REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 154 of 2012

(Appeal arising from the judgment of [MR. S. N. ABUYA, P.M.] in the Senior Resident Magistrate's Court at Butali in Criminal Case No.577 of 2011)

BONFACE WASIA .... APPELLANT

V E R S U S

REPUBLIC .... RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1) (3)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on the 6th day of October 2011 Kakamega North District within Western Province, intentionally and unlawfully cause his penis to penetrate the vagina of NM, a child aged 15 years. He was convicted and sentenced to serve twenty years imprisonment*.

The grounds of appeal are that the prosecution evidence did not prove the charge of defilement, the trial court applied the evidence on record electively to the detriment of the appellant and that the burden of proof was shifted to the appellant.

Mr. Onsando, counsel for the appellant submitted that the medical report as per the evidence of PW4, the clinical officer shows that the complainant had sex on 17th August and 7th September 2011. The complainant was sent to hospital on 8th October 2011. The date of the offence is not clear. The age of the complainant was not established. The complainant's hymen was not there and the investigating officer did not testify. Mr. Oroni, state counsel, conceded to the appeal. Counsel submitted that the complainant's age was not established, the investigating officer did not testify and no treatment notes were produced.

The record of the trial court shows that **PW1, NM** was the complainant. Her evidence is that she started friendship with the appellant. She slept with him on three occasions. On 6th October 2011, her brother saw her with the appellant walking on the road. She was a class eight student aged 16 years old by the time she testified on 1.2.2012. When she was taken to the hospital she was told she had a sexually transmitted decease, SYPHILIS.

PW2, SM is the father of PW1. On 27.8.2011, Philip (PW3) informed him that he had met the appellant with PW1 in a bush near his house. He reported the matter to the school on 21.9.2011. He then reported the matter to the police. **PHILIP MWANZALA SHITANDA** testified as PW3. His evidence is that on 7.10.2011 at 8.00 p.m. he was going home when he saw the appellant and PW1 together. He took them to PW2. The matter was then reported to the Administration police camp at Imbiakala and the appellant was arrested.

PW4, BEDA JUDITH, was a clinical officer based at Malava District Hospital. She attended to PW1 on 8.10.21. According to her, PW1 was sent to the hospital with a history of defilement by her cousin, the appellant. She testified that sexual intercourse occurred on 17.8.2011 and 7.9.2011. PW1 had her periods on 6.10.2011. PW1 missed school several times and on some occasions she did not go home.

The appellant was put on his defence. His sworn testimony was that PW1 is his cousin as well as a

cousin to PW3, Philip. They were found on the road walking as Naomi was coming from the market to buy a cardboard. They were arrested and taken to the police officer. PW1 told the police that she knew the appellant as a cousin.

The main issue for determination is whether the complainant was defiled. Indeed in her own testimony, she state that she had sex with the appellant three times. When they were arrested, they were simply walking along the road. The appellant is her cousin. There is no evidence that PW1 was defiled on 6th October 2011. In fact the evidence of PW4, the clinical officer is that PW1 had her periods on 6.10.2011, the date of the alleged defilement. PW2 and PW3 did not see the appellant defiling PW1. The evidence of PW1 does not show that she was complaining. It cannot be concluded with finality that it is only the appellant who had sex with PW1. PW1 contacted a sexually transmitted decease. The clinical officer did examine the appellant and he had no problem. I do find that the trial court did not accord the appellant the benefit of doubt. There was no defilement on 6.10.2011 and therefore the evidence on record did not prove the particulars of the charge. No one saw the appellant defiling PW1.

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 7th day of February, 2013

SAID J. CHITEMBWE

J U D G E