



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 14 OF 2013

JOSEPH NJIRU KITHAKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of M. OBIERO - PM RUNYENJES in Criminal Case No.57 of 2013 on 30TH APRIL 2013)

JUDGEMENT

The appellant Joseph Njiru Kithaka was convicted by Runyenjes Ag Principal Magistrate of the offence of defilement contrary to section 8(1) of the Sexual Offences Act and sentenced to serve fifteen (15) years imprisonment. Being dissatisfied with the judgment, the appellant relies on four (4) grounds;

1. That the trial court relied on evidence of a single witness.
2. That the appellant was not examined by the doctor to clear any doubts.
3. That the testimony of the complainant contradicted the statement she recorded at the Police Station; and
4. That the medical evidence did not support the complainant's evidence.

The appellant filed written submissions in which he articulated the evidential matters in support of his grounds of appeal.

M/s Ingahizu for the State submitted that the state was not opposed to the appeal based on two grounds;

- a) That the age of the complainant was not established;
- b) That the sentence imposed was not lawful.

The evidence in the case was that the complainant went to visit the accused person in his parents' home on 1st January 2013 where she stayed until 23rd January 2013 when the two were arrested by the area chief around 2.00am. This was after the complainant mother reported to the chief that the complainant had gone missing from home. She also gave the chief information to the effect that the complainant was staying with the accused in his home. The pair were taken to Runyenjes Police Station. PW1 was taken for medical examination and recorded her statement. The appellant was later charged with the offence. The prosecution called five (5) witnesses while the defence called his mother DW2 and his brother (DW3) as witnesses.

PW1 a clinical officer attached to Runyenjes District Hospital produced the P3 form. He testified that upon examining the complainant, he found all systems normal except a whitish discharge from her vaginal carnal. Laboratory results revealed nothing of medical importance. PW1 estimated the age of the complainant to be fifteen (15) years. He reached a conclusion that the complainant was sexually active.

In convicting the appellant, the trial magistrate considered the age of sixteen (16) years indicated in the charge sheet, that in the P.3 of fifteen (15) years and that from the testimony of PW2 and PW3 (complainant – and her mother) and concluded that the complainant was 16 – 17 years old. He therefore worked with that age in convicting and sentencing the appellant.

It is trite law that proof of age can only be established by tendering an age assessment report or a birth certificate. The prosecution did not produce any of the two documents. The court relied on the testimony of the witnesses, the charge sheet and the estimated age in the P.3 form. None of these documents can be relied on to prove the age of the complainant. The magistrate ought to have sent the complainant for age assessment as the hearing proceeded. In absence of proof of age, any conviction for the offence of defilement will not be safe. Any sentence imposed on the appellant should have been in compliance with section 8 of the Act, that is based on the established age for it to be lawful.

The medical evidence did not support the charge. The finding of the magistrate that the hymen was broken thus proving penetration was not founded on sound evidence. The report produced by the clinical officer did not establish when the hymen was broken. Was it during the material period between 1st to 23rd January 2013 or at any other time? It was not enough for the complainant to testify that she and the appellant engaged in sexual intercourse during the material period.

Assuming that age had been proved and that medical evidence was lacking, this court would have considered reversing the finding of the trial court and convicting the appellant with a lesser offence of indecent act with a child contrary to section 11(1) of the Act. However, this is not tenable in the circumstances since the prosecution in a charge under section 11(1) of the Act are required to prove that the complainant was a child which they failed to do in this case.

The prosecution did not apply for a retrial in this case. The appellant was convicted about 1½ years ago. If retrial is ordered, the prosecution may not be able to obtain accurate age assessment due to lapse of time. Coupled with the inconclusive medical evidence, retrial in this case may not serve the interest of justice. It is also likely to cause prejudice to the appellant in a fresh trial.

I agree with the State that the conviction cannot stand in the absence of evidence of age assessment and positive medical evidence. For the foregoing reasons, I find the conviction unsafe and quash it accordingly. The sentence is hereby set aside. The appeal therefore allowed.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF DECEMBER 2014.

F. MUCHEMI

JUDGE

In the presence of;

- 1. The State Counsel**
- 2. The appellant**