

REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 267 of 2011

VICTOR LUBEMBE APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that the appellant- *on the 25th day of December 2009 at [particulars withheld] in Kakamega North District within the Western Province unlawfully and willingly inserted his genital organ namely penis to the genital organ of a girl aged 17years old namely vagina of C.N.* He was convicted and sentenced to serve 15 years imprisonment. He preferred this appeal and the grounds are that the prosecution evidence was not corroborated, that no DNA test was conducted, the prosecution did not prove its case, and essential witnesses were not called, the burden of proof was shifted and that his alibi defence was ignored. The appellant filed written submissions which expounded on the above grounds. Mr. Orinda, state counsel opposed the appeal and submitted that the complainant's age was proved by the mother and that the doctor's evidence proved the case of defilement. The appellant's defence was that he was staying with the complainant as his wife and that defence was considered.

Three witnesses testified for the prosecution. I wish to state that the trial court did not take the evidence properly as required under Section 197 of the Criminal Procedure Code. The entire evidence is not flowing. The evidence of each witness does not flow so as to enable the court comprehend the prosecution case. The evidence of **PW1, C.N.** is that she was 16 years old and on the 25th of December 2009 it was Christmas day and she left home to celebrate in a church. On her way home she met the appellant who told her to go on a safari with her. She refused but the appellant followed her and when they reached near a bus stage the appellant pulled her inside a vehicle which sped off. They reached a stage and the appellant asked for a motor bike. PW1 was forced to sit on the motor bike and they went to the appellant's home where she met his mother and sisters. She stayed there and that evening the appellant defiled her. He threatened to kill her if she cried and used a rope to try to strangle her. She had no money to return home the following morning and she stayed at the appellant's home for five months until 24th of May 2010 when she was given KShs.200/= by the appellant's uncle and she went back home. When she stayed at the appellant's home she used to work at his uncle's farm and assisted in planting maize.

PW2, A.N. is the mother to PW1. Her evidence is that on the 25th of December 2009 PW1 did not return home. She looked for her and reported the matter at the Kabras Police station. On the 24th of May 2010 PW1 returned home and told her that she had met a boy from Lugari who took her to their home. PW1 was taken for medical examination and the doctor confirmed that she had been defiled. **PW3, KIZITO SIFUNA** is a clinical officer at Malava District Hospital. On the 29th of May 2010 he examined the complainant and concluded that she had been defiled.

The appellant was put on his defence and stated in his unsworn testimony that he knew the complainant. On the 11th of November 2009 he was doing practical work and was told that the complainant had visited their home. Sometimes in May 2010 he was arrested and taken to the Police station. He was later charged with the offence. **DW2, DORCAS NAWANGALA** testified that the complainant went to visit her in December 2009. She asked her where she came from and PW1 told her

that she was from Kambi ya Mwanza. PW1 told her that she was in Form II but was pregnant and had decided to look for the boy. DW2 asked for the phone number of PW1's mother. After about one week DW2 talked to PW1's mother who told her to ask PW1 to go home. According to DW2, PW1 used to sleep in the kitchen with three other girls. PW1 had told her that she was three months pregnant. DW2's further evidence was that PW1 informed her that she had fled from [particulars withheld] and her friend had drawn her a map leading to DW2's home. It can be deduced from the record that DW2 is the appellant's mother.

The evidence on record shows that PW1 was born on the 15th of December 1992. It is her evidence that the appellant abducted her and took her to their Lugari home. She stayed there for five months and the appellant defiled her. Although DW2 testified that the appellant was pregnant PW1 herself did not mention anything to do with pregnancy. The P3 form produced did not indicate that the complainant was pregnant. The evidence of PW3 does not state that the complainant was pregnant. The charge sheet states that the offence occurred on the 25th of December 2009 at [particulars withheld] Centre. It is the evidence of PW1 that the appellant took her to Lugari and she stayed there for five months. Given the evidence on record, I do find that the prosecution case does not prove the case of defilement beyond reasonable doubt. The evidence of PW1 that she was abducted by the appellant is not convincing. It is not clear why the appellant did not run away from the appellant's home for over 5 months. The defence evidence was that the appellant was attending college at that time and that the appellant went to their home on her own. The complainant did not testify that she used to sleep with the appellant during the five months period. It is not clear why the police who investigated the case did not testify. It is also not clear as to whether indeed the appellant defiled the complainant. The evidence does establish that the complainant was below the age of 18 years but the totality of the evidence raises doubt as to whether an offence of defilement was committed.

I do find that the prosecution case is not proved beyond reasonable doubt and I will accord the appellant the benefit of doubt. The appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

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

SAID J. CHITEMBWE

J U D G E