REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 132 OF 2011

WYCLIFFE WANYONYI NYONGESA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Appeal arising from the decision of Hon. T. A. Odera SRM, dated 06/09/2011 in Kitale Chief Magistrate's Court in Criminal Case No. 2041 of 2010)*

J U D G M E N T

The appellant Wycliffe Wanyonyi Nyongesa was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. Particulars are that on diverse dates between 31st March 2010 and 16th July 2010 at Chepchoina Centre Kwanza District within Rift Valley Province, intentionally caused his penis to penetrate the vagina of M N G, a child aged 15 years.

The appellant was convicted and sentenced to serve 20 years in prison. Being dissatisfied, he filed a memorandum of appeal dated 19th September 2011 through Messers J. M. Wafula & Co. Advocates in which he raised the following grounds:-

1. *The Lower Court erred in law and in fact and found the Prosecution had proved its case beyond reasonable doubt inspite of glaring loopholes in their case.*
2. *That the Learned Trial Magistrate erred in law and fact by failing to conclusively ascertain the age of the complainant.*
3. *The Lower Court erred in law and fact by not having given fair trial to the appellant in that the Honourable Court did not amend the age of the appellant at the time of judgment and infringed on Section 214 (1) CPC since the accused was not given opportunity to plead on the amended age of the complainant.*
4. *The Lower Court misdirected itself to have proceeded to convict the appellant contrary to Section 214 (1) of the Criminal Procedure Code.*
5. *The Lower Court erred in law and fact not to have dismissed the charge as the offence and the sentencing did not match.*
6. *The Lower Court erred in law in admitting a P3 medical document produced by a Clinical Officer, who signed the document as a medical practitioner which amounted to forgery.*
7. *The Lower Court erred in law and fact not to have dismissed the charge sheet against the appellant when there was reasonable doubt about the age.*
8. *The Lower Court erred in law and fact to have convicted the appellant when the Prosecution did not explain why they did detain the appellant in custody for more than 24 hours before taking him to Court as it was in breach of Section 72 (3) of the Constitution.*
9. *That the Lower Court erred in law and fact when it did not take into account the reasonable defence of the appellant raised.*

10. *The Lower Court erred in law and fact in convicting the appellant on a defective charge sheet.*
11. *The Lower Court erred in law and fact to have imposed a harsh sentence in the circumstances.*

Evidence adduced before the Lower Court is that the minor victim of the offence was a class seven pupil at ***[particulars withheld]*** Primary School ..She was 15 years old. Documents produced from her school show that she used to be absent from school and was a below average student. Sometime in 2010, she differed with her father Pw 3 P G. She ran to her aunt's place where the appellant went for her and started living with her as his wife. The minor had known the appellant in February 2010. The minor started living with the appellant in April 2010 until 16th July 2010 when her parents traced her to the appellant's home.

The parents of the minor reported the incident to the Area Chief and Endebess Police Station. The parents of the minor tried to pursuade her to leave the appellant and return to school but she refused. The appellant together with the minor were arrested from the appellant's home on 27/07/2010 and were taken to Kitale District Hospital where they were both examined by Pw 5 Linus Ligare a Clinical Officer at the said hospital.

The appellant was thereafter arraigned in Court where he was charged with the offence of defilement. When put on his defence, the appellant who stated that he was a casual worker at Mt. Elgon Flowers. On 26/07/2010, he was heading to his home when he met a Police Officer known as Rosemary Omollo who requested him to take her to the home of one Solomon Muchai. As the appellant had a bicycle he took the Police Officer to Solomon's place where she picked a girl. They proceeded to Endebess Police Station where he was locked up. He was thereafter taken for examination. He denied the charge arguing that he was a stranger to the same.

I have gone through the evidence adduced by the Prosecution as well as the defence of the appellant. My duty as a first appellate Court was clearly set out in the case of **Okeno Vs Republic [1972] EA 32.** The appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. However the first appellate Court is expected to make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.

Mr. Wafula argued ground 6 and 7 together. He submitted that the P3 from in respect of the minor was signed by a Clinical Officer who should not have done that and that what the Clinical Officer did amounted to a forgery. He also submitted that the age of the minor was not proved. He argued that the age assessment report was marked for identification but was not produced as exhibit. On the issue of age assessment, Mr. Wafula relied on a Court of Appeal decision Criminal Appeal No. 166 of 2009 between Kennedy Kiplangat Rono and Republic.

M/S Limo for the State opposed the submission by Mr. Wafula by pointing out that there was an age assessment report which was produced as evidence. She further argued that a P3 form is a standard document which can either be produced by a doctor or Clinical Officer

I have looked at the proceedings. There is an age assessment report *exhibit 1* which was produced by Pw 4 Chief Inspector Samuel Kibiego. There was also the minor's baptismal card produced as exhibit 6 by Pw 4 who was the Investigating Officer. The production of the age assessment report by the Investigating Officer was never objected to by the appellant during his trial. Even if one were to say that the age assessment report went in as evidence as the appellant was unrepresented, there is still other evidence from the minor's baptismal card *exhibit 6* which shows that she was born on 05/05/1995.

In the case cited by Mr. Wafula, the Court of Appeal found that there was no attempt at all by the State to ascertain the age of the minor who was only said to be 15 without any attempt to proof that this was the case. The Court of Appeal judges observed that age could be ascertained medically or by other means. In the present case, there was age assessment report and baptismal card which showed that the minor was 15 years old.

On the issue of the P3 form being signed by a Clinical Officer, I do not think there was any problem with that. Clinical Officers have always filled P3 forms which have been the basis of conviction in cases of assaults including sexual assaults.

The evidence of the minor is that she had known the appellant in February 2010. When she differed with her father, she took refuge at her aunt's place from where the appellant picked her and started living with her as a wife with effect from April 2010. When the minor's parent were looking for her, they found her at the appellant's home. There is evidence from the minor herself that when her parents found her at the appellant's home, they asked her to leave the appellant and return home but she refused. This evidence is corroborated by the minor's mother Pw 2 and the minor's father Pw 3.

The minor testified that all the time she was with the appellant, she had sex with the appellant. During cross-examination of the minor by the appellant, the minor stated that she had consensual sex with the appellant. The appellant then put a question to the minor which implied that the appellant's parents and the minor's parent had agreed to marry her off to the appellant.

There is medical evidence that the minor had had sex as her hymen had been broken. Whether the hymen was broken by the appellant or not is immaterial. At least there is evidence that the appellant was living with the minor as a wife. The minor was not framing the appellant in any way. The appellant merely stated in his defence that he was a stranger to the charges. Evidence adduced showed that the appellant was guilty of the offence. The minor was aged 15 years old. It was therefore immaterial whether she had consented to the sexual act. The law protects minors who are below 18 years. It does not matter whether sexual intercourse with a minor is consensual or not.

The charge sheet stated that the appellant defiled the minor on diverse dates between 31st March 2010 and 16th July 2010. Evidence adduced support the charge. The minor was at the appellant's home between those dates and her evidence which I do not doubt is that she had sex with the appellant. There is therefore nothing defective in the charge sheet.

The appellant contends that he was not given a fair trial when the age of the minor was amended but that he was not given opportunity to plead to the ammendment. I have looked at the record and do not find any amendment to the charge sheet. The age of the minor remained 15 from the time he pleaded to the charge on 29/07/2010. What I can only see from the record is that before the alternative charge was read to the appellant, the Prosecutor applied to have it withdrawn under Section 87 (a) of the Criminal Procedure Code. It was never again re-introduced though it is apparent from the judgment of the Trial Magistrate that she was not aware that the alternative charge had been withdrawn.

The appellant also contends that his constitutional rights were violated in that he was not taken to Court within 24 hours. The record shows that the appellant was arrested on 27/07/2010 and was brought to Court on 29/07/2010. There was no explanation given for this but if the appellant feels that his constitutional rights were violated, he is at liberty to bring a claim for damages against the State. Otherwise the delay will not automatically lead to nullification of the conviction.

The defence of the appellant was considered by the Trial Magistrate who dismissed it as a mere denial. There was enough evidence to sustain a conviction. The sentence given of 20 years was the minimum which the trial Court was allowed to give. The sentence is not therefore harsh. I find that the conviction and sentence of the appellant were proper. I dismiss the appellant's appeal and affirm the conviction and sentence.

Dated, signed and delivered at Kitale on this 27th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

27/11/2013