



REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT ELDORET

[Coram: F. Azangalala J.]

HC.CRC. NO. 79 OF 2009

STEPHEN SIJENDE APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the judgment of Hon. A.B. Mongare, Resident Magistrate dated 8th May, 2009 at Eldoret Chief Magistrate's Court in Criminal case No. 6010 of 2008]

JUDGMENT

The appellant herein, **Stephen Sijende**, has filed this appeal to contest his conviction and sentence by the learned Resident Magistrate (**A.B. Mongare**) sitting at Eldoret Law Courts.

The appellant was arraigned in Court on 8th December, 2008, and charged with defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006 (hereinafter "**the Act**") It was alleged, in the particulars, that on diverse dates between 26th November, 2008, and 5th December, 2008 in Lugari, within Western Province, the appellant intentionally and unlawfully caused penetration with his genital organ namely penis into the genital organ namely vagina of **M.A** a child aged 17 years. In the alternative, the appellant faced a charge of committing an indecent act contrary to section 11 (1) of the said Act. The particulars in the alternative charge were that during the same period at the same place, the appellant intentionally and unlawfully indecently assaulted the complainant by touching her private parts namely breasts, thighs and vagina

The appellant denied both charges and his trial commenced on 6th February, 2009, at which the prosecution led by Inspector **Barasa** called a total of six (6) witnesses in support of its case.

After their evidence, the learned Resident Magistrate found that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement in which he denied committing the offence.

Upon analyzing the evidence of both the prosecution and that of the appellant, the learned Resident Magistrate found the appellant guilty of principal count of defilement and sentenced him to fifteen (15) years imprisonment.

The appellant was not satisfied and has appealed to this Court against both conviction and

sentence. When the appeal came up before me for hearing on 26th January, 2012, the appellant appeared in person while **Mr. Kabaka**, learned State Counsel appeared for the respondent State. The appellant makes two principal complaints namely that the sexual intercourse with the complainant was consensual and that his conviction was based on the evidence of the complainant's kin.

Mr. Kabaka on his part opposed the appeal contending that the consent of the complainant was irrelevant given the age of the complainant.

This is a first appeal. That being the case, the Court has a duty to analyze, re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at its own independent conclusion bearing in mind that the Court did not see and hear the witnesses testify and should give allowance for that (See – **Okeno –vrs- Republic [1972] E.A. 32.**).

The brief facts of the case were as follows:-

In the month of November, 2008, **R.N**, (P.W.2), the mother of the complainant, found the complainant missing from their quarters. She and her husband **K.B** (P.W.4) looked for her but did not find her until 5th December, 2008 when the complainant was found in the appellant's house at Kipkaren. They reported to the police who arrested both the appellant and the complainant.

The complainant, on her part testified that in November, 2008, she met the appellant at a shop. He invited her to his house where she was fed on chapatti and rice before they had sex. Later, police officers arrested them. She was taken to hospital where a P.3 issued by P.C. **Grace Mwaura** (P.W.9) was filled. In cross-examination, she identified a photograph which they had taken at a studio together.

Peter Wenani (P.W.1) was the Clinical officer at Lugari District Hospital who completed the said P.3. On examining the complainant, he observed on the genitalia that the hymen was torn and spermatozoa were present. She concluded that the complainant's genitalia had been penetrated.

On the above facts, the learned Resident Magistrate found that the appellant had a case to answer and put him on his defence. He gave evidence unsworn and denied the offence as already stated.

On the above facts, the learned Resident Magistrate found that the principal charge of defilement had been proved against the appellant as required in law and convicted him as already stated.

The appellant's complaint that he was convicted on the evidence of the complainant's kin does not merit a detailed discussion. There is no legal bar to an offence being proved by the evidence of witnesses who are blood relatives. The complaint is without merit and is dismissed.

The second ground, that the complainant consented to having sex with the appellant and did so on many occasions, has caused me great anxiety. It cannot be seriously disputed that the complainant was a willing participant in the sexual act. In her own words:-

“He asked me to accompany him to his house. He went and brought me chapatti and rice. He spread his bed and we slept. I undressed, he also undressed. We had sex”.

The complainant was not coerced into accompanying the appellant to his house. When she was in the house, the appellant left to buy chapatti and rice. The complainant could have left the house if she had wanted to. Instead she waited until the appellant brought the chapatti and the rice. After being served with the said food, the couple then retired. The appellant spread his bed and undressed. The complainant also undressed and they had sex.

The complainant's testimony, clearly excluded coercion and the statement that **“I told him I did not know anything. He refused and forced me”** is not in consonance with her entire testimony because after the first session which ended at 6.00 p.m., the pair left to watch television at the appellant's friend's house. Clearly, if any force had been applied, the complainant would have escaped rather than accept to

go and watch television with the appellant at his friend's house.

I have analyzed the complainant's testimony in detail to demonstrate that the complainant's conduct was not that of a minor. The appellant produced a photograph taken together with the complainant. The complainant identified the photograph and herself. Clearly the complainant could be mistaken for a person aged 18 years or over.

The complainant stated that she was born in 1992. She did not specify which month. Her mother, P.W.2 and father (P.W.4) testified that the complainant was born in February, 1992. **Peter Wenani**, (P.W.1), the Clinical Officer at Lugari District Hospital did not indicate the age of the complainant when he testified in Court. In the P.3, he produced however; he estimated age of the complainant as 17 years. P.W.1 did not explain how he had made that assessment.

A charge of defilement is a serious charge. The gravity thereof is signified by the sentence provided in the Act. That being the case, the complainant's age is of paramount importance as a mistake on assessment can cost a citizen his liberty for a long time – sometimes for life.

In this case, the age of the complainant was not certain. A rough estimate of age 17 would range between 16 and 18 years. In the latter limit is taken then that the appellant would not be said to have committed an offence.

As I entertain doubt as to the age of the complainant, that doubt must be resolved in favour of the appellant. The appellant's conviction was therefore unsafe and is quashed and the sentence of fifteen (15) years set aside.

The appellant should be set free unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET

THIS 23RD DAY OF FEBRUARY, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

Stephen Sijende, the appellant and **Mr. Chirchir** for the State.

F. AZANGALALA

JUDGE

23/2/2012.