



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 101 OF 2012

ANTHONY CHEROTICH MARITIM APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. J. M. Nang'ea , SPM in Kitale Chief Magistrate's Court in Criminal Case No. 29 of 2011)

J U D G M E N T

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 No. 3 of 2006. Particulars are that on the night of 31st December 2010 at **[particulars withheld]** Village in Trans-Nzoia County intentionally caused his penis to penetrate the vagina of M M, a child aged 15 years.

The appellant was convicted and sentenced to serve 20 years in prison. He preferred an appeal to this Court in which he raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and in fact in holding that he committed the offence with out considering that he was not examined.*
2. *That the trial Court rejected his evidence without giving reasons for doing so.*
3. *That the Trial Magistrate erred in law in only relying on the Prosecution evidence.*

The brief facts of this case are that Pw 2 J K S is the mother of the complainant Pw 1 M M. On 31/12/2010, she came back to her house at around 8.00pm and found that the complainant was away. At around 10.00am on 01/01/2011, the appellant went to her kiosk and told her that she had seen the complainant on the tarmac road going for an end year party somewhere. The appellant then left. She wondered why the appellant was telling her that. She suspected that the appellant was not telling her the truth.

The appellant lives about 1 Kilometre away from her home. She decided to go to the appellant's place to see whether her daughter was there. While she was a few metres from the appellant's house, the appellant saw him and fled. She proceeded to the appellant's house where she found the complainant in the appellant's house. She interrogated the complainant who revealed to her that the appellant had lured her the previous day from their kiosk on the pretext that he was going to give her money which he owed her mother. While in the appellant's house, the appellant convinced her to sleep in his house. The appellant had sex with her before leaving only to come later. She went to Kipsaina Police Post where she reported the incident before she took the complainant to Kapenguria District Hospital where she was treated. She was referred to Kitale Police Station where a P3 form was issued. She took the P3 form to Kitale District Hospital where it was filled. The appellant was arrested on 03/01/2011.

Pw 1 M M O testified that on 31/12/2010 at around 6.00 pm, she met the appellant on the road near her home. The appellant asked her to accompany him to his home so that he could give her money which he owned to her mother. She accompanied him to his house where he opened. It was now around 7.00 pm. He lit a tin lamp after which he removed her inner wear and skirt and made her to lie on the mattress before having sex with her. The appellant then left after locking the complainant in the house. On the following day at around 10.00 am, he came back and opened the house. The appellant appeared drunk. After a short while her mother came to the appellant's house and took her to Kipsaina Police Post. The appellant fled on seeing her mother.

The complainant's mother made a report of the incident at Kipsaina Police Post before taking the complainant to Kapenguria District Hospital where she was treated. The complainant was taken to Kitale District Hospital where she had a P3 form filled.

Pw 3 Francis Barchebo is a Clinical Officer attached to Kitale District Hospital. He testified that he received the complainant on 03/01/2011. He examined her and filled P3 form in which he concluded that there was penetration on the complainant's genitalia. He produced the P3 form as *exhibit 2*.

Pw 4 PC Samuel Kimathi Elijah is a Police Officer attached to Kipsaina Police post. He testified that on 03/01/2011, he received a report from the complainant who was accompanied by her mother. They reported that the appellant herein had defiled the complainant. He recorded the statements of the witnesses and went and arrested the appellant whom he charged with the offence for which he was convicted.

When put on his defence, the appellant denied the offence alleging that he was maliciously implicated. The appellant's appeal was opposed by Mr. Chelashaw for the State who argued that the conviction and sentence was proper. There was enough evidence adduced by the Prosecution witnesses. There was evidence as to the age of the complainant. He urged the Court to dismiss the appeal.

In the case of **Okeno Vs Republic [1972] EA 32**, the role of a first appellate Court was stated as follows:-

“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] 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 [Shantilal M. Ruwala Vs Republic [1975] EA 570]. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses, (see Peters Vs Sunday Post, [1958] EA 424).

The appellant contends that he was convicted without him being subjected to medical examination. There was no need for the appellant to be subjected to examination. The offence took place on the night of 31/12/2010. The appellant was arrested on 03/01/2011. There was no evidence that the complainant had contracted any venereal disease to have required examination of the appellant to confirm if he had a similar ailment.

The appellant also contends that the Trial Magistrate dismissed his defence without assigning any reasons for doing so. I have looked at the judgment of the Trial Magistrate. The appellant had merely stated in his defence that the charge was maliciously brought. The Trial Magistrate considered the defence and arrived at a conclusion that there was no evidence of any malice shown. He therefore dismissed it as a mere denial. The Trial Magistrate considered the evidence of the Prosecution as well as the defence contrary to the appellant's contention that the Trial Magistrate only considered the evidence of the Prosecution.

There is evidence from the complainant's mother that, it is the appellant who went to her kiosk and told her that he had seen her daughter going for an end year party the previous day. This was around 10.00am. This evidence is supported by the complainant who testified that the appellant came back to his house at around 10.00 am. The appellant is said to have been drunk. This may have been the reason why out of his drunken state, he went and offered unsolicited hints as to where the complainant was. The complainant's mother became suspicious and went to the appellant's house and indeed found the complainant there.

The complainant was treated at Kapenguria District Hospital. The Court record shows that the complainant's mother referred to some treatment notes during her testimony. Though these treatment notes were never produced, there is no doubt that the complainant was defiled. The complainant's evidence was corroborated by that of her mother as well as the P3 form which was produced by Pw 3, the Clinical Officer who concluded that there was penetration.

The appellant in his submissions contends th there were no spermatozoa found in the genitals of the complainant. The most important evidence is that of penetration. Even if an assailant penetrates but does not ejaculate, if evidence of penetration is proved, that is enough for the offence to be complete.

The appellant contends that there were contradictions in the evidence of the witnesses. He took issue as to time. I do not find that the difference as to time in the statements of the witnesses and their testimony in Court was material. The variance of time did not affect the evidence which finally led to the conviction of the appellant. There was corroboration of the complainant's evidence in material aspects.

The complainant's evidence is that when her mother came, she found her outside the appellant's house, whereas the complainant's mother testified that she found her in the appellant's house. I do not think that this contradiction is material. The fact is that the complainant was found at the appellant's place. It does not matter whether she was inside or outside the house. The important thing is that she spent the night there and that the appellant had sex with her.

The age of the complainant was 15 years. A certificate of birth was produced in evidence. The evidence by the Prosecution witnesses was enough to sustain a conviction. The sentence handed down to the appellant was lawful. He was given the minimum allowable under the Sexual Offences Act. I find that the conviction and sentence of the appellant was proper. The appellant's appeal is hereby dismissed in its entirety.

Dated,

signed and delivered at Kitale on this 12th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

12/11/2013