



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 16 OF 2017

ARMSTERDAM LOMER JADA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in original Kakuma SRM CR. 180/2015

delivered on 16/3/2017 by J M WEKESA Senior Resident Magistrate)

JUDGMENT

The appellant **Amsterdam Lomer Jada** was charged with the offence of defilement contrary to **section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006.**

The particulars of the offence are that on the 23rd day of May, 2015 at [particulars withheld] village in Turkana West District within Turkana County, intentionally caused his penis to penetrate the vagina of NS a child aged 16 years.

On the alternative charge the accused is charged with committing indecent act with a child contrary to section 11(1) of the Sexual offences Act No.3 of July 2006.

The particulars of the offence are that on the 23rd day of May, 2015 at [particulars withheld] village in Turkana West District within Turkana County, intentionally touched the vagina of NS a child aged 16 years with his penis.

The evidence before the trial court was that **PW1 NS** the complainant who is a pupil at [particulars withheld] Primary School in standard 6 was on 22/5/2015 travelling from Uganda to Kakuma where she stays in Kakuma 3 zone [particulars withheld] at the Refugee camp. On the way from Uganda with her brother she met the appellant at [particulars withheld] village. The appellant told her he was chairman of the area and offered to provide a place to sleep for complainant and her brother and they will proceed with the journey the next day. The complainant agreed and appellant took her to his house. In the house the appellant then had sexual intercourse with her by inserting his penis into her vagina and ejaculating four times. This occurred from 1am at night to 5am in the morning.

In the morning while the appellant was asleep the complainant went and reported the matter to the elders and Kenya police Reservists. She led the KPR to the appellant's home where they found him present and he was arrested.

PW2 Ray Situma the clinical officer at Kakuma Mission Hospital examined the complainant on 24/5/2015 and found that she had tenderness on the breast and some blood spots. The breasts were painful and tender. On examination of the genitalia it was normal, hymen perforated, presence of whitish vaginal discharge, but no sperms were seen but presence of pus cells noted. Upon the examination he formed the opinion that penetration occurred.

PW4 James Achuka a Kenya Police Reservist testified that he was at their office where the complainant reported that she had been defiled by the appellant. She led them to the home of appellant where they arrested him and took him to Oropoi Police Camp.

The appellant gave unsworn evidence in his defence. He testified that on 22/5/2016 he went to Kakuma and later returned to Oropoi and went home. He found his mother had left home to the Kraal and he slept till the next day when while brushing his teeth in the morning he saw six KPR officers who arrested him on allegations that he was dressed as a military man. He was taken to Oropoi police post and later to Kakuma police post where he was charged with the present offence.

Relying on the above evidence the trial magistrate found the appellant guilty, convicted him and sentenced him to serve 15 years

imprisonment. Aggrieved by the conviction and sentence the appellant filed this appeal on the following grounds:

- 1. That the learned trial magistrate erred in law and facts when she failed to observe that the prosecution case was marred and barred incurable irregularities beyond any reasonable doubt.**
- 2. That the learned trial magistrate erred in law and facts when she failed to observe that the prosecution side failed itself when it availed its witness without considering the importance of the knife and the pant exhibits to prove its case beyond any reasonable doubt.**
- 3. That the learned trial magistrate erred in law and facts when she failed to observe that the complainant to the present case was unfamiliar to them who dwelt in the area and the possibility of mistaken identity was incurred to hunt the innocent appellant for nothing.**
- 4. That the learned trial magistrate erred in law and facts when she failed to observe that prosecution case had no eye witnesses who proved the prosecution case beyond any reasonable doubt.**
- 5. That the learned trial magistrate erred in law and facts when she failed to observe that the clinical evidence had nothing to do with the innocent appellant in that he was not medically examined along with the complainant to prove the prosecution case beyond any reasonable doubt.**

The appellant filed written submission in support of his appeal. He submitted that this is a case of mistaken identity as the complainant did not know him before and never gave the physical features to the KPR, he submitted that he is not the Esinyen referred to by the witnesses as his names are Amsterdam Lomer Jada. He submitted that the issue of identification became more crucial because the complainant stated that she met him at 7.00pm and yet contradicted herself when she testified that she had met him during the day.

The appellant submitted that crucial eye witness, the brother of the complainant was not called to testify and the important exhibit a knife alleged to have been used to threaten the complainant and the torn skirt and inner pant which were torn by the appellant were never produced in evidence. Appellant submitted that although the complainant testified that she was cut with the knife, no such injury was seen by the clinical officer.

The appellant submitted that the police investigations in this case was shoddy as age assessment of the complainant was not done to ascertain her age. He attacks the evidence of the clinical officer which he calls shoddy because of contradictions and in particular the absence of spermatozoa when complainant was examined.

Mr. Kimanthi for state opposed the appeal. He submitted that the complainant met the appellant at day time; and was therefore able to identify the appellant. The appellant defiled the complainant from 8pm on 22/5/2015 to 5am on 23/5/2015. When she got an opportunity she escaped and reported to KPR who arrested the appellant. The clinical officer who examined the complainant found that there was penetration. The age of the complainant who confirmed to be 16 years and the sentence of 15 years imprisonment is the minimum.

The appellant contends that the age assessment report produced was made by a clinical officer who is not a dentist. He further submits therefore that the age of the appellant was not properly proved. On this issue the learned trial magistrate in her judgment

Thus in relation to this case, proof of age is relevant at two levels, first, to establish that the complainant herein was under the age of 18 years and therefore, a child, and secondly to establish that the complainant was between the age of 16 to 17 years such as the bring the sentence of the accused, if convicted, within the minimum provided under section 8 (3) of the sexual offences act. The complainant herein told the court she was a class six pupil at [particulars withheld] primary school and was aged 16 years old. The age assessment report on file indicated her to be between 16 to 17 years old. I do note that under part C of the P3 form, the age required is estimated age and under the children's Act, "age," where actual age is not known means apparent age. This means that in the doctor's opinion, the apparent age of the complainant from his observation was 16 years. Thus although the actual age of the complainant was established as sixteen years. This mean her actual less her or more and this was sufficient to bring the complainant within the age bracket of 16 to 17 years or the purposes of the penalty under section 8 (3) of sexual offences act.

The age of the complainant in a case of defilement can be proved by production of documents such as birth certificate, baptismal cards, birth notification by age assessment report by a medical practitioner, by evidence of the complainant and or parents or the apparent age observed by the court. It is therefore not a requirement that it is only a dentist who has to examine and estimate the age of the complainant. I am satisfied that the age of the complainant was properly proved to be between 16 – 17 years old.

The appellant in his defence pleaded an alibi defence. He stated he was at Nwalintos where his parents stay where he reached at 7pm and that he went to sleep and on waking up in the morning he was arrested by KPR officers. Appellant submitted that the complainant's allegations is a case of mistaken identity as he denied ever meeting her and more so defiling her as she alleges. The evidence of the complainant which was not controverted is that she met the appellant during the day. After discussion he offered to give her and her brother a place to sleep. He then led them to his house where indeed they slept in the same house and appellant defiled her during the night.

To fortify the fact that she indeed knew the complainant, the next day she reported to KPR about the defilement and led them to the home where appellant was arrested. It is therefore not true in my view that the complainant made a mistake in identification of the appellant.

Upon evaluating the evidence before the trial court and considering the submissions by the appellant, I am satisfied that the appellant's conviction on the charge of defilement contrary to section 8(1) as read with section 8(4) of the sexual offences Act was premised on sound evidence. I find the conviction proper and the sentence of 15 years imprisonment legal.

I hereby uphold the conviction and affirm the sentence. This appeal is hereby dismissed.

Dated and signed at Lodwar this 15th day of December, 2017

S N RIECHI

JUDGE