



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 47 of 2011

EKIRU EKWONI LOTUIAPPELLANT

V

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of T. Nzioki – SRM. in Criminal Case No. 603 of 2010 delivered on 30th March, 2011 at Lodwar.)

J U D G M E N T

The appellant, **Ekiru Ekwoni Lotui**, appeared before the Senior Resident Magistrate at Lodwar charged with two counts viz:-

(I) Abduction, contrary to section 259 of the penal code, in that on the 29th August, 2010 at {particulars withheld}, with intent to wrongfully confine abducted M. A. A. by taking her to Lokore Manyatta.

(II) Defilement; contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 29th August, 2010 at {particulars withheld}, defiled M. A. A., a girl aged 15 years.

The appellant denied both counts but was convicted on both counts after a full trial and sentenced to three (3) years imprisonment for count one and twenty (20) years imprisonment for count two. However, being aggrieved with the conviction and sentence, the appellant filed this appeal on the basis of the grounds contained in his petition of appeal filed herein on 11th April, 2011. His main complaints are that there was no evidence to ascertain the alleged age of the complainant and that the doctor's findings did not link him with any act of defilement.

The appellant represented himself at the hearing of the appeal and presented written submissions in support of the appeal. The state/respondent was represented by the learned prosecution counsel, **Mr. Chelashaw**, who opposed the appeal by submitting that an age assessment report produced by PW7 indicated that the complainant was aged less than 18 years even though the exact age was not specified. The learned prosecution counsel submitted that the complainant said that she was 15 years and this was confirmed by the doctor (PW4). Further, even if the age of the complainant was an issue, there was no dispute that the appellant committed the offence and therefore, the age factor would only impact on the sentence meted out to the appellant. It was the contention of the learned prosecution counsel that the appellant was known to the complainant as they lived together after he abducted her. Further, a pregnancy test carried out on the complainant was positive.

The learned prosecution counsel called for the dismissal of this appeal contending that the appellant was properly convicted.

All considered, this court is required to draw its own conclusions upon its own examination of the evidence adduced before the trial court while bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In summary, it was the prosecution case that the complainant **M.A.A. (PW1)**, was at the material time a refugee living at *{particulars withheld}* and on the material date she had been sent to a market to buy vegetables. She was in the company of her cousin A., aged eleven (11) years who boarded a motor cycle which took him home while she opted to walk back home. In the process, she met the appellant who invited her to his home. She agreed to meet him later. She went home and gave out the vegetables. Thereafter, she left home to go and meet the appellant. They met.

She became confused and accompanied him to his house where she found his family members consisting of his two sisters. She spent the night in the house and in the process had sexual intercourse with the appellant. On the following day, she was unable to find her way home. She remained at the appellant's home for next four (4) days during which time she engaged in sexual intercourse with him.

Later, on realizing that her brothers were looking for her, the appellant took her to a house at a manyatta called Lokore where they were found by police officers and arrested.

She spent a night at the police station after refusing to return to her home. She was later taken to a hospital and examined. Thereafter, she was charged for being a child in need of care and protection.

The complainant's disappearance was reported to a security officer, **Daniel Nyok Choli (PW2)**, by her mother, **A. N. (PW5)**. The security officer and **Nathaniel Malien Kudum (PW3)**, made a vainless effort searching for the complainant and eventually reported to the police.

P.C. Keah Rono (PW6), investigated the matter and in the process found and arrested both the complainant and the appellant. He took them to Kakuma police station and later took the complainant to hospital where she was examined and found to be pregnant. She was also found to be less than 18 years. He thereafter preferred the present charge against the appellant.

Dr. Claire Nyambati (PW4), examined the complainant and completed the necessary P3 form showing that the hymen was broken.

A clinical officer at Kakuma Mission Hospital, **Joseph Chebii Kaino (PW7)**, assessed the complainant's age to be less than 18 years.

In his defence, the appellant said that the complainant who was like a wife to him came looking for and found him at Kakuma. She told him that she had spent two days at his home while he was away. He repaired his motor cycle and returned to a place called Kalobeyei where he stayed for four days from 1st to 4th September, 2010. Thereafter, he went back to Kakuma and went to his home where he found the complainant. She informed him that she was expecting his child and wanted him to marry her. They both loved each other. He allowed her to call her parents and she did so. She told her parents that she was on her way to Mombasa. He later proceeded to a place called Pelekech to buy a goat for sale. He returned home and was informed by the complainant that her brothers were looking for him. He talked to her brothers on phone. They later came to his home and found him with the complainant. He denied having defiled the complainant and contended that they lived together as man and wife and that she was expecting his child. He also contended that the complainant was 19 years old and had agreed to be married by him. He said that his only mistake was failing to seek the complainant's parents' consent before they began living as husband and wife.

After considering the evidence from both sides, the evidence from both sides, the learned trial magistrate concluded that the prosecution had proved the charges against the appellant. In so doing, the learned trial magistrate noted that the appellant eloped with the complainant and took her to Lokore Manyatta without the knowledge of her parents and that the two engaged in sexual intercourse while living together.

Indeed, the appellant did not deny that he lived and engaged in sexual intercourse with the complainant. He however, contended that his relationship with the complainant was that of man and wife and that his mistake was failing to seek the complainant's parents' consent for their relationship.

In convicting the appellant, the learned trial magistrate heavily relied on the evidence of the complainant (PW1)m, PW2, PW3 and PW7 to find that the complainant was 15 years old and not 19 years old as

alleged by the appellant.

Undoubtedly, age is a significant factor and a vital ingredient in a charge of defilement.

The view of this court after having reconsidered the evidence in its totality is that, there was insufficient evidence to establish the offence of abduction against the appellant. It would appear that the complainant and the appellant had known each other and were perhaps very close to each other than was presented in evidence by the complainant. Therefore, most likely than not, the appellant did not forcefully take the complainant to his home but rather the complainant went there voluntarily much to the chagrin of her parents. The appellant could not be said to have abducted her with intent to secretly and wrongfully confine her. His conviction on count one by the learned trial magistrate was therefore unsafe.

With regard to the second count, there was dispute with regard to the age of the complainant. It was therefore incumbent upon the prosecution to establish beyond reasonable doubt that the complainant was aged 15 years old at the time she lived and had sexual intercourse with the appellant. If indeed she was 15 years old or less than 18 years old then it was obvious that she fell under the definition of a child in which case the appellant would have been held criminally liable for defiling her whether or not they lived as man and wife.

The complainant's evidence as supported by that of PW2, PW3 and PW7 was insufficient to establish that she was aged 15 years old.

The report by the clinical officer (PW7) with regard to the complainant's age (i.e. P.Exh. 1) was vague and unreliable. In any event, the clinical officer was not the rightful medical officer to carry out an age assessment.

Be that as it may, the burden to establish that the complainant was aged 15 years or below 18 years lay with the prosecution. There was no burden placed on the appellant to establish that the complainant was 19 years old. It is the opinion of this court that the prosecution did not herein discharge its burden of establishing the age of the complainant to be 15 years or below 18 years.

The evidence with regard thereto was essentially based on conjecture. It would therefore follow that the ingredients of the charge of defilement were not fully established by the prosecution. Consequently, the appellant's conviction on the second count was also unsafe.

In sum, this appeal is allowed to the extent that the appellant's conviction on both counts is quashed and the sentences in respect thereof set aside.

The appellant shall be set at liberty unless otherwise lawfully held.

[Delivered and signed this 14th day of May, 2013.]

J.R. KARANJA.

JUDGE