



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 14 OF 2012

BENSON NYAGA MUCHOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with three counts (1), abduction contrary to Section 142 of the Penal Code (2) defilement contrary to Section 8(1) (4) of the Sexual Offences Act No.3 of 2006 and (3), indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The appellant was convicted on count II and sentenced to serve 15 years imprisonment.
2. The appellant being aggrieved by the conviction and sentence he preferred this appeal setting out 7 grounds of appeal in the petition of appeal filed on 27/1/2012. The appellant's counsel Miss Nelima learned Advocate subsequently filed supplementary grounds of appeal dated 6th November, 2012 setting out 6 grounds of appeal. On 8th April, 2014 Mr. A. G. Riungu, learned Advocate filed notice of change of Advocates and came on record for the appellant.
3. When the appeal came up for hearing Mr. A. G. Riungu learned advocate appeared for the appellant whereas Mr. Makori, learned State Counsel, appeared for the State. Mr. A. G. Riungu combined the six(6) grounds of appeal as in the supplementary grounds of appeal and argued all of them together as one ground. Mr. Makori, learned State Counsel conceded the appeal.
4. This is the first appeal and this court has legal duty to subject the evidence adduced before trial court to a fresh analysis and evaluation and come to its own conclusions bearing in mind it had no opportunity to hear and see the witnesses at the time of giving their evidence and have given due allowance for the same. The court is guided by the court of appeal decision of **OKENO V REPUBLIC (1972) EA 32.**
5. The prosecution case is that the appellant abducted and detained H G a girl aged 17 years between 5th and 15th May, 2010 at Igoji from [Particulars Withheld] School against her will with intent to marry or carnally know her. PW1 father to PW3, the complainant, went to [particulars withheld] School on 6th May, 2010 to pay school fees for the complainant. That upon paying school fees PW3 was called so that the principal and PW1 could discuss an issue concerning PW3 but she was not found at the school. Search was subsequently commenced for PW3 and announcement about

her missing was placed in Muga FM, Kameme FM and Inoro FM Radio stations. That a friend of hers C disclosed that PW3 had called her through a private No.0722..... which number was known to PW1 father to PW3. It was number of Benson Nyagha the appellant. PW1 reported to Nkubu Police Station and he was referred to Meru Police Station with a note whereby he was assigned two police officers who he led to appellants' house but found that the appellant had shifted from the house but CID tracked the phone at Nkubu.

6. The complainant's father PW1 returned to Nkubu Police Station and informed them of the new developments. That on 15th May, 2010 PW1, PW2, his wife, and Chief Josheck Mungatia spotted PW3 within Nkubu main stage in the company of the appellant, who on seeing PW1, and PW2 in company of Mungatia took off and was pursued and arrested. PW3 was in new grey skirt suit and black shoes. PW3 and the appellant were taken to Nkubu Police Station. The witnesses recorded statements. PW3 stated that on 5/5/2010 she sneaked out of school and went to Meru Town [particulars withheld] area into the house of the appellant where PW3 spent with the appellant and they had sex many times. That on 16th May, 2010, PW1, PW2 and PW5 were led by PW3 and the appellant to appellant's house at Meru, [particulars withheld] area, where appellant opened the house and PW3 school uniform recovered. That on 20.5.2010 PW3 and the appellant were escorted to Meru General Hospital for examination. The girl's age was assessed to be under 18 years and that she had experienced laceration, the hymen was broken and had whitish vaginal discharge. The appellant was examined and found to be HIV positive. The two were examined and one P3 form was filled for both. The appellant was then charged with the three counts.
7. The appellant in his sworn defence testified that H G was known to him and that he is a student at University of Nairobi taking medicine. That on 11th May, 2010 he was at Nkubu town when he met a lady who asked him to assist her secure a job. On interviewing her she told him she was over 18 years and had no documents such as identity card nor academic certificates. She told him she had not obtained the documents for she lacked school fees and had differences with her step father and it is at that time he heard people saying he should be arrested and he was arrested. He suggested that they proceed to Nkubu Police Station. The girl was not in uniform and the appellant denied having known her before or her parents. He testified that he did not know [particulars withheld] School nor was he her man friend. He denied having had sex with her and testified he does not know why the girl fixed him. He averred he had not known her real age as she had told him she was a Form IV school leaver. He testified the witnesses who gave evidence against him lied. He denied anything having been recovered from his house. He denied having ran away on seeing PW1 or being chased. He testified the girl got his number from police station.
8. The appellant's Counsel Mr. A. G. Riungu condensed all the six(6) grounds of Appeal as set out in the supplementary grounds of appeal dated 6th November, 2012 and argued them as one ground. He urged that PW1 and PW2 parents to PW3, the complainant, stated that PW3 was 17 years old at the time of the commission of the offence and was below 18 years old. He urged that the complainant's age was within the borderline and that it was possible the complainant had attained the age of majority at the time of the alleged commission of the offence. He faulted the P3 form filled by Dr. Macharia on the grounds that the Dr. relied on what he was told on the age of the complainant and did not conduct or cause the conducting of the complainant's age assessment and urged P3 form was not an assessment of age as known in law. He urged the P3 form was for two different people, PW3 and a suspect whose name has not been given in P3 form and the same was not clear as to which party it dealt with. He further submitted the test on PW3 showed hymen had been broken but did not show when and that the P3 form had several relevant observations missing. On the importance of age assessment in defilement or rape cases Mr. Riungu learned Counsel referred this court to several cases. See **HCCRA No. 97 of 2002 Gilbert Miriti Kanampiu V Republic (Meru)** in which Hon. Mr. Justice F. Gikonyo held that, the proof of age is critically important in proving offences of defilement as it is the age of the nation that determines the amount of sentence to be imposed on conviction. Similarly in the case of **HCRA NO.191 OF 2011 Francis Mukhaso V Republic(Mombasa)** Hon. Mr. Justice Muya in a case of defilement stated that where there was no documentary evidence of the age of a child age assessment was necessary. Mr. Makori, learned State Counsel conceded the appeal on the ground

of failure to carry out assessment of age in default of production of the documentary evidence and pointed out that it could most likely be that the complainant was close or above 18 years and that her age was doubtful.

9. The appellant was charged and convicted of defilement contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006 which provides:-

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

The evidence by PW1 and PW2 and PW3 was that the complainant was aged 17 years. PW1 and PW3 did not state the date of birth of PW3. No documentary evidence such as birth certificate, baptism card, school leaving certificate or natal clinic attendance card was produced. PW4, the doctor in the P3 form did not carry out the age assessment of the complainant. It is strange and unbelievable PW1 and PW2 parents to the complainant could not remember and state when their daughter was born. PW3 did not in her evidence state when she was born. The appellant in his evidence testified that the complainant had told him she was above 18 years. I do not believe that the prosecution witness PW1, PW2 and PW3 were truthful witnesses. There was something they were hiding as regards the age of the complainant. I also do not find support of the prosecution case on the age of the complainant from the P3 form. In absence of birth certificate or documentary evidence in defilement case in which the age of the complainant is on borderline it is the duty of the prosecution to prove beyond reasonable doubt that the age of the complainant is not beyond 18 years by documentary evidence as it possible to complainant in such circumstances may be beyond 18 years.

10. I have carefully considered the evidence of PW1, PW2 and PW3 and PW5 and I have noted the same is full of contradictions and inconsistencies which could not be resolved with the evidence. PW5 the Investigating Officer testified that PW3 took him, with PW1, PW2 and the appellant to appellant's house where by he recovered the school uniform of the complainant and that they did not get anything else. PW1, PW2 and PW3 did not mention that they visited the appellant's house in presence of the appellant and recovered complainant's school uniform. The appellant denied his house being visited and anything recovered from his house. PW5 further testified of finding a bucket with urine as the complainant was detained by the appellant. Strange enough the uniform and the bucket were not produced as evidence and the landlord was not called as a witness to confirm the appellant was indeed the tenant to alleged houses at [particulars withheld], Meru. PW1 talked of recovery of complainant's uniform and her books from the appellant's house at [particulars withheld]. This part of evidence contradicts evidence of PW5 and was not supported by any other prosecution witness. PW1 testified that he was given appellant's number by one C a fellow student of PW3 as No.0722..... yet contrary to evidence of PW2, PW1 did not mention being called by the complainant using the complainant's number.

11. The learned Counsel Mr. A. G. Riungu raised the issue as regards the contents of the P3 form. PW4 testified that the P3 form revealed there were perineal laceration, hymen was broken and there was whitish vaginal discharge. That the suspect was examined on the same P3 form and his name was not given. That the whitish discharge could have been a normal discharge unless tested for infections and that the P3 form did not show when the hymen had been broken. PW4 stated that the cause of PW3 injuries were not indicated as they could have been caused by something else other than a penis. The P3 form, exhibit 1 show that the approximate age of injury to be N/A and probable type of weapon causing injury to be N/A. Part C under 4 for male accused of any sexual offence is not filled. The P3 form do not have the appellant's name. It can therefore be concluded that the particulars under part C 5 and 6 were of the complainant and not of the undisclosed suspect. Having analyzed the particulars set out in the P3 form and without belaboring any further I find that the prosecution did not prove that the complainant was defiled by the appellant and I further find that the P3 form do not support the prosecution case of defilement as the P3 form is full of inconsistencies and irrelevancies which do not support the charge of defilement. It was further contradictory of PW4 and PW5 evidence that a suspect was

taken to hospital for medical examination. That if the appellant was examined as alleged by the prosecution why was the medical report not produced. The prosecution were not honest and sincere in this matter as they failed to produce the relevant material evidence and the only conclusion that can be drawn is that the report was not in their favour and decided not produce the same.

12.The appellant denied having committed the offence and gave sworn defence and stated that he met a girl at Nkubu who wanted to be assisted seeking employment. That her parents came and he was arrested. He denied having sex with the complainant and testified that the complainant testified nothing was recovered from his place. The trial court dismissed the appellant's defence as sham without giving reasons and stated that the defence was not convincing at all as true. The trial court fell into trap when it dismissed the appellant's defence as a sham and not convincing to be true. The accused has no obligation in criminal cases to give convincing and true defence but the court is under obligation to analyze and evaluate the defence before declaring it a sham. The defence has to be considered in light of the prosecution case but not in isolation. The trial court erred in law and fact in failing to analyze and evaluate the appellant's defence.

13.In view of the foregoing I find that the appellant's appeal to be merited and the learned state counsel Mr. Makori to have rightly conceded the appeal.

14.The upshot is that the appellants appeal is allowed, I quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 17th DAY OF JULY,2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. A. G. Riungu for appellant

2. Mr. Makori for the state

J. A. MAKAU

JUDGE