IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 157 OF 2013

SAMUEL NGANGA KAMAU……..……..APPELLANT

VERSUS

REPUBLIC……..…….……..RESPONDENT

JUDGMENT

Samuel Ng'ang'a Kamau was charged with the offence defilement of a girl aged 15 years contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the charge were that on 13/1/2012, at *particulars withheld*, unlawfully and intentionally caused his penis to penetrate the vagina of MN. In the alternative, he faced an offence of indecent act contrary to Section 11(1) of the Sexual Offences Act.

The prosecution called a total of 5 witnesses while the appellant declined to say anything in his defence. He was convicted and sentenced to 20 years imprisonment. The appellant is aggrieved by both conviction and sentence and hence this appeal. The grounds of appeal are contained in the amended grounds filed in court on 14/7/2014. The appellant also filed written submissions. The grounds upon which the appeal is premised are as follows:-

1. **That the age of the complainant was not proved;**
2. **There was contradictory evidence as to the scene of crime;**
3. **That the medical evidence was inconclusive;**
4. **That the court erred by failing to call PW1's grandfather as a witness;**
5. **That the court erred by shifting the burden of proof to him;**

The appellant submitted that though the charge indicated that the complainant was 15 years, and PW1 also said she was 15 years, but the father, PW2 said that she was between 13-14 years; that PW4 said the complainant was 12 years. He submitted that the age of the complainant was not proved. It was also the appellant's contention that the court also failed to carry out a voire dire examination. He relied on the case of **Kibangeny Arap Kolil v R (1959)EA 92**, where the court held that a child of tender years to be under 14 years.

On contradictory evidence, the appellant submitted that PW1 told the court that she was arrested in *particulars withheld* whereas PW3 said he found the appellant and complainant in Convex Bar and Lodging and that the contradictions were not reconciled.

It is also the appellant's contention that the prosecution failed to call some important witnesses including PW1's grandfather, the watchman and management of CB. He urged that though he requested that PW1's grandfather be called, because he had refused to pay the appellant's salary, was never called.

The appeal was opposed and Mr. Chirchir, Learned Counsel for the State submitted that the complainant testified voluntarily; that when the appellant asked the court to disqualify itself from hearing the case, the court declined because no reason was given for recusal; that the appellant did not appeal the ruling but proceeded with his case. He further submitted that it was a fact that the complainant was defiled and the medical evidence confirmed it; that the accused was well known to PW1 and the issue of identification did not arise and in any event he was caught red handed.

As the first appeal court, I have the duty to assess and re-evaluate the evidence adduced in the trial court and arrive at my own conclusion bearing in mind that I did not have an opportunity to see the witnesses and observe their demeanor.

A brief summary of the case before the trial court is that M N (PW1) lived with her grandfather at Popong. On 11/12/2012, she went to Narok Town to get fees but she did not want to go back to school in Nairobi and she went to her uncle's place, then to the aunt's on 12/1/2012. She went to M behind *Particulars withheld* where she slept. She said that she was at K in a different room from the appellant's but they were arrested because she was in a relationship with Sammy, the appellant. She admitted that they booked the room and had sex with the appellant.

PW2, P J W, is the complainant's father. He recalled that on 12/1/2012, he learnt that PW1 had disappeared. He informed his father about it and on 14/7/2012, at 2.00 p.m. his father informed him that the complainant was found at LBar near K L in a lodging. He found the complaint arrested and in police cells. PW2 denied having had any grudge with the accused but that his father had severally warned the appellant about having an affair with the complainant and that he had even been detained for that before.

PW3, PC Stephen Kalawa of Narok Police Station recalled that a report was made at the station about a missing girl who had been spotted at C B & Lodging. He proceeded to the bar with PC Bulei, they asked for permission to search the rooms. They knocked on room 5 where they found a man and a girl. The relative of the girl who was with them identified her and they arrested both of them. The arrest was made between midnight and 2.00 a.m.

PW4, PC Faith Naserian Naimodu of Narok Police Station found the accused and complainant in cells, recorded witnesses' statements and took the complainant to Narok Hospital for medical examination and it was confirmed that she was defiled.

PW5, Jesse Kimojino is a Clinical Officer at Narok District Hospital. He examined the complainant on 14/1/2012. She was said to have a broken hymen. PW5 found evidence that PW1 had been involved in sexual intercourse which was ongoing.

When called upon to defend himself, the appellant declined to say anything in his defence.

Having considered all the evidence before the court; I am satisfied that the complainant took part in a sexual act with the appellant. She had disappeared on 12/1/2012 and was found on the morning of 14/1/2012. She was examined on the same day by PW5 who confirmed that her hymen was broken and there was evidence that she had taken part in sexual act, which was ongoing. PW1 admitted that fact.

PW1 admitted that she had a relationship with the appellant. She stated:-

> **"we had been friends for one month. When we were arrested we had sexual intercourse for only that day. We had protected sex. We used condoms that was used by Sammy… I was not having an affair with any other person apart from Sammy. When we booked the lodging, we had sex."**

PW3 corroborated PW1's evidence that he acted on information and caught the appellant and the complainant in C B and Lodging between 12.00 midnight and 2.00 a.m.

Although the appellant alleged that the complainant's grandfather had issues with him, the appellant did

not claim to have any issues with the complainant or her father. He did not deny that he had an affair with the complainant as alleged.

The appellant opted not to say anything in his defence which is his right to do so. This is because it is the prosecution who has the duty to prove its case beyond any doubt. During cross examination of witnesses, the appellant was alleging that he had issues with the complainant's grandfather. Having mentioned the old man, and due to the fact that even PW2 told the court that it is the father who called him to inform him that the complainant had gone missing, it was also alleged that the appellant used to work for the complainant's grandfather, it was imperative that he be called to tell the court what he knew. PW2 told the court that his father had severally warned the appellant about his affair with the complainant because she was a minor but he had not heeded. He further said that the old man had even caused the appellant to be detained because of moving with PW1. PW1 denied that she was ever threatened to record a statement by the Investigation Officer. In court, she freely answered the questions put to her by the appellant that she had a relationship with him and had been arrested in a lodging with him. PW1's testimony was not dislodged during cross examination as regards what had occurred between her and the appellant. The appellant did not make any other allegation as to what the complainant's grandfather had against him and in my view, failure to call him as a witness does not weaken the prosecution case. I am alive to the fact that it is the duty of the prosecution to call all relevant witnesses to their case even when the witnesses' evidence might tend to be adverse to the prosecution case. (see **Bukenya v Rep (1972)EA 358**). Of importance is that the prosecution must place all the relevant evidence before the court to enable the court arrive at a fair determination. In this case, having considered the evidence in its totality, I find that the failure by the court to ensure that complainant's grandfather was called as a witness will not make any difference to the prosecution case. After all the appellant and complainant were caught red handed in the act in a lodging.

Where was the offence committed? The charge reads that the offence was at K L. PW1 told the court that they were found in a lodging behind K. PW2 told the court that PW1 and the appellant were found in Lonux Bar & Lodging but he was not present while PW3 who actually did the actual arrest said it was in Convex Bar & Lodging. It is clear from the evidence of all the witnesses that the offence was not committed at K L but one called Lonux or Convex. In my view, because there was mention of K L, a confusion may have arisen from that and the wrong name written in the charge sheet. It is interesting that the trial court did not even notice that anomaly. Be that as it may, the confusion in the names did not prejudice the appellant's case in any way, the fact being that an offence was committed in a lodging in the same area of Narok.

The appellant also complained that the complainant should have been subjected to voire dire examination being a child. However, voire dire examination will only be conducted on a child of tender years. The Children's Act Section 2 defines a child of tender years as a child under 10 years of age. Even from the estimate and what witnesses told the court, PW1 was obviously over 10 years.

The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** To prove an offence of defilement, one of the ingredients that the prosecution must prove is the age of the complainant because the complainant's age determines the kind of sentence to be meted in the event the court convicts the accused. In this case, the charge stated that the complainant was 15 years. PW1 told the court that she was indeed 15 years. PW2 said she is aged 13 to 14 years meaning the father was not sure of the daughter's age. PW5 estimated the complainant's age to be 13 years. The prosecution did not produce PW1's birth certificate, clinic card or sent her for age assessment. The trial court never bothered to consider whether or not a crucial element of the charge was proved, that is, age. I find that the prosecution failed to prove the age of the complainant and in the end, I find that all the ingredients of the charge were not proved and the trial court fell into error in finding the appellant guilty of the offence of defilement contrary to **Section 8(1)** and **(3)** of the **Sexual Offences Act** and he is hereby acquitted on the main charge.

However, the trial court had not made any finding on the alternative charge of committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. There is overwhelming evidence that PW1 and the appellant had sexual intercourse. To do so, the appellant's genital organs came into contact with the

complainant's genitalia. That was an intentional and unlawful act. There is no doubt that the complainant was still a child as she was still in Class 5 at the time of this incident and though age was not established, PW5 estimated it at 13 years. I am satisfied beyond any doubt that an offence of indecent act was committed, the appellant is convicted of the alternative charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act** and sentenced to 15 years imprisonment.

DATED and DELIVERED this 24th day of September, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Chirchir for the State

Kennedy – Court Assistant