



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO.32 OF 2013
KEN SIRANGA SITUMA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G E M E N T

1. This is an appeal arising from the judgment of Hon. J.A. Nyagol Resident Magistrate Sirisia in Criminal Case NO.579 of 2012 where the appellant KEN SIRANGA SITUMA was charged with defiling a minor age 15 years M.S.
2. Based on the evidence of 4 witnesses the appellant was convicted and sentenced to 15 years imprisonment after the court had rejected his defence.
3. He filed this appeal on grounds that the trial was conducted in a language he did not understand; the court failed to consider that the prosecution case was speculative, incredible, fabricated and lacked probative value; his rights were violated and he did not get redress in Court.
4. The prosecution case was mainly based on the evidence of the alleged victim PW 2 M.S. In brief the prosecution case is that between the 21st of September 2012 and 27th September 2012 the appellant lived with the complainant as his wife and during the time he had sexual intercourse with her. PW2 testified that upon her father's death she had problems with her brothers and on the material day her mother sent her for paraffin she bought sent it home with a child and as she fetched firewood she met the appellant who she had known since year 2011. She explained her predicament and went to the appellant's house and lived with him as a wife, did all wifely duties including having sex with him. She stayed with him for 7 days before they got arrested by the D.O and taken to Malakisi police station. In cross-examination she said that the accused asked her to go back home seek for forgiveness, go back to school and if this did not work she would inform him.
5. **PW1 was Antony Waswa** a clinical officer at Malakisi health centre. He testified that on 27th September 2012 at 11.35am he examined PW2 and the appellant. On examining PW2 her hymen was broken. There were no other injuries but she had epithelial cells upon vaginal swab an indication her vaginal walls were engaged in a friction most likely sex or trauma. He produced the hospital treatment card and the P3 form as Exhibits.
6. **PW3 G S M** PW2's mother confirmed her daughter disappeared from home on 21st September 2012 a fact she reported to the village elder and the sub chief of Mukwa Sub location. Her daughter was turning 17 at the time of hearing having been born on 14/6/1996. She produced PW1's clinic card.
7. **PW4 A.P.C. Geoffrely Wanza** of Netima A.P Post confirmed that on 27th September 2012 PW2's mother reported that PW2 had disappeared from home for 3 days and had been spotted with the appellant heading to Mayanja. They intercepted the two and took them to Malakisi police station.

8. After close of the prosecution case the appellant was placed on his defence. It was his testimony that he did not know PW2 save that he had carried her as his passenger and had charged her 50/- for the journey before they got arrested.
9. As the 1st appellate court I have examined, analysed and evaluated the evidence before court in order to arrive at an independent opinion. The issues are;

- i. ***Whether PW2 was a minor***
- ii. ***Whether she was defiled.***
- iii. ***Whether (ii) is in the affirmative and if so if it can be linked to the appellant.***

10. The age of the victim was adequately proved by her mother PW3, it was not in contention and I therefore conclude that PW2 was as a matter of fact a minor aged 16 years at the time of the alleged offence.
11. **PW 1** examined the minor and found that she had no hymen and there were indications of friction in her vagina which corroborated PW2's evidence that she had engaged in sex with the appellant while staying with him as his wife.
12. The next issue is whether there is evidence that she engaged in sex with the appellant. None of the other witnesses could for sure testify to this save for PW2 herself. She named the appellant as the man she had sex with as she lived with him for 7 days as a wife. If this is true then the appellant has to face the wrath of the law as at 16 the minor could not consent to sex and nor marriage. The appellant denied knowing the victim. It is his word against that of the minor. This being a case of sexual assault the court turned to the Proviso to Section 124 of the Evidence Act that provides as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

13. Can I trust the evidence of the alleged victim? I must say that this issue was not discussed by the trial court. However this cannot be fatal as I have had to evaluate the evidence afresh and formed my own opinion. The alleged victim appears to be an honest and truthful witness who left home due to problems with her siblings and married herself off to the appellant and lived as such for 1 week

until both were arrested. She narrated how all along she had sex with the appellant whom she had known for some time. She was very clear as well. I find her evidence credible as against appellant's evidence.

14. The defence is not credible or believable against the evidence of PW2 which was to an extent corroborated by that of PW1 & PW4.
15. From the evidence on record the appellant is 28 years, he knew the victim was a school going child and he went ahead to live with her as a wife. He ought to have known the law and returned her back but alas he took advantage of her and stayed with her and made her his wife!
16. As to violation of his rights the Appellant did not address the issue on appeal. As regards the language, there were conducted in English and translated to Kiswahili. The record is clear on

this. This Court also takes Judicial notice that the Appellant conducted his appeal in Kiswahili which is clearly a language he understands and therefore this ground is not sustainable.
17. Consequently therefore the conviction for the above reason was safe and I affirm the same.
18. The minimum sentence of the offence the appellant faced is 15 years and this is what he was sentenced to. The same is lawful and

cannot be interfered with. The appeal is therefore dismissed.

DATED and DELIVERED at BUNGOMA this 16th day of November, 2017

ALI ARONI

JUDGE