



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NO. 26 OF 2016**

**[From the original conviction and sentence dated 19/5/2016 in Criminal Case No. 738 of 2015 in the Chief Magistrate's Court at Narok, R. v. Benson Keen Munene]**

**BENSON KEEN MUNENE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of 20 years imprisonment in respect of the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. The appellant was convicted on the direct evidence of the complainant (PW 1).
4. The defence of the appellant through his sworn evidence is a bare denial.
5. The appellant has raised 13 grounds of appeal in his petition to this court. In ground 1, the appellant has faulted the trial court in failing to find that the age of the complainant was not conclusively established. In this regard, CPK (PW 2) testified that the complainant is her 2<sup>nd</sup> born who was born on 23/8/2002. In this regard, she produced a birth certificate as exhibit 3. It therefore follows that she was 12 years old when this offence was committed. In addition to the birth certificate, there was also the evidence of Hillary Kiptoo (PW 3), who was the clinical officer. He examined the complainant and found her to be 14 years old. He also found that her hymen was broken. Finally, he found her with a pregnancy of 32 weeks old. In the circumstances, I find as did the trial court that the complainant was 12 years old. I find that medical science through Hillary Kiptoo was not correct in finding that the complainant was aged 14 years.
6. In grounds 2 and 3, the appellant has faulted the trial court in failing to find that penetration was not proved beyond reasonable doubt. Again in this regard, the evidence of the complainant was that she used to have sex with the appellant. In one such incident, they had sex on the grass. The 2<sup>nd</sup> incident when they had sex was in the bedroom of their house when the complainant conceived and became pregnant. She gave birth to a baby boy in August, 2015. In this regard, she was issued with an antenatal card which was put in evidence as exhibit 1. Unfortunately, the child died after only 3 weeks.
7. There is the evidence from her mother (PW 2), that the complainant told her that the pregnancy was that of the appellant. In the circumstances, I find that penetration of the complainant's female organ by

the appellant was proved beyond reasonable doubt. In the circumstances, I find that there is no merit in these grounds and I hereby dismiss them.

8. In ground 4, the appellant has faulted the trial court in failing to find that the complainant did not report this offence to the police within a reasonable period. In this regard, the evidence of the complainant's mother is that she took the complainant to Narok District Hospital, where the doctor demanded to know as to why the complainant was pregnant. From there they went to the children's office in Narok. It seems the appellant was summoned to that office and he denied that he was responsible for that pregnancy. It is in that office that the appellant was arrested by the police after the children's officer had reported to the police in respect of this incident. It is therefore clear that were it not for the intervention of the children's officer, the offence might have ended without the police being notified.

9. It is everyone's duty including the children's officer to report the commission of suspected criminal offences to the police. In the circumstances, I find that the complainant never reported this offence to the police. Instead, the matter was brought to the attention of the police by the children's officer. The contention by Mr. Kamwaro that the complainant failed to report the offence within reasonable time to the police has no merit and is hereby dismissed.

10. In ground 5, the appellant has faulted the trial court for misdirecting itself on the effect of contradictions and the inconsistency in the prosecution evidence. I have considered the evidence of PW 1 and PW 2 and I find that there were minor contradictions in their evidence, which does not affect their credibility. I therefore find no merit in this submission and I therefore dismiss it.

11. In grounds 6,7 and 8 in a condensed form, the appellant has faulted the trial court in failing to find that the evidence adduced was incapable of sustaining a conviction and that the flaws in the investigations created the doubt, which should have been resolved in favour of the appellant. I find that these grounds touch on the credibility of the prosecution witnesses. I have considered their evidence and find it to be cogent and credible. In the circumstances, I find that the trial court was entitled to believe them in view of the evidence placed before it. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss them.

12. In ground 9, the appellant has faulted the trial court for relying on the birth certificate to establish the age, when such certificate was secured after the arrest and arraignment of the appellant in court, which may have been doctored. This issue of the birth certificate that it might have been doctored was never put to the mother of the complainant by the appellant under cross-examination. It is coming up for the first time in these appellate proceedings. I therefore reject this ground of appeal as an afterthought and is hereby dismissed for lacking merit.

13. In ground 10, the appellant has faulted the trial court in convicting him in the absence of some essential witnesses who were not called to testify. In this regard, I find that Mr. Kamwaro has not indicated the identities of the potential witnesses who should have been called, both in his oral and written submissions. On my own motion, (*suo motu*) after considering the record of proceedings, I find that the officer in the children's office who called in the police to arrest the appellant should have been called as a witness to shed more light in respect of the circumstances in which the appellant was arrested. It is difficult at this stage to say whether the failure to do so affected the conviction and sentence of the appellant. In the circumstances, I find that this ground of appeal is lacking in merit and is hereby dismissed.

14. In ground 11, the appellant has faulted the trial court for believing the evidence of the complainant that the child died in the absence of a dead certificate or a post mortem report. In this regard, I find that this issue was not put to the complainant when she was being cross-examined and I therefore find that this is an afterthought. As a result, I reject this ground as lacking in merit.

15. In ground 12, the appellant has faulted the trial court in convicting him in the absence of a scientific age assessment report. I find that the age of the complainant was established to be 12 years. The key

witness in this regard was the mother of the complainant. The trial court believed her evidence that the complainant was aged 12 years. A fact in issue in a trial may be proved by non-scientific evidence or scientific evidence or a combination of both scientific and non-scientific evidence. In the circumstances, I find that the oral evidence of the mother who produced the birth certificate of the complainant conclusively proved that the complainant was aged 12 years.

16. This is a first appeal. As a first appeal court according to *Okeno v. R (1972) EA 32*, I am required to re-assess the entire evidence upon which the appellant was convicted. Additionally, I have considered the detailed submission of counsel for the appellant together with the authorities cited. Having done so, I find that the conviction of the appellant is sound.

17. I also find that the sentence of 20 years imprisonment was merited.

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

Judgement delivered in open court this 23<sup>rd</sup> day of November, 2017 in the presence of Mr. Kamwaro for the appellant and Ms Nyaroita for the Respondent.

**J. M. Bwonwonga**

**Judge**

**23/11/2017**