



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO 102 OF 2016

(BEING AN APPEAL FROM THE DECISION OF HON. P W WASIKE (RM))

IN CRIMINAL CASE NO 1295 OF 2013)

CWW.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the diverse dates between 27th February, 2013 and 5th of March, 2013 within Trans-Nzoia County intentionally caused his penis to penetrate the vagina of JNW a child aged 14 years.**

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 27th February, 2013 and 5th of March, 2013 within Trans-Nzoia County intentionally caused the contact between his genital organ penis and the genital organ namely vagina of JNW a child aged 16 years.**

3. The Appellant was convicted and sentence to serve 15 years' imprisonment hence this appeal. The same is premised on several grounds which substantially revolves around the fact that there was no sufficient evidence to have convicted him. The summary of the evidence as presented during trial were as hereunder.

4. PW1 the Complainant testified that she was aged 17 years and a class 6 pupil at [Particulars withheld] primary school, although she had already abandoned school. She said that the appellant who was also a class 8 pupil at their school approached her on the 5/2/2013 to be his girlfriend and she accepted. They went together with another girl called D as well as a boy called N to the Appellant's home where they engaged themselves in sex the whole night.

5. She said that she had sex with the Appellant and though she felt pain and saw blood from her vagina it was consensual. Together with D she went to the Appellant's place and they had sex together on 3/3/2013. She stayed till 5/3/2013 when her father and WW came and found her at the Appellant's home. She was arrested and the Appellant run away. She was taken to Sirende at the District Officers Office and later taken to Kitale District hospital. She was accompanied by her friend D.

6. At the hospital she was treated and a P3 form filled and Age Assessment was done and she was found to be 16 years. She further said that the doctor found that she had contracted syphilis.

7. PW2 KIRWA LABATT a Clinical Officer from Kitale District hospital examined the Complainant and filled the P3 form which indicated that there was no tear, no semen, no physical injury, no bruises on both labia, the hymen was torn and not fresh wound and there was whitish discharge and she had no infection. He also produced the age assessment for the complainant on behalf of DR KIPROP from the Dental Unit at the said hospital.

8. PW3 WW a minor aged 17 years testified that he went with his father to the Appellant's home where they found the Complainant hiding under the bed. The Appellant after the door was forcefully opened took off. He said that the Appellant was his classmate.

9. SWW the father to the Complainant explained how she disappeared from home for two days and when he inquired he was told where she was and he went there together with the village elder. She found them and the Appellant took off. The complainant was taken to the AP

camp at Sirende and later taken to the Kitale District hospital where she was treated.

10. When placed on his defence the Appellant gave sworn evidence denying the charge and said that she was a student and the Complainant was his girlfriend for a year. He said that he was in class 8 and a pupil at [Particulars withheld] primary school. On further cross examination she said that she was 18 years at the time of his arrest.

ANALYSIS AND DETERMINATION

11. The court has perused the appeal herein, the proceedings as well as the written submissions by the Appellant's Counsel. The duty of this court is to re-evaluate the evidence afresh as was stated in **OKENO VS. REP. (1972) E A 32**.

12. The three ingredients of the offence of defilement are the age of the victim, the identity of the perpetrator as well as prove of penetration.

13. In this regard to the Complainant's age the production of the dental age assessment established that at the time of the incident she was 16 years old although at the time of testifying she was 17 years.

14. As to the identity of the perpetrator, the evidence of the minor was well corroborated with that of the father and the brother who arrested her at the home of the Appellant. Although as clearly submitted by the Appellant the independent witnesses like the village elder who was allegedly present at the arrest of the Complainant should have come and testified, I do not think this minimises the fact that the Complainant was found hiding inside the Appellant's house.

15. The Appellant on the other hand in his evidence confirmed that the Complainant had been his girlfriend for one year.

16. On the question of penetration, the Medical evidence was not conclusive. The p3 form did not in my view find that she had engaged herself in sexual activity at that period as her genitalia was found to be with no injury and even the hymen was torn but old looking.

17. The finding of this court is that this appeal ought to succeed for the following reasons. First of all, the Appellant said that he was 18 years old as per his defence evidence. PW3 the brother to the Complainant stated that they were in the same class. PW3 was 17 years at the time he testified. Ideally the trial court should have considered an Age Assessment of the Appellant.

18. The above finding goes on to suggest that there was every possibility that the offence was committed by two minors experimenting on their bodies. These are things besetting our teenagers in the society. Notice for example that they were in the same school and from the same village. They went for sports and the Appellant as well as the Appellant and two other friends N and D went on sex orgy. It was only fortunate that the appellant was arrested. The fate of D and N was not explained.

19. In essence this was a societal problem. The two minors went through a *discovery* class. The Appellant was arrested and charged and convicted and sentence. The Complainant a minor is free and to make the matters worse she dropped out of school for reasons that could not be explained. This was what the drafters of the Sexual Offences Act may not have foreseen and the more reason why it ought to be relooked so that a balance can be found.

20. The trial court as well as the Respondent for that matter ought to have for instance undertaken an Age Assessment for the Appellant as well prior to having the matter heard.

21. In the premises, on that issue alone of the Appellant's age, the appeal is allowed. As indicated there was every possibility that they engaged themselves in sexual activity but the evidence was insufficient.

22. The appeal is allowed, the appellant set free unless lawfully held.

Dated, signed and delivered in open court this 16th day of April, 2020.

H. K. CHEMITEI

JUDGE

16/4/2020