



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 84 OF 2014

CK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 676/13 at Butali Senior Resident Magistrate's Court by T.K. Kwambai - RM on 24th September, 2014)

JUDGEMENT

The appellant has appealed against his conviction and sentence of fifteen (15) years imprisonment imposed upon him on 24th January, 2014 by the Ag. Senior Resident Magistrate at Vihiga. In his petition of appeal, he has listed three grounds in support of his appeal to have the conviction and sentence set aside.

This is a first appeal. By virtue of its being a first appeal, I am required to reassess the evidence tendered at trial and arrive at my own independent findings while at the same time deferring to findings of credibility as found by the trial court. In order to do so, it is important to analyze the grounds of appeal in the right of the evidence produced in the trial court and the judgement appealed against.

The evidence which was produced in court consisted of the 17 year old complainant (PW 1). She gave unsworn evidence following the holding of a voire dire examination which was conducted by the trial court. It seems that the trial court was of the view that the complainant was a child of tender years which in our practice means a child who is aged 14 years and below. When she gave evidence, it turned out that she was actually 17 years old having been born in 1996. A birth certificate was produced being exhibit PMFI 1. According to the birth certificate, PW 1 was born on 11th April 1996. She stated that the appellant was his boyfriend. She went further to state that tshe used to have sex with him. Furthermore, she stated that on 5th July, 2013 at about 2.00 p.m. She left her home heading to Madzuu. She did not tell her aunt (PW 2) that she was proceeding to Madzuu. She further said that she had gone there to see the appellant who was his boyfriend. They spent the night together. She also says that they had sex once and they did not use a condom. She stayed in the boyfriend's house from 5th July, 2013 to 11th July, 2013 and that they used to have sex daily.

Furthermore, she stated that on 11th July, 2013 at about 1 p.m, her aunt (PW 2) came and took her. As at that time, the appellant was not there because he had gone to work at Madzuu Secondary School. The aunt proceeded to take her to Mahanga AP Camp and thereafter was taken to Vihiga Police Station where she found the appellant who had already been arrested. It is also her evidence that the appellant is not married. According to her, she decided to have sex with the appellant because she was her boyfriend.

Subsequently, the complainant was taken to Vihiga Hospital for medical examination and treatment. She had stated that she was feeling pain in her private parts. Her treatment notes were put in evidence as exhibit PMF 12 and the P3 form was put in evidence as exhibit PMFI 2.

Apart from the evidence of the complainant, there is the evidence of her aunt DKA. Her evidence is that the complainant is the daughter of her sister. She says that the complainant was living with her because she (PW 2) was staying alone. According to her, the complainant left her home on 5th July, 2013 at about 2.00 p.m without telling her where she was going. She stated that the complainant was going to borrow some past examination papers for revision. The next day she went to look for the complainant at her friend's home at Mahanga but she was unable to trace her. She reported her disappearance to his father and together they reported to the village elder by the name Kisili. Thereafter, they proceeded to the home of the Assistant Chief who eventually accompanied them and they traced the complainant at Madzuu in the village elder's home. They then arrested the accused person at Madzuu school and took him to the AP camp.

Finally, her aunt stated that the complainant told her that for all the days that she was staying with the appellant, they used to have sex. She also confirmed the date of birth of the complainant as being 11th April, 1996.

The evidence of the complainant's aunt is supported by that of the Assistant Chief of [Particulars Withheld] sub-location Mr Reuben Amuyunzu and that of No. 22906 APC Richard Biwott who was attached to Mahanga AP Police Post. The evidence of this police constable is that he rearrested the appellant while the appellant was on his way to Mahanga market.

The complainant was taken for medical examination at Vihiga District Hospital. She was examined by Mr. Sammy Chelule a Clinical Officer at the hospital. According to this Clinical Officer, the complainant told her that she was enticed into getting married by the appellant. She further stated that she was about 16 years old. She also told the Clinical Officer that they used to have sexual intercourse everyday between 5th July, 2013 until 11th July, 2013.

Upon examination, he found the hymen had healed although there was fresh rubbing on the walls of her private parts. The Clinical Officer found that there was swelling and that the complainant was feeling pain upon his genital examination. The Clinical Officer also found that there was a smelly whitish discharge. He concluded that this minor had been defiled which in his view was intentional forceful penetration and that it was being done daily.

The appellant in his defence decided to give sworn evidence and decided not to call any witness in his defence. In his evidence, the appellant stated that he was working at Mudavadi Girls School. While at the school the Assistant Chief came to talk to the Headmistress and it is from that office where he was arrested and taken at Mahanga AP camp. He further stated that he was assaulted at that camp. It is also his evidence that the complainant too was assaulted and ordered to state that she was a girlfriend to the appellant.

According to the appellant, he was married to a Luo Lady. It is also his evidence that he used to work for the complainant's mother who refused to pay him. As a result, he took her three hens. Due to this the complainant's mother then vowed that he was going to pay for it. He says that is why he was framed up by the complainant's mother. Finally, he stated that the complainant's mother made everyone to hate him in the area because he had gotten a new job and for that reason she wanted to frustrate him in order to lose that job.

Under cross-examination, he denied ever seeing VA who is the complainant in this case. The reason he gave is that he lives in Nairobi. It is his further evidence that he used to come home to visit his father. One such visitation occurred on 28th May, 2013. According to him, he was shocked to hear these charges that have been preferred against him. He also said that no one wants him in their area. He also says she hates him because he works in Nairobi.

The trial court accepted the prosecution evidence and rejected that of the defence. I have reassessed that evidence and I have come to the same conclusion as the trial court. The unsworn evidence of the complainant is credible. She was consistent in maintaining that the appellant was his boyfriend. She told her aunt DKA that the appellant was his boyfriend. She repeated the same evidence of her friendship with the appellant to the Clinical Officer (PW 6). I find no reason why she should be telling lies against the appellant. I also find that the evidence of the defence is not credible. There is no reason why everyone in his home village would hate him because he has been employed in Nairobi. His evidence was rightly rejected.

In respect of his first ground of appeal, I find that the appellant's identity was not mistaken by the complainant. The trial court properly directed itself as to the identification of the appellant by the complainant and found that the appellant was positively identified. This finding is supported by evidence of the fact that they had stayed together for 6 days. Furthermore, the complainant stated that the appellant was his boyfriend. This ground of appeal is without merit. As regards ground 2 of his appeal, I find that there was no ill motive that motivated the police in charging the appellant with defilement and indecent assault. This ground of appeal also fails.

The appellant has also attacked the judgement of the trial court for failing to scrutinize the medical evidence. I find as did the trial court that the evidence of the Clinical Officer as regards the injuries that were found on the complainant as being consistent with having been defiled. The Clinical Officer found that the penetration of the complainant by the appellant was intentional and forceful. This is consistent with the evidence of the complainant. And for this reason, this ground of appeal also fails.

I find that the sentence of 15 years imprisonment that was imposed by the trial court is one that is authorized by law.

However, I find that the proceedings and the sentence imposed which are lawful raise issues of public concern. Here is a complainant who admittedly is the girlfriend of the complainant. It is not proper for these proceedings to have been filed in view of the consent and age of the complainant who was less than one year to attain the age of majority. It is for this reason that I recommend that the sentence imposed upon the appellant be reviewed by the Advisory Committee with a view to recommending to the President that the appellant's sentence be commuted.

JUDGEMENT DATED, SIGNED and DELIVERED at KAKAMEGA this... 23rd.... day of JULY....., 2015

J.M. BWONWONGA

JUDGE

23.07.15