



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL CASE NO. 40 OF 2013

[Being an appeal from the judgment of the Kimilili SRM'S court [S.K.NGI]]

delivered on 28th March 2013 in SRM'S criminal case no. 946 OF 2012]

ALEX KIMUTAI AMOS.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant faced the charge of defilement of a child under the age of 12 & 13 years contrary to Section 8 (1)(1) of The Sexual Offences Act No. 3 of 2006, In PMCC No. 946 of 2013, where the appellant was convicted and sentenced to imprisonment for a term of 20 years.

2. Being aggrieved by the said judgment the appellant preferred this appeal on the following grounds;

1. That the trial magistrate erred in law and facts by failing to consider that the complainant could not have conceived on 2.11.11 and delivered on 28.6.12.

2. That the trial magistrate erred in law and facts by failing to consider that the prosecution case did not establish whose child the complainant begot – no DNA tests were conducted on me and the child.

3. That the trial magistrate erred in law and facts by not appreciating that the medical evidence contradicted the allegations of PW 1 hence exonerating me from the commission of the offence.

4. That the trial magistrate erred in law and facts by not appreciating that the complainant was not a pupil at my school and that no letter from the said school was tendered in evidence in support of her evidence.

5. That the trial magistrate erred in law and facts in convicting me when the prosecution had not proved its case to the standard required beyond any reasonable doubt.

6. That the trial magistrate erred in law and facts by failing to appreciate that the prosecution case was not only insufficient but was contradictory, jubicative, unreliable, inconsistent in material particulars, totally inadequate to sustain a conviction.

7. That the trial magistrate erred in law and facts by holding that my defence did not dent the prosecution case when it really did.

3. At the hearing of the appeal the appellant appeared in person and argued his appeal as follows; The complainant gave birth on 29th of June 2012 and he could not have defiled her while pregnant and in labour; no DNA was conducted to ascertain who the father of the child is; the report to the police was made several months after the alleged offence; the complainant was not a pupil in his school when the alleged crime took place; the charge sheet was defective as the doctor gave age of the complainant as 16 years; he was no given an opportunity to bring his witnesses and the court failed to consider the P3 form to see whether the same was not genuine.

4. In response Mr. Oimbo for the state submitted that the fact in issue is not who fathered the complainant's child but whether the appellant defiled the complainant or not. As regards the appellant's witnesses he submitted that despite being given opportunity to avail the said witnesses the appellant failed to produce them in court.

The counsel further stated that the complainant was clear of the date the appellant defiled her; the P3 form supported the allegations before court. As to the age of the complainant, counsel submitted that the complainant was between 13 and 15 years and even if she were beyond the said years only the sentence would change.

5. Being the first appellate court, this court has to reconsider, examine and analyze the evidence afresh in order to arrive at an independent decision. See *Okeno V. Republic*.

In her evidence PW1 informed the court that she was a student at [particulars withheld] secondary school and a student at [particulars withheld] academy until 2011. She further said that the appellant was her teacher in 2011; she went into the appellants house to buy get books but the appellant locked her inside the house and defiled her. She thereafter went to her aunts place and later to her parents but did not inform any of them what had happened to her. On 6th of November her mother took her to [particulars withheld] where she sat for her KCPE examination and after the results were out she joined [particulars withheld] secondary school and studied for 1 term and at the beginning of the 2nd term she refused to go to school as she was pregnant. Upon informing her parents of the pregnancy they took her for medical examination and the same was confirmed. She later gave birth to a son. It was her evidence that the appellant defiled her 3 times.

PW2 B M - a farmer and mother of the complainant confirmed that her daughter attended [particulars withheld] academy at the time of the alleged offence and that sometime in November 2011 the complainant disappeared from school and home. Later the girl was found and the witness took her for examination. The complainant was later admitted to [particulars withheld] secondary school where she attended first term and part of 2nd term for a week and refused to go back as she was pregnant. The complainant named the appellant as the person responsible. The witness took the child for a test which confirmed that the allegation was true. At labour the complainant developed complications and she was taken to Bungoma where she delivered by caesarian section. She gave her daughters age as 15 and her year of birth as 1977. In cross examination the witness stated that her child disappeared from school and had been expelled at some point because of the appellant.

PW2 J M -the complainants' father stated that in November 2011 his child disappeared from home for 3 days. He reported the incident at Sirisia Ap camp after he learned of the same from his wife on 6.11.11. On learning that the complainant was pregnant the matter was reported to Kipsigon police station, a P3 form was issued. Later the appellant was arrested.

PW4 John Kea of Kopsiro health center examined the complainant on 1.6.2011 and found her 32 weeks pregnant. He also assessed her age. He produced a medical report (p3) giving the complainant's age as 15 years. **PW5 APC** Samuel Museba on his part stated that on 4.7.12 he received a complaint from PW3 that his daughter had been defiled. He proceeded and arrested the appellant.

PW6 Deputy OCS of Kipsigon police station, confirmed that on 11.11.2011 PW3 reported his daughter had disappeared with the appellant a teacher at her school. Efforts at the time to arrest the appellant did not bear fruits as he had gone into hiding; the offence was committed between 2nd and 6th November 2011.

At the defence hearing the appellant was given an opportunity to call witnesses and indeed brought one. The defence evidence was as follows;

DW1 the appellant a farmer aged 40 – recalled being sent by his head teacher on the 27.9.2012 to listen to a case at the chief's. That on 6.11.2011 he attended prayers for standard 8 pupils in the company of colleagues. Later he was taken to Chebelion Ap camp in connection with this complainant who had disappeared and surfaced on 6.11.2011. Much later he was charged with this offence. He denied having defiled the complainant or having disappeared from the village.

DW2 K M aged 19 years, recalled that the police looked for the appellant on 6.11.11 but they had gone for prayers. On 10.11.2011 they went to Cheboi and found PW3 to resolve the issue involving the complainant but this did not happen as the girl was found loitering elsewhere. On 2.7.12 the police came for DW1 as PW3 declined to have the matter resolved at home.

6. From the evidence stated above I am convinced from both the complainant, her parents and indeed the medical record that at the time the complainant engaged in sex she was aged 15 years and a pupil in class 8 awaiting to do her KCPE examination. The complainant attended [particulars withheld] primary school and was registered for her exams at [particulars withheld] primary school. She was a day scholar and returned home every day except the 2nd to the 6th of November 2011, when she disappeared and was later found by her mother who thereafter took her to an aunts place so that she would attend rehearsals for purposes of her examination. She was later admitted to [particulars withheld] secondary school where she attended school for the first term and 2 weeks of 2nd terms and thereafter stopped attending school because of pregnancy. At the instigation of the parents the complainant was examined and found to be 32 weeks pregnant. She thereafter she delivered a baby boy. No DNA was conducted done to ascertain the paternity of the child was.

The complainant maintained that the appellant defiled her 3 times and that She had not had sex before. She blamed the appellant for the pregnancy.

PW3 complained to the police immediately after the incident but did not pursue the matter until the complainant dropped from school due to the pregnancy.

On his part the appellant denied the allegations. The appellant argues that since no DNA was performed there is lack of proof that he defiled the complainant.

In my view the medical record gives the age of the complainant as being 15 years in 2012 thus corroborating the evidence of PW1, 2 and 3. I find as a matter of fact that the complainant was 15 at the time of the alleged defilement. The fact that the complainant delivered a child is full proof that she had sex. The question is who defiled her.

It is the complainant's word against the appellant. However I deduce the following from the defence case.

One DW2 in his evidence stated that on 6.11.11 & the 10.11.2011 they went with the assistant chief to the police station to resolve the issue regarding the complainant. He further stated that on 2.7.2012 they were informed by the police that PW3 had declined to resolve the issue at home. Thirdly the appellant severally attempted to compromise on this matter.

Having made the above observation I am inclined to believe the evidence of PW2 the complainant and I find that there is consistency between her evidence, that of PW1, 2 and 3. The complainant disappeared and slept in the appellant's house on 2.11.2012, she altogether had sex 3 times with the appellant. She was a standard 8 pupil and was about to miss her examination but for the efforts of her parents. Although it is not clear whether she is back to school, what is clear is that she attended form 1 in 1st term and 2 weeks of 2nd term and left due to her pregnancy. As at 5.6.2012 she was 32 weeks pregnant. Scientifically this places the date of conception at the time of the alleged defilement. I see no inconsistency in the prosecution case.

The appellant did not displace the cogent prosecution case in fact his evidence is clear that he did attempt to resolve the matter elsewhere in a bid to avoid the law.

I see no error in the finding of the trial court as regards consistency and truthfulness of the complainant's evidence that led to the conviction of the appellant.

Having found concurrence with the trial court on the issue of defilement, I am of the view that the complainant was 15 years and not 12 as held by the trial court and the question therefore is whether the sentence meted out will therefore hold.

Section 8 (1) provides

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8 (3)

“A person who commits an offence of defilement with a child between the age of sixteen and fifteen years is liable upon conviction to imprisonment for a term not less than 20 years.”

From the above provision of the law the sentence was lawful.

From the reasons above therefore the court upholds both the conviction and sentence.

The appeal is dismissed.

Dated at Bungoma this 21st day of May 2015.

ALI-ARONI

JUDGE.