



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 95 OF 2012

ABBAS KWEYO NGOMBE APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal from the Chief Magistrate's Court Kakamega in Criminal Case No. 3176 of 2007 against the Judgment of [H.I. ONG'UDI, CM] dated 31.8.10)

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(4)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on the 8.12.2007 at [particulars withheld], in South Kakamega District within Western Province, intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely vagina of L K a child aged 16 years.*

The appellant was convicted and sentenced to serve 18 years imprisonment. The grounds of appeal are that the prosecution case was not proved beyond reasonable doubt, the age of the complainant was not ascertained and that his defence was rejected. The appellant filed written submissions and contends that the trial court relied on baptismal card yet there was an age assessment report that was not produced. There was contradiction in relation to a sleeveless blouse. Further that the complainant was conducting a tailoring business at [particulars withheld] trading centre and he considered her as being an adult who was running a business and having customers. The complainant had had sex before and he thought that she was an adult.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that the complainant was a minor and could not have consented to the offence. Some clothes belonging to the complainant were found in the appellant's house. The evidence of **PW1 L K** is that she does tailoring business at [particulars withheld]. She was born on 14.11.1991 and was baptized in 1992. On 8.12.2007 she went to the appellant's home looking for the appellant's mother. She had stitched a dress for the appellant's mother and she had gone to collect her money totaling KShs.300/=. It was about 4.00 p.m. She found the appellant washing clothes and he invited her. She entered the house and inquired about the appellant's mother who was not in. When she trying to leave the appellant held her hand and pulled her into a bedroom then defiled her for about 2 hours. She then managed to escape and ran outside but she fell and the appellant dragged her back to the house and defiled her the whole night. She managed to escape at 5.00 a.m. She had KShs.4,150/= in her blouse and it was missing. She went to inform her parents and they went to report the matter at Navakholo police station. She was later treated at Navakholo district hospital. She went to the appellant's house with the police and her handkerchief, panty and blouse were recovered. It is her further evidence that she finished primary school in 2005 and trained as a tailor in 2006.

PW2, R N W, is the mother of PW1. It is her evidence that PW1 was born on 14.9.1991. On 8.12.2007 at 3.00 p.m. PW1 went to collect her money from the appellant's mother but she never went back home. On the 9.12.2007 at about 6.00 a.m. PW1 went home and informed her that she had been defiled. She had no blouse, panties and her skirt was torn. The mater was reported to the police. **PW3, CHARLES LEPORO MORETHO** is a clinical officer who was based at the Navakholo district hospital. The complainant had swollen forehead and painful thighs. On examination he concluded that PW1 had been defiled. An age assessment was done on the complainant but he did not have the report.

PW4, PC PHILIP ATEMBA, was based at the Navakholo police station. The mater was reported on the 9.12.2007 and he went with the complainant to the appellant's house. He recovered a sleeveless blouse, black pants and a white handkerchief. The complainant identified them as hers. The appellant was later charged with the offence.

The appellant was put on his defence. In his sworn evidence he stated that on the 8.12.2007 the complainant went to his home at 3.00 p.m. He had known the complainant as his lover for about 1 ½ years and she was not going to school. The complainant was a tailor at [particulars withheld]. On 8.12.2007 she went to his house to fulfill a date and not to collect any money from his mother. He was expecting her and he had prepared for some food. They had supper at 8.00 p.m. and the complainant took a bath at 9.00 p.m. He did not know that she was 16 years old and he met her when she was doing her business. That was the first time she was sleeping in his house but they had had sex before. The complainant had sex with him that night and left at about 5.45 a.m. He denied that he used force on her or tore her clothes.

ZAITUNI NANZALA YAKOBO, testified as **DW1**. She is the mother of the appellant. She knew the complainant as the appellant's girl-friend since 2007. On the 8.12.2007 she left the appellant at home and when she returned she found the appellant and the complainant seated at the table. That was the fourth time the complainant had gone to her home. Her house is about 20 meters apart from that of the appellant and she could just hear laughter from the house and not cries. She further testified that she had no debt with the complainant and she had no dress stitched by the complainant.

The trial court considered the evidence on record and found that there was defilement. The trial court also considered the defence provided under **section 8(5)** of the Sexual Offences Act. The main question for determination is whether the complainant had sexual intercourse with the appellant, whether the appellant innocently believed that the complainant was over 18 years and whether the prosecution case proved beyond reasonable doubt.

The prosecution evidence does prove that the appellant had sexual intercourse with the complainant on the 8.12.2007. Although the appellant contests that the baptismal card was not sufficient to prove the age of the complainant, I do find that the document was properly produced and the age of the complainant was established. The complainant was born on the 14.11.1991 and she was therefore 16 years old when the incident occurred. The complainant testified that she did not agree to have sex with the appellant. Her blouse was torn and she escaped in the morning. On the other side the appellant contends that the complainant was his girl-friend and she had come to fulfill a date. The appellant's mother denied that the complainant had gone to collect a debt as there was no money owing to the complainant. According to the investigating officer there are four houses in the compound. This is in line with the evidence of DW1. The complainant alleges that she screamed but no one went to her rescue. The incident occurred throughout the night and DW1 did not hear any screams. It is not clear how the complainant escaped at 5.00 a.m. Although it would be expected that DW1 would testify in favour of her son, I do find that the defence evidence did raise doubt on the prosecution case. It is possible that the complainant had befriended the appellant. The medical evidence does not show that the complainant's hymen was broken. It is clear that she had had sex before that incident. It is also possible that she had had sex with the appellant before that incident.

Section 8(5)(a) states that it is a defence to a charge of defilement if:-

(a) If it is proved that such child, deceived the accused person into believing that he or she

was over the age of eighteen years at the time of the alleged commission of the offence and

(b) the accused reasonably believed that the child was over the age of eighteen years.

Under **section 8(6)** it is indicated that the belief by an accused person that the child was over 18 years has to be determined by taking into account the circumstances including any steps the accused person took to ascertain the age of the complainant. The trial court only concluded that since the baptismal card showed that she was 16 years and the fact that she was a tailor could not have been sufficient proof that she was an adult. Given the circumstances of the case it is clear from the prosecution evidence that the complainant had been tailoring for 2 years. It is the evidence of the appellant that they were friends for some time. It is also established that the complainant had had sex before that incident. Taking regard of the circumstances involving the case, a prudent person would have thought that the complainant was an adult. I am alive to the fact that the trial magistrate had the advantage of seeing the complainant and assessing her appearance. However, as indicated by the appellant since the complainant was conducting business and had befriended him, that was sufficient consideration on the part of the appellant to have concluded that the complainant was an adult. I do find that the appellant was entitled to the benefit of doubt and the defence evidence raised doubt on the prosecution case.

In the end, I do find that the appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E