



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 21 OF 2018**

**LEKISHON SENJO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment of Hon. Z. Abdul RM*

*delivered on 28<sup>th</sup> November, 2018 in Naivasha CM/SO No 22 of 2017)*

**JUDGMENT**

1. This appeal is against conviction for defilement contrary to **Section 8 (4)** of the **Sexual Offences Act**, and the sentence of fifteen (15) years which was meted by the trial court. The Appellant had been charged with the offence of defilement of SY a 16 year old girl. There was an alternative charge of indecent act. The offence was alleged to have been committed on diverse dates between December 2016 and March 2017.

2. The Appellant's appeal herein centres around the issue whether the prosecution proved its case beyond reasonable doubt. In particular, the appeal asserts that:

- *the complainant's age was not proved;*
- *the evidence on record was uncorroborated, presumptuous and unsupported;*
- *the Appellant's alibi was not properly considered.*

3. The court's duty is to review and re-evaluate the evidence on record and come to its own conclusions, not ignoring the conclusions made by the lower court. (**Okeno v. Republic 1972 EA 32**).

4. SY was taken through a voir dire examination and the court found her capable of giving sworn evidence. The prosecution then sought that SY be declared a hostile witness and that the court acceded. Her evidence was that it was the police officer, Kibet, who told her to record that the accused raped her. Further, she said that the accused came to her home to look for his goats and that he did not ask her to be his wife.

5. She recanted her written statement which stated that the accused asked her to have sex; that they went to a thicket and had sex; that a police officer arrested them; and that they went to Olkaria Police Station and later to Naivasha District Hospital.

6. In her brief cross-examination, she denied that the accused had ever seduced her or come to her home when her parents were not there.

7. PW2, Jane Njoroge was a Clinical Officer at Naivasha District Hospital. She testified that SY complained of being defiled by a person known to her; that on examination she was found to have a broken hymen and whitish discharge from the vagina; that she was found in the perpetrator's house where she had been from 6<sup>th</sup> to 24<sup>th</sup> March, 2017. PW2 produced the P3 form and PRC Form as Exhibits 1 and 2. The examination did not now show vaginal lacerations but she noted that there was vaginal penetration. PW2 also produced an Age Assessment Report for the complainant which disclosed that she was below 16 years.

8. In cross-examination, PW2 said that SY had no injuries or lacerations, but her hymen was broken.

9. Corporal Mike Magenya (PW3) testified that he was instructed by his inspector to go to [Particulars withheld] Primary School to

investigate a case in which a girl (SY) had been reported to have disappeared school from 6<sup>th</sup> March, 2017. He went to the school with PC Nampere, spoke with the headmistress who said the girl (SY) had undergone early marriage and that her sister could explain more. The sister, Mary Chepkemoi, also a student, was called and interrogated by PC Nampere. The interrogation revealed that SY had been married off by her mother to the accused who was an employee of Lavington Security at Olkaria.

10. PW3 got the number of the accused's Security Company and eventually got to meet and interrogate the accused. According to PW3, he arrested the accused after the accused told him he had married SY. The accused also took the police to his mother's home where they were allegedly living with SY. PW3 took the child and placed her under protection after both her and the accused were taken to Naivasha District Hospital for examination. The headmistress however declined to record a statement.

11. In cross-examination, PW3 confirmed he was the arresting officer; that they found SY at the accused's home, and that the headmistress refused to record a statement as she feared for her life.

12. PW4 John Kibet, was the Investigating Officer. He stated that the accused and complainant were brought to the Police Station; that he had arrested the accused; that SY had told him she had been sent home to get school fees, and that she told him she had been married by the accused; that they knew each other for some time; that the complainant would visit the accused at his home; that they had previously had sex about twice; and that they lived together. PW4 confirmed that he recorded her statement, which she had signed on 25<sup>th</sup> March, 2017. PW4 also said he was aware that SY had recanted her testimony. He produced her statement as P. Exhibit 4.

13. In cross-examination he stated that the complainant's mother could not afford to pay fees; that the complainant had explained what had transpired; that the accused had then persuaded SY to marry her; and that she was found in his home.

14. The Appellant gave unsworn testimony. He said that on 23<sup>rd</sup> March, 2017 he went to work at Olkaria 4 Station. He was called by his supervisor, and on reaching his office he met two police officers who asked him if he knew SY. He took them to her home and pointed her out. She was washing clothes. Her mother was not there. He was then handcuffed and taken to Naivasha District Hospital with SY for medical examination. Thereafter, he was taken to Kongoni Police Station. He denied committing the offence.

15. DW2 Senteru Ole Nosaron (DW2) testified that the accused is his neighbour. He stated that the girl (SY) had told him she was not defiled. In cross-examination; he said SY was a school girl; that he has known the accused for a long time and was unaware that he had married SY.

16. DW3 Parkimalo Ole Karaison, testified that he works at Lavington Security where he was the accused's supervisor. He was also his neighbour. His manager called him on the 25<sup>th</sup> March, 2017 and asked him to bring the accused to the office. He did. There, they met police officers who interrogated the accused, and he said he knew her. The accused took him to SY's home. There they found four girls and accused pointed out SY. The accused and SY were then arrested.

17. In cross-examination, DW3 confirmed that the accused did not take SY to his home. She was at her mother's house.

### **On Penetration**

18. The trial magistrate assessed the evidence and found that the accused and SY had had consensual sexual intercourse, which was unlawful as she was a minor. She noted P. Exhibit 4, the statement recorded by SY who stated that the accused had seduced her and wanted her to be his wife; and that the accused.

***“.....Seduced me to have sex with him. I did not refused (sic). We proceeded to nearby thicket area. I lay down. I removed my inner-pant and Lekishon Senjo (Accused) removed his trousers then removed his penis and inserted it into my vagina defiling me.”***

19. The trial magistrate found that the age of the complainant had been proved through the age assessment report; that the accused had been positively identified; and that penetration had occurred. The learned trial magistrate did not find the defence credible in light of the complainant's statement.

20. I think that this case turns around the value that the trial court placed on the evidence of, SY, the hostile witness. Once SY was declared a hostile witness the prosecutor's role was to cross-examine the witness by putting to her the previous statement she had made to the police as required by **Section 153, 154, 161 and 163 of the Evidence Act**. Whilst the prosecutor cross-examined SY, she asserted that it was police officer Kibet who told her to record a statement that the accused raped her. She also stated that the accused did not ask her to be his wife.

21. The state cited the case of **Daniel Odhiambo Koyo v Republic [2011] eKLR** where the Court of Appeal stated as follows regarding of hostile witness evidence:

***“The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In Maghenda v. Republic [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:***

***‘The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.’***

.....

***Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify.*** (Emphasis added)

22. It appears to me that the trial court gave undue weight to the evidence of SY. As a hostile witness she gave evidence both in favour of the accused and against the accused. The trial court did not make an evaluation to that effect, instead wholly relying on the contents of the witness's statement.

23. Further, the trial magistrate did not take into account the legal principles in **PKW v Republic [2012] eKLR** where the Court of Appeal has held that the absence of a hymen per se is not conclusive proof of penetration. The medical evidence in this case did not show that there were recent injuries or vaginal inflammation. Further the evidence as to whether the accused was living with SY was disputed.

24. It bears reciting in some detail the Court of Appeal's decision in the **PKW's case** (supra):

***“Dr. Mutahi did not find any injuries on the child's genitalia. That also does not prove much because if she was defiled on 8<sup>th</sup> May, any injuries may have healed by 13<sup>th</sup> May when she was examined.***

***In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?***

***Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.***

***In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.***

25. Ultimately, I think that it was unsafe to convict the accused on the basis of the evidence on record.

26. Accordingly, the conviction and sentence are hereby set aside and the Appellant is set free unless otherwise lawfully held.

#### **Administrative directions**

27. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

28. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

29. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 2<sup>nd</sup> Day of November, 2020.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Lekishon Senjo - Appellant in person in Naivasha Maximum Prison

### 3. Court Clerk - Quinter Ogutu