



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 13 OF 2017

SAMUEL KIBET ROTICH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal case S.O. No. 18 of 2016 Bomet PMs Court – Hon G. Kiage–RM)

JUDGMENT

The appellant Samuel Kibet Rotich was convicted and sentenced to fifteen years for the offence of defilement C/S 8(1) as read with S.8(4) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on diverse dated between August and December 2015 in Bomet County, intentionally caused his penis to penetrate the vagina of LC a child aged sixteen years.

The prosecution in this case called five witnesses in support of their case. The defence called one.

This being the first appellate court it has a duty to evaluate and reconsider the evidence on record so as to arrive at its own conclusions but bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses.

Brief facts

The complainant in her evidence in chief testified of how the appellant found her in the shamba doing cultivation on a date in the month of August which she cannot recall. He seduced her to have sex but she refused and ran away but he followed and caught up with her. He undressed her. He also undressed and forced her to lie on the ground and he inserted his penis into her vagina. They had sexual intercourse and afterwards the appellant gave her Kshs.100/= and went away. She further told the court that the incident took place about 200metres from their house. She later went home and did not report the incident to anybody.

Later in the month of September 2015 the appellant found her in the shamba when she was looking for vegetables. The time was around 6.00p.m. The appellant dragged her to the same spot he had sex with her previously. He undressed her and also undressed himself and proceeded to insert his penis into her vagina. They had sexual intercourse and when he was finished with her he rose up and went away. She also proceeded home and did not report the incident to anybody.

In the month of December while on the way home from the nearby posho mill which is at Legetetiat shopping centre at about 6.00 p.m. she met the accused at the gate of their shamba. He took her to some maize shamba, removed her clothes and his and inserted his penis into her vagina and they had sexual intercourse. The appellant after finishing dressed and went away. She also did the same.

Thereafter after some time she missed her periods. In the month of May she decided to report to her mother of what had transpired between her and the appellant. Her mother reported this to her father who in return reported to the Assistant Chief. She was later taken to Makimery police station where she recorded a statement. The appellant was arrested near the same time. She was issued with a P3 form. She was referred to a medical doctor who examined her and found that she was pregnant.

PW2 is the father of the complainant. After getting information that his daughter was pregnant he reported the matter to the area chief and the police and the appellant was arrested. He informed the court that his daughter was aged 16 years old having been born in the year 2000.

Erick Kipkirui (PW) is a clinical officer. He examined the complainant on 8/6/2016. Upon examination of the genitalia he found no visible injuries but the hymen was broken. There was no indication as to when the breakage occurred. She had no discharge or anything to suggest that there was presence of a venereal disease. The complainant was six months pregnant.

PW Anastasia Amase was the investigating officer. He produced the birth certificate of the complainant which showed her date of birth as 3/10/2000.

In her defence the accused offered an alibi defence to the effect that at the time of the alleged incident he was not at home as he had travelled to Mauche in the month of August 2015 returning in the month of June 2016. That he returned home on 5/6/2016 and was arrested on 7/6/2016 for an act which he did not commit.

The appellant has raised several grounds in his appeal.

- (1) Voire dire examination
- (2) Penetration
- (3) Age assessment
- (4) Corroboration

Voire dire examination

It is noted that the learned trial magistrate did examine the witness before ascertaining that she understood the nature of an oath. The same was not in question and answer form. However, there was no need for such examination as this was a 15 year old girl and not a child of tender years as defined by the Children Act. S. 2 of the Act defines; a child of tender years as one under the age of ten years.

Penetration

The complainant testified to have had sexual intercourse with the appellant on various occasions. The clinical officer upon examining her genitalia found that her hymen was broken but it was not a recent phenomenon. He conducted a pregnancy test and found that the complainant was six months pregnant.

Age assessment

A certificate of birth Exhibit No. 1 shows that the complainant was born on 3/10/2000. The offence is said to have taken place in the year 2015. This places her age at 15 years.

Corroboration and identification

The appellant put up an alibi defence to the effect that at the time of the alleged events of defilement he was away at Mauche from August 2015 to June 2016. The complainant knew the appellant as a neighbour. She did testify of how they used to meet at their shamba and in the bushes to engage in their illicit affairs. Her evidence was not shaken during cross-examination. There was no allegations to the effect that anybody in her family bore a grudge against the appellant.

I find there was overwhelming evidence against the appellant.

The conviction was safe and sentence lawful. Both are upheld. The appeal is dismissed.

Judgment delivered dated and signed in open court this 16th day of November 2017 in the presence of learned counsel for the prosecution – Mr. Barasa Appellant in person – present

Court assistant Rotich

M. MUYA

JUDGE

16/11/2017