



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE NO. 60 OF 2015

(Being an appeal from Judgment of Kitale Resident Magistrate C.N. MUGO delivered on 30th April 2015 in Criminal Case NO. 590 of 2014)

AMOS MASIKA KIDIMAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The appellant 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 are that on diverse dates between 28th November 2013 and 9th February 2014 *particulars withheld* within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of **P S** a child aged 15 year. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.

The summary of the evidence presented is as follows:

PW1 aged 16 years and in standard 8 at [*particulars withheld*] primary school told the court that the appellant was her boyfriend between the year 2012 and December 2013. That on 2/12/2003 together with her cousin sneaked away and went to Matunda Trading Centre where they met the appellant. She stayed in his place for 3-4 days and in the process had sexual intercourse with him. She said that this was not the first time they were having sex.

In the cause of time she heard that her father was looking for her and he released her. She then met **PW2**, her father who took her to Matunda Health Centre where she was treated and discharged. She reported the matter at Sikhendu police post and went back to school. She also identified the **P3** form which was filled on 20/12/13.

PW2 Z S W is the complainant's father. He said that he knew the appellant. He said that the complainant disappeared for 3 days from 5th December 2013 to till 9th December 2013 when he found her with the appellant. The appellant disappeared and he was searched for 2 months. He took the complainant to hospital for treatment where the **P3** form was filled.

PW3 Francis Barchebo a Clinical Officer produced the **P3** form on behalf of Mr Chepkos who opined that the complainant had been defiled as the hymen was torn and old looking. He said that from the history the complainant had had sex the whole of 2013.

PW4 P.C. Michael Michir took over the investigation from PC Yator. The information was that **PW1**

had disappeared from home and the matter reported. He said that the complainant had been defiled between 28/11/13 and 9/12/2013. She was found in the home of the appellant and the doctor had found evidence of defilement.

When put on his defence the appellant said that on 17/12/13 he was in Pokot and went back to Matunda on 25/12/13 and arrested on 10/2/2014. He said in cross examination that he knew the complainant but denied that he had sexual intercourse with her.

The appellant who has filed several grounds of opposition which dwell majorly on the fact that the prosecution witnesses contradicted themselves on the evidence presented. The learned state counsel opposed the appeal arguing that the lower court judgment ought not to be disturbed.

Analysis and Determination

From the evidence on record, it is true that the appellant as well as PW1 and PW2 are people known to each other. They are neighbours. It is the contention by the complainant that the appellant was her boyfriend and that he locked her in his house for 3-4 days.

She further stated that they have been having sex for a whole year. On this material day as soon as he heard that PW2 was looking for her the appellant released her. She further stated that PW2 found them on the way. She went on to say;

“..... when he heard my father was looking for me, he released me at 7 pm and when I was going I met my father on the road he took me home. He had been told by neighbours I was there.”

On his part PW2 stated that:

“ On 5/12/13 my daughter got lost from home I tried to look for her for 3 days she was found in the house of Amos. I am the one who found her on 9th December 2013. I was with a boda boda operator George Wanyama. I had been told she was there. I went there at 9 pm found them on the road, the accused ran away and I went with my daughter home.”

I have quoted the above evidence extensively because that is where the issue lies. How did PW2 meet with PW1? In his defence the appellant denied ever being with the complainant. Indeed there was no eye witness who met the two. L the cousin to PW1 was not called to testify. Neither the boda boda rider Mr George Wanyama. It is therefore the words of PW1 and PW2 against the appellant.

I find that there are contradictions in terms of timing. Whereas PW1 stated that he was released at 7 pm. PW2 stated that he met her with the appellant at 9 pm. Surely the two hours difference are very material in my view. Secondly if it was 9 pm and they met on the road how sure was he that it was the appellant and not someone else? I find that the evidence of Wanyama the boda boda rider would have been very relevant.

In any case, there was nothing to indicate that there was sufficient light to identify the appellant. Given the nature of the complainant who seemed to have engaged herself in sexual activity at such an early age as she clearly confessed more evidence ought to have been required to corroborate that she was actually in the house of the appellant her boyfriend.

Section 124 of the Evidence Act provides that the court shall convict an accused person in a sexual offence involving a minor without corroboration if it believes that the complainant is truthful. In the instant case I do not find the evidence on record weighty to believe the complainant. The key witness namely L her cousin who seemed to have seen both the appellant and the complainant together was not called. Neither was the boda boda rider who was with PW2 that night.

The medical evidence (P3 form) presented although it shows evidence of defilement, is not conclusive on

when the complainant was defiled. She admitted that she had sexual intercourse with the appellant for the whole year. Is it possible that she did had sexual intercourse with other men other than the appellant?

Consequently, in light of my above observation I find that it will be unsafe to deny the appellant the benefit of doubt. The offence facing the appellant is far reaching and any deficiency in the evidence presented ought to tilt in his favour which I find in this case it does.

The appellant is hereby set free unless lawfully held.

Delivered this 3^{1st} day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for State

Appellant - present

Kirong – Court Assistant