the trial court for convicting him by failing to find that certain crucial witnesses were not called to testify. In his submissions the appellant has not elaborated as to the witnesses who were not called during his trial. I therefore find no merit in this ground of appeal and therefore dismiss it.

11. In ground 6, the appellant has faulted the trial court for rejecting his defence without good reason. The defence of the appellant was that he worked in the hotel the whole day on 6/1/2015. He also testified that the police arrested him on 7/1/2015. The evidence of the appellant on crucial issues was evasive. I find that his defence was fully considered and rightly rejected.

12. In his further written submission to this court, the appellant had submitted the age of the complainant was not established. In this regard the evidence of the complainant's father was that the complainant was born in 1998. By the time he was testifying, the complainant was aged 16 years. The complainant herself testified that she was 16 years old. The evidence of Felix Kibet Rotich (PW 4) was that he examined the complainant and found her to be 16 years old. He put in evidence the medical report namely the P3 form as exhibit 2A. In the circumstances, I find that the complainant was aged 16 years. It therefore follows that this ground of appeal is lacking in merit and is hereby dismissed.

13. The appellant also submitted that he was convicted on fabricated and contradictory evidence of the prosecution witnesses. I have already dealt with this ground of appeal and therefore dismiss it for lacking in merit. From the evidence, I find that the prosecution evidence proved the charge of defilement beyond reasonable doubt. I therefore find no merit in the submission of the appellant that the prosecution

evidence was doubtful. I therefore dismiss this ground of appeal.

14. The appellant further submitted that the charge was defective. He has submitted that the charge should have specified that the defilement was unlawful. The term “*unlawful*” is not a constituent element in the definition of punishment of the offence of defilement. This is clear from the provisions of section 8 (1) (4) of Sexual Offences Act. The appellant also submitted that the charge is defective in specifying that the offence was committed in diverse dates between 3/12/2014 and 7/1/2015. The evidence of the complainant and her father shows that the complainant lived with the appellant on diverse dates at his home. And for this reason, the charge is not defective in any way. It therefore follows that this ground of appeal lacks merit and is hereby dismissed.

15. The appellant submitted that the complainant failed to report the offence to the police station within a reasonable time. In this regard, the evidence of the complainant is that she believed that the appellant had taken her as his wife and that explains why they were living together on and off, because she had to attend school. The fact that the matter was not reported to the police in good time is explained on this basis. I therefore find no merit in this submission and thereby reject it.

16. This is a first appeal. As a first appeal court according to *Okeno v. R (1972) EA 32*, I am required to reassess the entire evidence tendered at trial and make my own findings of fact. I have done so and I find that the appellant was convicted on sound evidence.

17. The sentence of 15 years imprisonment is merited.

18. The upshot of the foregoing is that the appellant’s appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 18th day of October, 2017 in the presence of the appellant and Ms Nyaroita for the respondent.

J. M. Bwonwonga

Judge

18/10/2017