



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 106 OF 2013

PATRICK WEKESA SUNGUTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against Judgment conviction and sentence of Hon. J.W. Owiti Principal Magistrate at Kitale delivered on 20th September, 2013 vide Kitale CMCR. No. 1745 of 2011)

J U D G M E N T

1. The appellant, **Patrick Wekesa Sunguti**, appeared before the Principal Magistrate at Kitale charged with defilement, contrary to Section 8(1) read with 8(4) of the Sexual Offences Act, in that on the 24th July, 2011, in Trans-Nzoia County, he defiled **MC**, a girl aged sixteen (16) years.
2. After a full trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment. He preferred this appeal to express his dissatisfaction with the conviction and sentence. The grounds of appeal are those contained in the petition of appeal dated 23rd September, 2013.
3. The appellant appeared in person at the hearing of the appeal and presented his written submissions which he relied on in support of his case. He urged this court to allow the appeal. **Mr. Kakoi**, the learned prosecution counsel, appeared for the respondent and opposed the appeal by submitting there is nothing on the record to warrant the intervention of this court on conviction and sentence.
4. The learned prosecution counsel, further submitted that the complainant testified on how she lived with the appellant after he took her from her home and how in the process acts of defilement were committed against her. That, the age of the complainant was confirmed to be sixteen (16) years and that it was confirmed by the clinical officer that the complainant was indeed defiled. That, the defence raised by the appellant did not invalidate the evidence against him. The learned prosecution counsel urged this court to dismiss the appeal.
5. Having considered the submissions by both sides, this court was called upon to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence by the five (5) prosecution witnesses was considered along that of the appellant in his defence.

6. In her testimony, the complainant **MC (PW1)**, indicated that the appellant was her boyfriend and that they met on the material date and proceeded to his house at Kaplamai centre where they had sexual intercourse. She slept in his house and on the following day took her to Amagoro where her grandmother

lived. She did not find the grandmother and ended up sleeping at an old woman's house before she was taken to her grandmother by a neighbour. She reported the matter to her grandmother and it ended up with the police.

7. The complainant's guardian, **GL (PW2)**, indicated that the complainant left home on the material date but did not return. She later called using a phone said to belong to the appellant and said that she was at Amagoro. He (PW2) caused the matter to be reported to the chief after the appellant denied any knowledge of the complainant's whereabouts. She (complainant) was later traced in Kitale town and later to Sibanga from where she was taken to hospital.

8. **P.C. Joshua Nganga (PW3)**, indicated that the appellant was apprehended by police reservist and taken to a police post on allegation that he waylaid the complainant, and took her to Amagoro. She was therefore taken for age assessment and after statements were obtained from witnesses, the appellant was charged with the present offence.

9. **Linus Ligare (PW4)**, a clinical officer at Kitale District Hospital examined the complainant and concluded that she had been defiled while **Dr. Ken Ndege (PW5)**, examined her for purposes of assessing her age and concluded that she was below seventeen (17) years but above fourteen (14) years. Her age was thus assessed at sixteen (16) years.

10. In his defence, the appellant (DW1) denied the charge and indicated that he reported to his place of work a day after the material date and was informed that he had defiled the complainant. He denied the allegation and contended that the girl disappeared from her home for four (4) days.

11. From all the foregoing evidence, it is apparent to this court that the complainant and the appellant were persons known to each other and may have been involved in a relationship which the complainant implied was a girlfriend/boyfriend relationship. The appellant did not deny the existence of such a relationship.

12. It is also apparent that on the material date 27th July, 2011, the complainant met with the appellant and may have ended up at his house. She said that she spent the night at the appellant's house. This fact of spending the night outside her home was confirmed by her guardian (PW2) who later traced her whereabouts through a phone belonging to the appellant.

13. The appellant, however, indicated to the guardian that he did not know where she was but she herself indicated in evidence that she was with the appellant at the time in his house before he arranged for her to be taken to Amagoro.

The appellant did not admit having been with the complainant on the material date but said that she had disappeared from her home for four days, a fact which was somehow confirmed by her guardian (PW2).

14. Indeed, the complainant confirmed that she was not at the appellant's house for the entire four days but implied that she was there for only one day during which time they engaged in sexual intercourse. She said that she went to that house voluntarily and as a girlfriend of the appellant. She indicated that she slept elsewhere when she left the appellant's house. She talked of having spent two (2) nights with an old lady called Sabina.

15. However, other than what the complainant stated, nobody came to the fore to confirm that the appellant was indeed with the complainant in his house on the material date. Nobody saw them together or none of the people who might have seen them together on that day was called to confirm the fact. Here, our minds would be directed to people such as the old lady Sabina and the motor-cyclist who allegedly took the complainant to Amagoro at the behest of the appellant.

16. From what the complainant stated, it was evident that she may have voluntarily engaged in sexual intercourse with the appellant on the material date or any other and with other unknown persons from the time she disappeared from her home and was not with appellant. In the circumstances, it was difficult to

pinpoint the appellant and say that he was responsible for defiling the complainant. It was clear that the complainant with the knowledge that she was underage voluntarily engaged in sexual intercourse with the appellant and must probably other people. There was no evidence to suggest that the appellant had the knowledge that the complainant was under eighteen (18) years when the two engaged in sexual intercourse.

17. It cannot therefore be far fetched to think that the complainant intentionally deceived the appellant in order to have sex with him or that she set him up for him to land in trouble with the law. This court does not think that she was a reliable witness and may have told a story to implicate the appellant and cover for her disappearance from home for four days.

18. It would therefore follow that even if there was medical evidence of defilement, it could not be said beyond reasonable doubt that the appellant was the person responsible to the exclusion of any other person.

Consequently, the charge against the appellant remained unproved by the prosecution. The appellant's conviction by the learned trial magistrate was therefore unsafe and is hereby quashed with the resultant sentence of fifteen (15) years imprisonment being set aside.

19. In sum, this appeal is allowed. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

J.R. KARANJA

JUDGE

18/6/2015

[Delivered and signed this **18th** day of **June, 2015**]