



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.145 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2027 of 2014 by: Hon. A.W. Mukenga – R.M.)

STEPHEN MAURA MBOGO.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

Stephen Mwaura Mbogo, the appellant herein, was convicted for the offence of ***defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. No.3 of 2006***. It was alleged that on 23/7/2014 [particulars withheld] in Nyandarua County, unlawfully and intentionally caused his penis to penetrate the vagina of **R W C**, a girl aged 15 years. Upon conviction he was sentenced to serve 20 years imprisonment.

The appellant had also faced an alternative charge of ***committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act 403 of 2006*** in that on 23/7/2014 at [particulars withheld], Nyandarua County, unlawfully and intentionally touched the vagina of **R W C**, a girl aged 15 years. No finding was made on the alternative charge.

The appellant is aggrieved by the conviction and sentence meted on him by the trial court and preferred this appeal based on the grounds found in the petition of appeal dated 16/3/2017 and further grounds found in the supplementary submissions filed in court on 3/5/2017.

The grounds upon which the appeal rests can be summarized as follows:

- 1. That the conviction goes against the weight of the evidence;***
- 2. That the complainant's evidence was contradictory;***
- 3. That the documentary evidence was not conclusive;***
- 4. That failure by the doctor to appear was fatal to the prosecution case.***

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.

Mr. Mong'are, learned counsel for the State opposed the appeal arguing that the evidence of PW1 and 4 was straight forward; as for the Doctor's evidence, he argued that the law allows another doctor to produce a document on behalf of another; that there were no contradictions in the prosecution evidence;

that the allegations of previous defilements does not exonerate the appellant from blame; that failure to indicate the reference number in the P3 form should be treated as a *bona fide* error and not fatal to the prosecution case. He urged the court to dismiss the appeal.

This is the first appellate court and it has a duty to re-examine and review all the evidence that was tendered in the trial court and arrive at its own determinations and conclusions. This court should however never lose sight of the fact that it never saw or heard the witnesses testify as did the trial court in order to appreciate the demeanor of the witnesses. See ***Okeno v Republic (1972) EA 32***.

Bearing the above in mind, I will go ahead to summarize the case in the trial court:

The **complainant R.W.C. (PW1)** testified on oath that she was 15 years old and in Form 1. She recalled that on 23/7/2014 at 7.00 p.m. while going to fetch milk, she was stopped by a man who took her to a secluded place and that with the help of lights from a lorry that came, she was able to see the person as Mwaura, who hailed from the same village; that he was armed with a knife and threatened to kill her if she told anyone what he would do; he made her lie down, removed her clothes, penetrated her and asked her to take pills to prevent pregnancy and left her there; that thereafter he made it a habit to wait for her as she went for milk and defiled her six times without protection and she did not tell anybody. She started having headaches and told her parents, was taken to hospital at Nyahururu where it was found that she was pregnant.

PW2 C W, PW1's mother told the court that on 7/8/2014, PW1 was sick, she took her to hospital and she was found to be pregnant and claimed that Mwaura was responsible. PW2 said that she reported to the Children's Office, the police and the chief and that PW1 was found with the appellant's phone which the chief returned to the appellant; that they had a case before the chief over the said phone.

PW3 Dr. Joseph Karuri Kinyua produced the P3 form on behalf of Doctor Beatrice Chesire who had been transferred at the time of the hearing. The examination had revealed that PW1's hymen was broken and she was 8 weeks and 4 days pregnant.

PW4 Nelson Lechuta of Ol Jororok Police Station received PW1 & 2 at the Police Station on 7/8/2014 when a report of defilement was made PW4 said that the appellant was arrested by Administration Police at Kibathi AP Camp and he re-arrested him. He produced in court a Birth Certificate which shows that the complainant was born on 11/9/1999.

When called upon to defend himself, the appellant opted to give unsworn statement in his defence to the effect that he was arrested on 15/8/2014 while working in his farm. He knew of the charges after he was charged. He denied committing the offence.

After a careful review of the evidence, there is no doubt that PW1 is a minor having been born on 11/9/1999 as evidenced by the Birth Certificate produced in court. PW1 and 2 confirmed that fact. In July, 2014 when the offence was allegedly committed, PW1 was about 15 years old. She was still a minor.

The appellant was charged with the offence of defilement and it is the duty of the prosecution to prove beyond any doubt that the complainant was a minor and there was penetration. Penetration is defined under Section 2 of the Sexual Offences Act to be:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

There is evidence from the Doctor, corroborated by PW1 herself and PW2 that she was found to be pregnant. Her hymen was broken and for one to be pregnant there must have been penetration. The only question is who committed the act.

If indeed PW1 was defiled by the appellant on 23/7/2014, she could not have been over 8 weeks pregnant

as of 8/8/2014 when she was examined by a doctor and found to be pregnant. It would mean two things: Either PW1 was wrong on the dates she was defiled or she had been engaged in another sexual encounter before 23/7/2017. The pregnancy notwithstanding, the question is whether the appellant had sexual intercourse with the complainant. At this stage, the court is not dealing with the issue of paternity of the child. Even if PW1 was 8 months pregnant and somebody had sexual intercourse with her. It would amount to defilement since she was still a child.

In the instant case, the complainant was not a stranger to the appellant. On the first encounter, PW1 saw the appellant using a motor vehicle lights and knew him to be Mwaura but thereafter, the issue of identity did not arise because PW1 said the appellant made it a habit to wait for her and they would engage in sexual acts.

The fact that PW1 did not tell anyone about her encounters with her assailant does not mean that it did not happen. Different people react differently from such trauma or encounters. When PW2 enquired from PW1 who was responsible for the pregnancy, she pointed at the appellant. From the cross examination of PW2, it emerged that in fact PW1 was found in possession of the appellant's phone which the chief returned to the appellant. That was not contested. The finding of the appellant's phone with PW1 is evidence that goes to fortify PW1's testimony that she had been relating with the appellant.

I find both PW1 & 2's evidence were not challenged in cross examination at all. The trial court invoked Section 124 of the Evidence Act and warned itself of the dangers of basing a conviction on the evidence of a single identifying witness and found PW1 believable; the court further found that the defence had not shaken PW1's evidence in any way. The trial court having believed the complainant and based on the evidence on record, I have no doubt that the appellant had unlawful sexual intercourse severally before 7/8/2014 when PW1 was found to be with a child.

The trial court correctly observed that although PW1 was found to be pregnant, the definition of Section 8(1) pregnancy is not one of the ingredients of the offence. As earlier observed, even if the pregnancy did not belong to the appellant, meaning that somebody else had had intercourse with PW1 before, it would not exonerate the appellant from the offence.

I am satisfied that the trial court arrived at the correct finding that the appellant did defile PW1.

The appellant challenged the production of the P3 form by another doctor other than the one who examined PW1. Indeed the appellant did oppose the production of the P3 form by PW3. The court considered the objection and overruled the appellant. Under Section 33 as read with Section 77 of the Evidence Act, another doctor can produce a P3 or medical report for another if he knew the doctor, was conversant with the signature and hand writing just as PW3 said he was. The magistrate rightfully allowed the production of the P3 form. The law envisaged situations where an officer may be on transfer and those working with them can produce such public documents so as not to defeat the ends of justice. The doctor who examined the complainant was said to be on transfer and calling her would have caused unnecessary delay and costs. I find no merit in that ground of appeal.

The appellant also complained that the P3 form did not have a reference number. In my view, a reference number in a P3 form cannot be fatal to a conviction. The P3 form was identified by PW3 and found to be genuine and in the hand of the said Dr. Beatrice Chesire. PW3 observed that the reference number was 16/11/8/2014 which was also the O.B. number. I find no merit in the said ground.

In the end, I am satisfied that the prosecution proved beyond any doubt that the appellant defiled PW1. The appellant's defence was a mere denial that did not shake the prosecution case. I must point out that the paternity of the child that was to be born was an issue to be determined later and it did not matter whether it was the appellant's child. In regard to the sentence, the appellant was handed the minimum sentence under Section 8(3) of the Sexual Offences Act. In the end, I find the appeal to be devoid of any merit and dismiss it in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this 17th day of *October*, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutemei - Prosecution Counsel

Soi - Court Assistant

Appellant - present