REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 104 OF 2012

(CORAM: F. GIKONYO J.)

BONIFACE OTIENO ONYANGO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by R.O. OIGARA, SRM in KIMILI SRMCCRC NO 357 OF 2010 on 8.7.2011)

JUDGMENT

The charge

[1] BONIFACE OTIENO ONYANGO, the Appellant, faced a charge of child prostitution contrary to section 15(a) of the Sexual Offences Act. The particulars of the offence were that; on diverse dates between 20th March, 2010 and 26th March, 2010 at [particulars withheld] in Kimilili District within Western province, he intentionally and unlawfully permitted a child namely P N a girl aged 16 years to remain in a premises for the purposes of causing the child to be sexually abused or to participate in some form of sexual activities. He was tried and convicted for the offence.

The Appeal

[2] Being dissatisfied with the conviction and sentence, he filed this appeal. He proposed the following five significant grounds of appeal:

> ***1) That the learned trial magistrate erred in law by trying, convicting and sentencing him on a charge which was incurably defective, unlawful and unconstitutional;***
>
> ***2) That the learned trial magistrate erred in law in convicting him for the offence of child prostitution when the age of the complainant was not ascertained;***
>
> ***3) That the learned trial magistrate erred in law by convicting him on medical evidence which was speculative, discredited, fabricated, inconsistent and un-corroborative;***
>
> ***4) That the learned trial magistrate erred in law and facts in failing to take***

proper account of the credibility of the prosecution witnesses; and

5) That the learned trial magistrate erred in law and facts by convicting him when the prosecution had not proved its case to the required standard and without calling crucial witnesses.

[3] The Appellant filed written submissions and also made oral ones before the court. I shall consider every piece of argument he made in support of each ground of appeal in my analysis of the merits or demerits of the appeal.

State Opposed Appeal

[4] Mr Kamau, the learned state counsel appeared for the state and opposed the appeal. He made elaborate submissions which I will also consider during my evaluation of the evidence and analysis of the arguments presented in the appeal.

COURT'S RENDITION

Duty of court

[5] This is the first appeal. I will, therefore, as by law required evaluate the evidence afresh and come to my own findings and conclusions, except I should give allowance for the fact that I neither heard nor saw the witnesses. See **OKENO v REPUBLIC.**

Court's analysis of evidence and submissions of the parties

[6] Prosecution called four (4) witnesses. PW1 was 15 years old. She testified under oath after the trial magistrate was satisfied that she possessed sufficient intelligence to testify. She told the trial court that on 20.3.2010 she had visited her sister called L N at [particulars withheld] when the Appellant, who had boarded the same vehicle as her, asked her to alight from the vehicle for he wanted to talk to her. That was their first encounter as she did not know the Appellant before then. The Appellant asked her to visit him the following day which she did. The Appellant then told her that he wanted to marry her and asked her to spend the night at his place. They had sex once on that day. The Appellant then asked her to return to his place the following day at 5.00. The Appellant feared that she might be pregnant and that she should not go home. But she decided to go home and attended school. She, however, went back to the Appellant and she stayed with him until 26.3.2010.

[7] On 26.3.2010, her sister L and the wife of the Appellant found her with the Appellant. The Appellant then ran away only to be traced on 27.3.2010, was arrested and taken to Kimilili police station. PW1 was taken to the police station and later to Kimilili district hospital where she was examined. In the room where the Appellant had sex with PW1 lived another man by the name Peter.

[8] PW2 is the mother of PW1. PW2 had sent PW1 to go and assist her sister L. PW1 was to return home on 21.3.2010 but she did not. PW2 called L to enquire why PW1 had not returned home. L told PW2 that PW1 had left for home on 21.3.2010. PW1 arrived home on 22.3.2010 and when PW2 asked her where she had been, she replied that the vehicle she had boarded broke on the way and she had to sleep at a lady's place whom she had just met after the breakdown of the vehicle. PW1 then pretended that she had left for school. PW2 then found the school uniform for PW1 in the bathroom and she realized PW1 had not gone to school. PW2 went to L's place and together with the wife of the Appellant, they started looking for PW1. On 26.3.22010 they found PW1 but the Appellant ran away. On 27.3.2010, they traced the Appellant and he was arrested before he could flee. He was taken to the AP Camp. Then he was taken to Kimilili police station. PW1 was then examined and P3 Form filled in. PW2 confirmed that PW1 was 15 years old having been born in 1995. She did not know the Appellant before the arrest.

[9] PW3 is the Investigation Officer (IO). She received the complaint from PW1 and PW2 that PW1 had been defiled and married by the Appellant for four days. She also recorded their statements and issued them with P3 Form.

[10] PW4 testified on the medical aspects of the case. He assessed the age of PW1 to be approximately 16 years. He also produced medical treatment notes and a P3 Form for PW1, and P3 Form on the examination carried on the Appellant. The medical evidence showed that PW1 had had some sexual intercourse. She had even contracted sexually transmitted disease which was similar to the infection found on the Appellant. He concluded that the Appellant transmitted the disease to PW1.

[11] I will proceed to weigh the grounds of appeal and the arguments put forward by both parties against the evidence I have recast above to determine whether they are meritorious or not. Then I shall make my overall impression of the entire evidence and come to my own conclusions on the case.

Was the charge defective, unlawful and unconstitutional?

[12] The Appellant has argued that the witnesses gave different dates for his arrest. This contradiction according to him does not support the charge sheet. From the evidence of PW1 and PW2 the Appellant was arrested on 27.3.2010. They clearly stated the date of the arrest and I do not see any contradiction as submitted by the Appellant. PW3 on the other hand did not mention when the Appellant was arrested. She only mentioned when she formally recorded the statements of PW1 and PW2. The argument that the evidence on the date of arrest does not support the charge sheet is most feeble and it fails. I also find the other argument based on the same ground that the charge was unlawful and unconstitutional not to have merit, and is accordingly dismissed.

Was the age of the complainant ascertained?

[13] The age of the complainant was ascertained by medical assessment of age to be approximately 16 years. The doctor who filled the P3 Form also carried out age assessment on the complainant on 30.3.2010 and recorded his assessment after due consideration of reproductive her systems, hair distribution, dental formula and radiological examination. I wish to disabuse the Appellant from the argument that the exact age of the complainant was not ascertained because there was no certificate of birth which was produced, and because there was contradictory evidence. Age assessment does not mean certificate of birth as the court could use other methods and information to settle the question of age of the complainant. Although in this case, as I have stated earlier, the age of the complainant was ascertained through professional age assessment by the doctor, for better understanding of the first point I made on certificate of birth see the decision by Prof Ngugi J in **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC:**

> ***''…that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases''.***

The argument by the Appellant that the age of the complainant had not been ascertained is, therefore, misguided and ground 2 of appeal on that aspect fails.

Was medical evidence speculative, discredited, fabricated, inconsistent and un-corroborative?

[14] The medical evidence adduced by PW4 was conclusive and consistent in showing that the complainant had sexual intercourse. It also established that the complainant had been infected with sexually transmitted disease with the same strain as the one found on the Appellant when he was examined. The infection was about three days old. The evidence of PW4 is consistent with the evidence of PW1 that she had with the Appellant during the time she was with him. When that

evidence by pw4 is interposed within the evidence of PW1, the court comes to an irresistible conclusion that the Appellant transmitted the sexually transmitted disease to the complainant. To that extent, I agree with the submission by Mr. Kamau on that aspect. I refuse to accept the submissions by the Appellant that the medical evidence did not reveal any sexual intercourse with PW1 and as such exonerated the Appellant. I reject his said arguments.

[15] One other issue; the original booklet containing the medical notes shows the first visit in hospital was on 28.3.2010 and diagnosis on the complainant was done the following day on 29.3.2010. The diagnosis on the complainant about the sexually transmitted disease was, therefore, not done on 24.3.2010 as alleged by the Appellant. The doctor signed and dated the diagnosis on 29.3.2010. The other date of 24.3.2010 below the date of 29.3.2010 relates to the prescription for drugs and injections; and that date is clearly an error which does not vitiate the medical evidence tendered in court as submitted by the Appellant. I, therefore, fail to see how the medical treatment notes were a forgery as alleged by the Appellant. The whole analysis by the Appellant that the error I have just resolved portends fabrication is wrong and is not supported by the evidence on record. I dismiss ground 3 of the appeal.

On credibility of prosecution witnesses

[16] The Appellant has submitted that PW1 talked of two different schools i.e. [particulars withheld] primary school and [particulars withheld] primary school. I have perused the typed proceedings as well as the handwritten notes of the trial magistrate and I do not see ‘’[particulars withheld] primary school’’ anywhere. The hand written proceedings are not quite legible but they refer to the same school either [particulars withheld] or [particulars withheld] primary school. I do not find any contradiction in the evidence of PW1 with regard to the school she attended then. Based on the earlier findings about the date of arrest, and the foregoing finding on the name of the school attended by PW1 on the material day, I dismiss ground 4 of the appeal for lack of merit.

Did the prosecution prove its case beyond any reasonable doubt?

[17] The learned state counsel cited the case of **JULIUS LANG’AT KIPROTICH v REPUBLIC [2006] eKLR** to support his case**.** The Appellant on the other hand, tried to distinguish the case from the case facing him. The thrust of the difference he sees in the two cases is that the case quoted by the state counsel was decided on the following basis:

> ***1) That the evidence of the complainant was highly compelling as true and that her case sounded natural and logical which withdrew any chance of it being fabricated;***
>
> ***2) That her evidence as to circumstances leading to rape was corroborated by the evidence of PW2; and***
>
> ***3) That the medical evidence confirmed the complainant had had sexual intercourse.***

[18] True, the said case was decided on the basis as captured by the Appellant. But even in the present case, I have found that the medical evidence proved the complainant had had sexual intercourse. The evidence of PW1 was also compelling and I ruled out the possibility of fabrication of the case he faced. Finally, I found that, the evidence of PW4 corroborated that of PW1 that she had had sex with the Appellant, and the court came to an irresistible conclusion that it was the Appellant who transmitted the sexually transmitted disease to the complainant. PW1 testified that he was with the Appellant from 21.3.2010 to 26.3.2010. Although she did not know the Appellant before that encounter, five days is such a long time, especially when it is spent intimately between two people who are romantically involved, for PW1 to have recognized the Appellant. There was nothing to suggest any mistaken identity on the part of PW1 about the person she had sex with and temporarily eloped. The evidence by the defence was mere non-

admission of the allegations levelled against him and does not dislodge the prosecution case. As a result, the prosecution proved that the Appellant ***knowingly permitted PW1, a child aged 16 years to remain in some premises at [particulars withheld] Market, for the purposes of sexually abusing or making her to participate in sexual activity. Indeed he sexually abused her and lured her to participate in sexual activity with him.***

[19] The evidence tendered has even proved the offence of defilement with a child between the age of sixteen and eighteen years contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. Major portion of the submissions by the Appellant and Mr Kamau evidently address a case for defilement. But I am restrained by good sense of justice not to convict him for defilement for two reasons; 1) defilement is a greater offence for upon conviction a person is liable to imprisonment for a term of not less than fifteen years; and 2) no notice had been given to the Appellant about enhancement of sentence. Nonetheless, the upshot of my analysis is that the prosecution proved that the Appellant was guilty of the offence charged; the conviction is safe; and the sentence imposed by the trial magistrate is legal and reasonable. I uphold the conviction and sentence by the trial court. The Appellant shall continue to serve the original sentence of ten (10) years imprisonment. The appeal is dismissed.

Dated and signed at Bungoma this 21st day of January, 2014

F. GIKONYO

JUDGE

Signed and Delivered in open court at Bungoma the 21st day of January, 2014

A MABEYA

JUDGE