



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 25 OF 2015

(From original conviction and sentence in criminal case number 955 of 2015 of the Principal Magistrate's Court at Kapenguria)

GEOFFREY NYONGESA... .. APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

GEOFFREY NYONGESA the Appellant herein was charged and tried in the lower court before Hon. D. M. Machage (PM), for an offence in the main count of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act number 3 of 2006.

He also faced an alternative count of Indecent Act to a child contrary to section 11(1) of the Sexual Offences Act number 3 of 2006.

The particulars of the offence in the main count of which the Appellant was found guilty, convicted and sentenced to serve 15 years imprisonment are that on the diverse dates between 7th June and 2nd July days of the year 2015, within West Pokot County, the Appellant did cause his penis to penetrate the vagina of SC a girl aged 17 years.

The prosecution case as was presented in the lower court is that by the time of the alleged offence the complainant was aged 17 years having been born on 6th May, 1998. She was schooling at [particulars withheld] Secondary School in form one. She was the first born in a family of four children. On 7th June, 2015 the mother who gave evidence as PW2 quarrelled her for not doing as expected in school. She was told of the need to choose her destiny. The complainant had a boyfriend of one year, the appellant in this case. He was a carpenter and was living behind hotel Kalya, not far from where PW2 was doing business of a hotel. The complainant decided to go there. The appellant had promised to marry her and even to introduce her to his parents. When she went to the appellant's house she was welcomed by him. She lived with him since 7th June, 2015 till 2nd July, 2015 when PW2 found out where she was and arranged for the arrest of the appellant.

On 2nd July, 2015 PW2 in company of PW-4 who is a police reservist, went to the appellant's house at about 10.00pm. They knocked on the door. The appellant opened while stark naked. The complainant was in bed also stark naked. She was rescued while the appellant was arrested and taken to Kapenguria Police Station.

The complainant was examined at Kapenguria District Hospital and her P3 filled on 3.7.2015. The doctor

found that her hymen was broken of which he opined was a sign of her having been penetrated. The complainant in her evidence-in-chief indicated that for the period she was in the appellant's house they used to kiss and have unprotected sex. Her birth certificate was availed in court showing she was born on 6.5.1998 and hence in June 2015 she was 17 years old. It is upon these set of facts that the appellant was found guilty, convicted and sentenced.

Dissatisfied with the said conviction and sentence, he appealed on the grounds:

- 1. That the charge was defective in that it was at variance with the evidence adduced in court.**
- 2. That the trial magistrate erred in shifting the burden of proof to him.**
- 3. That the evidence relied on was insufficient, unreliable and uncorroborated and,**
- 4. That he had no witness statements, trial took a short time and his defence was unfairly rejected.**

In his submissions, relying on the case of *Martin Charo versus Elizabeth Ngali, Criminal Appeal case number 32 of 2015 of Malindi High Court*, he averred that it's the complainant who took herself to his house and he had consensual intercourse with her of which she enjoyed. Her behaviour was that of a full grown woman and the trial court should have acquitted him on the ground that he had reasonable cause to belief that the child was over the age of eighteen years.

I have considered the entire evidence as was adduced in the lower court. The appellant when he was placed on his defence opted to give unsworn testimony and called no witness. He told the court that,

'I stay at Kiminini. I used to do work at Makutano. The offence is not true. 2.7.2015 I woke up morning. I was arrested and charged to the offence I don't know.'

In his written submissions he concedes to the facts in the prosecution case and clings to the defence that the circumstances of the case, more so the complainant's behaviour made him reasonably believe that she was over the age of 18 years. This is the issue I need consider in this appeal given that other grounds of appeal are not supported by the facts of the case and were neither argued by the appellant.

Section 8(5) (a) and (b) and also (6) of the Sexual Offences Act number 3 of 2006 is about a possible defence to the offence of defilement. They read:-

8(5) it is a defence to a charge under this section if-

(a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) The accused reasonably believed that the child was over the age of eighteen years

(6) The belief referred to in sub section (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

The circumstances to be weighed in consideration of this defence are that the complainant was a school girl in form one. She was living with her parents prior to her shifting to the appellant's house. She had been in a love relationship with the appellant for a year. On her cross-examination she said she told the appellant that she was not going to school because she was not performing well. This shows vividly that the Appellant knew she was a school girl. She also stated that the appellant instructed her not to say where she was held up with him. This indicates that the appellant was as well aware that what he was doing was not right.

Nothing in the entire evidence suggests reasonably that he had cause to believe she was an adult or at least 18 years old. Her act of running away from her parents' home, to his house and consent to having sex with him are not enough grounds to have made the appellant reasonably believe she was an adult. The appellant never raised the said defence during trial in the lower court. Throughout he never suggested that he reasonably believed the complainant was over or at least 18 years old at the time of the commission of the alleged offence. For this defence to sustain, it must be established either directly or indirectly by way of evidence in court. It should not be merely accorded to the accused, by the court, on suspicion.

There is undoubted, reliable evidence that the complainant was then 17 years old. She was a child who in law was incapable of giving consent to having sex. The offence of defilement was established by the prosecution beyond reasonable doubt and the appellant was rightly convicted and sentenced of it.

Section 8(4) of the Sexual Offences Act states that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The appellant was sentenced to serve rightly the minimum period of 15 years. I have no cause to interfere with the sentence. The upshot is that appeal fails and the appellant will continue serving the stated sentence. This court so finds.

S. M. GITHINJI

JUDGE

29.9.2016

Judgement read and signed in the open court this 29th September, 2016 in presence of Mr. Mark Nabuyumbu for the state and the appellant in person.

S. M. GITHINJI

JUDGE

29.9.2016