



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 240 of 2010

POLYCARP SHAMALLA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against the judgment of [MR. S.N. ABUYA, AG. SRM] dated 5.11.2010 in Butali Senior Resident Magistrate's Criminal Case No.756 of 2007)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the offence were that the appellant on the 25th day of June 2007 at [particulars withheld], in Kakamega North District within Western Province, unlawfully inserted his genital organ namely penis into the genital organ namely vagina of R.M. a girl aged 17 years. He also face an alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The appellant was convicted and sentenced to serve 15 years imprisonment.

The grounds of appeal are that the burden of proof was shifted, the prosecution witnesses did not corroborate each other. The evidence was contradicting and unreliable, the trial court erred in law by not dismissing the evidence of PW1 and that the appellant was minor also. Mrs. Imwene counsel for the appellant submitted that the complainant's age was not proved. No birth certificate was produced and she confirmed during cross-examination that she was over 18 years old. PW3 was a clinical officer and not a doctor and therefore could not have filled the P3 form. The medical evidence does not prove that there was a defilement. The evidence of PW6, the investigating officer is not corroborated by that of PW1 in relation to a blood stained pant. The complainant's evidence that the appellant had a knife is not corroborated by the evidence of PW2 and PW3 who purportedly rescued PW1.

Mr. Orinda, state counsel, opposed the appeal and submitted that the offence occurred during broad daylight and PW1 knew the appellant. The evidence on record did prove the case and a baptismal card was produced that proved the age of the complainant. PW3 and PW4 testified that they found the complainant locked in a room in a bar.

The record of the trial court shows that six witnesses testified for the prosecution. PW1, **R.M.** was the complainant. Her evidence was that she was born on the 26th October 1989 and was a class six pupil at [particulars withheld] School. On the 25th of June 2007 at about 12.40 p.m. she was with **F.B. (PW2)** coming from school and going home for lunch. They were passing through [particulars withheld] market when they saw the appellant and one Evans Lumbasi standing outside a bar. They were pulled into the bar and led into different lodging rooms. The appellant defiled her while her colleague was defiled by Evans

Lumbasi. She tried to scream but the appellant covered her mouth with his hand and was holding a knife. At about 5.00 p.m. the appellant left the room and told Evans Lumbasi to ensure that they did not leave the premises. They were rescued at about 6.00 p.m. by the school watchman. They were taken to Malava Police station and later got treatment. The appellant went underground and was arrested on 20th December 2007. PW1 disowned the statement that was in the police file.

PW2, F.B. testified that she was 15 years old and in class six at [particulars withheld] school. On the 25th of June 2007 at about 12.40 p.m. she was with PW1 when the appellant and one Evans Lumbasi stopped them at Bondeni Bar. They were pulled inside and informed that the appellant wanted to give them a letter to take to PW1's father. However, the appellant and his friend held them and took them inside the lodging rooms. She was held by Evans Lumbasi while the appellant held PW1. They were defiled in different rooms and were rescued at about 5.00 p.m. Evans Lumbasi was arrested inside the bar. **PW3, KIZITO SIFUNA** filled the P3 form for PW1 on 27th June 2007. According to PW3 the complainant had been defiled and gave her age as 17 years old.

PW4, HEZRON CHISEMBE ASWENYI got information that there were students from [particulars withheld] school who were crying at Bondeni Bar on the same day at about 4.30 p.m. He went to inform the school watchman PW5. The two went together to the bar and found PW1 and PW2 locked inside the lodging rooms. Together with members of the public they forced the rooms open and rescued the girls. **PW5, KEMBO SHIKANGA** was the watchman at [particulars withheld] School. On the 25th of June 2007 at about 4.30 p.m. PW4 went to inform him about the incident. He went to the scene and found the two girls locked inside separate lodging rooms. The rooms were locked from outside. They force open the rooms and rescued the girls. They took the girls to the area assistant chief and the matter was reported to the police station. **PW6, PC JOSHUA KIPTILONG** was based at the Kabras police station and got the report on 25th June 2007 in the evening when the complainant and her parents went to report at the station. He investigated the matter and referred the complainant to the hospital. He got the complainant's baptismal card and underwear which he produced. The appellant was arrested at Matete by the Administration Police officers on the 20th of December 2007.

The appellant was put on his defence and he testified that PW1 was his girlfriend and they agreed to have sex. She said she had a problem and he agreed that he would give her KShs.1000/=. They stayed in the room for about 20 minutes and he went away only to hear later that he had defiled her.

The main issues for determination is whether PW1 was defiled, the age of PW1 and whether it is the appellant who defiled her. It is PW1's evidence that she was defiled on the 25th of June 2007 while coming from school in the company of PW2. PW3 produced a P3 form and in its evidence he testified that PW1 was defiled. PW4 and PW5 rescued the complainant together with PW2 locked inside lodging rooms. From the evidence on record I am satisfied that PW1 was defiled.

PW1's evidence was that she born on the 26th of October 1989. A baptismal card from the Pentecostal Assemblies of God issued on the 21st of October 1990 was produced. According to the card the complainant was born on the 26th of October 1989. PW3's evidence is that the complainant was 17 years old and during cross-examination he stated that she could be between 16½ or 17½ or possibly over 18 years. Counsel for the appellant submitted that the complainant admitted during cross-examination that she was over 18 years. However, the record shows that she said she was over 18 years at the time she was testifying and when the incident occurred she was 17 years old. From the evidence on record I am satisfied that the complainant was under 18 years old. The baptismal card was issued on the 21st of October 1990 about one year after PW1 was born. It is her evidence that she was born on the date indicated on the baptismal card. There is no law that states that one's age can only be proved by a birth certificate. PW3's evidence that the complainant could be over 18 years old was an opinion when he was being cross-examined and that was not the exact age of the complainant. The prosecution evidence did establish that the complainant was below 18 years old.

The other issue is whether it is the appellant who defiled PW1. The evidence on record shows that

the incident occurred during the day in a lodging. The complainant was from school and saw the appellant with his friend Evans Lumbasi. There was no one else in the bar and they were pulled inside the lodging rooms. She was defiled by the appellant while her colleague was defiled by Evans Lumbasi. According to PW1 she knew the appellant who is her relative. The appellant was holding a knife and covered her mouth.

On his part the appellant's defence was that the complainant was a friend and they agreed to have sex. The complainant told him that she was 17 years old. Although the appellant testified that he was 16 years old he gave his date of birth as 3rd March 1984. That shows that by 25th of June 2007 he was over 20 years old. From the evidence on record it is established that it was the appellant who defiled PW1. The evidence of PW2 corroborates that of PW1 that it was indeed the appellant and his friend who defiled PW1. The appellant lured their victims with the pretext that they were to give a letter to the complainant who was to take to her father only to take them to separate rooms and defile them. The evidence of PW4 and PW5 does prove that PW1 and PW2 were locked inside the lodging rooms. The complainant and PW2 were rescued by PW4 and PW5 together with members of the public. Counsel for the appellant submitted that PW1 disowned her statement. The statement was produced and I have gone through it. According to the statement PW1 informed the police that she went with PW2 to meet their boyfriends who worked as waiters at the bar. They had drinks and later had sexual intercourse. PW1 was promised a reward of KShs.1000/=. They stayed there until 4.00 p.m. and she was surprised when members of the public went to arrest them. It was the evidence of PW1 that that is not what she told the police. She disowned the signature on that statement. I have gone through the statement of PW2 that was also produced and it is consistent with the evidence on record. It should be clear to defence counsels that when a complainant records his or her statement before the police that person is not under oath and when that person testifies before court under oath there is the right to state what that person believes to have been the correct position unless it can be shown that the statement was self-recorded. Even if it were the case that the complainant agreed to have sex with the appellant it is clear that she was under the age of 18 years old and therefore could not have given her consent. Section 42 of the Sexual Offences Act requires that the person giving a consent must have the freedom and capacity to make that choice. The complainant was under 18 years old and lacked capacity to make that choice.

In the end I do find that the prosecution proved its case beyond reasonable doubt. I do find that the appellant is above 18 years old as he told the court that he was born on the 3rd of March 1984. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 31st day of July 2012

**SAID J. CHCITEMBWE
J U D G E**