



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 72 OF 2014

(Being an appeal from the Judgement of the Kitale Resident Magistrate P. W. Wasike delivered on 3rd July 2014 in Criminal case NO. 2367 of 2012)

SIMON MUKUSIAPPELLANT

VERSUS

REPUBLICSTATE

J U D G E M E N T

1. The appellant , **SIMON MUKUSI** was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the sexual offences act No. 3 of 2006.

The particulars of the offence are that on diverse dates between April 2012 and 9th day of September 2012 at [**Particulars withheld**] within **Trans Nzoia County** intentionally caused his penis to penetrate into the vagina of **S N M** a child aged 15 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the sexual offences act NO. 3 of 2006.

The Particulars of the offence are that on diverse dates between April 2012 and 9th September 2012 at [**Particulars withheld**] within **Trans Nzoia County**, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of **S N M** a child aged 15 years.

3. When the appellant was arraigned before the trial court, he pleaded not guilty in both the main count and the alternative. The case proceeded for full hearing.

4. In support of their case, the prosecution called five witnesses. The prosecution case was that the complainant, **PW1 S N** and the accused started dating and had sexual intercourse several times at night in the house of the accused between April and September 2012. One night the complainant's mother, **PW2 J W** noticed that the complainant was not at home during the night. They looked for the complainant but in vain. At about 5.00 am the complainant returned home. The mother questioned and punished her and the complainant who revealed that she had been with the accused. The complainant was taken to the hospital for tests. It turned out that the complainant was pregnant. The matter was reported to the authorities.

5. A police officer **PW3 PATRICK NYONGESA** went to the home of the accused and arrested him. **PW4 PC CALLEB YATOR** commenced investigations . The complainant was issued with a P3 form. **PW5 LINUS LIGARE** the clinical officer examined the complainant and confirmed that the complainant had been defiled and was three months pregnant. The accused was subsequently charged

with the present offence.

6. In his defence the appellant stated that he was a form four student. He further testified that police officers arrested him from home and took him to the Chief's office. He was then escorted to Kitale police station without being told the reason for his arrest. After two days he was brought to court and charged. The accused further stated that he did not know anything about the charges read to him.

7. The trial court found the appellant guilty of the main count of defilement and convicted him accordingly. The appellant was sentenced to 20 years imprisonment.

8. The appellant was dissatisfied with both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-

(a) That the charge was not proved.

(b) That the conviction was against the weight of the evidence.

(c) That the appellant was not given an opportunity to have his counsel present when the judgement was read and mitigation given.

(d) That the investigating officer produced documents irregularly.

(e) That the burden of proof was shifted to the appellant.

9. During the hearing of the appeal, the learned counsel for the appellant and the learned counsel for the state relied on written submissions. I have duly considered the same.

10. This being the 1st appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences [*See Okeno –vs- Republic (1972) EA 32*].

11. It is the complainant's evidence that she was dating the appellant and they had sex in the house of the appellant at night several times before they were discovered. The complainant gave the period they had the sexual relationship as between April and September 2012. During cross-examination, the complainant stated that the appellant pleaded with her and gave her Kshs 500/- on a date that she could not remember. She gave the first time she had sex with the appellant as the month of May at about 10.00 am. The complainant described the appellant as somebody she knew as a neighbour. The complainant's evidence is that of recognition in broad daylight.

12. The complainant's evidence that she was born in the year 1997 was corroborated by the mother's (PW2) evidence. According to the mother, the complainant was born on 14/3/1997. The mother identified the complainant's immunization card in court. The immunization card was produced as an exhibit by the investigating officer (PW4). It has been submitted by the appellant that the immunization card was irregularly produced by the investigating officer as the same was obtained when the appellant had already been arraigned in court. However, the complainant's mother (PW3) explained in her evidence that she had the clinic card and went to District Hospital to have the records retrieved. The evidence on the complainant's age was corroborated by the clinical officer (PW5) who filled in the P3 form produced as an exhibit which estimated the complainant's age as 14 years. From the date on the complainant's immunization card (13/3/1997) the complainant's age was 15 years at the time of the offence as reflected in the charge sheet.

13. The evidence of the clinical officer (PW5) confirmed that the complainant had sexual intercourse and was pregnant. The law makes no requirement for DNA tests to be carried out as proof of defilement.

14. The evidence of the arresting officer (PW3) was that when he went to arrest the accused, he found him hiding in the ceiling. There was a sign of guilt knowledge.

15. The defence case is essentially on the arrest. The same failed to cast any reasonable doubts on the prosecution case.

16. On the lack of eye witnesses, it is common knowledge that sexual activities do not take place in the open.

The proviso to section 124 of the Evidence Act states 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.”

17. The Judgment of the trial court was delivered on 2/7/2014 as scheduled. The defence counsel was not present although aware of the date. The appellant went ahead and gave his mitigation in the absence of the advocate. The trial court ought to have made inquiries from the accused on the issue of representation. Be as it may, the appellant was sentenced to twenty (20) years imprisonment which is the minimum sentence provided by the law for the offence charged.

18. Having evaluated the evidence on record, I am satisfied that the prosecution case was proved beyond any reasonable doubts. I find no merit in the appeal and hereby dismiss the same.

B. THURANIRA JADEN

JUDGE

COURT: Judgment dated and delivered this 17th March 2016.

B. THURANIRA JADEN

JUDGE