



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 102 OF 2018

DERRICK KIPKEMBOI BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal on conviction and sentence from the judgment and/or decree of honourable R. AMWAYI,

Resident Magistrate in Molo CMCC No. 43 of 2017 delivered on 13th November 2018

JUDGMENT

1. The appellant was charged with two counts and an alternative charge as follows:-

i. **Defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006.** The particulars being that on the 3rd of January 2017 at [particulars withheld] in Molo District within Nakuru County, intentionally caused his penis to penetrate the vagina of **JC** a child aged 17 years.

He faced an alternative charge of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.** The particulars being that on the 3rd of January 2017 at [particulars withheld] in Molo District within Nakuru County, intentionally touched the vagina of **JC** a child aged 17 years with his penis.

ii. **Supplying drugs or instruments to procure abortion contrary to Section 160 of the Penal Code.** The particulars being on the 27th day of March 2017 at [particulars withheld] in Molo District with Nakuru County, wilfully and unlawfully administered drugs to procure miscarriage on **JC** a child aged 17 years.

2. The appellant denied the charges and the case proceeded for full trial, the prosecution called 4 witnesses in support of their case while the appellant in his defence gave sworn statement and called 2 witnesses. By the judgment delivered on 13th November 2018 the lower Court found the appellant guilty of Count 1 of defilement, he was consequently convicted and sentenced to 20 years imprisonment. He was however acquitted under **Section 215 of the Criminal Procedure Code** on Count 2.

3. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of appeal dated 27th of November 2018 and challenged the conviction and sentence on 8 grounds namely:-

i. *The learned trial magistrate erred both in law and in fact by failing to appreciate the complainant's age was not substantially proved in. there was contradicting evidence on age on the birth certificate and the school examination register;*

ii. *The learned trial magistrate erred both in law and in facts by failing to find that the medical evidence adduced was insufficient to corroborate that charges since it was taken after the lapse of the stipulated 72 hours and it was based on the results of a positive pregnancy test;*

iii. *The learned trial magistrate in law and in fact by failing to consider that the alleged underlying circumstances during the commission of the offence were illogical and inconsistent with the truth;*

iv. *That the learned trial magistrate erred in law and in facts by relying on the evidence of a single witness yet failed to adequately caution herself on its danger.*

v. *That the learned trial magistrate erred in law and in fact by failing to appreciate the failure by the prosecution to produce any exhibit in form of clothes was tantamount to concealment of evidence and occasioned great miscarriage of justice;*

vi. *That the learned trial magistrate erred in law and in facts by failing to consider the appellant's plausible defence without offering any cogent reasons thereof yet the same was candid enough to water down the prosecution's case;*

vii. *That the learned trial magistrate erred in law and in facts by failing in the naked gaps in the prosecution evidence and relying on the prosecution evidence that was marred with contradictions and inconsistencies;*

viii. *That the learned trial magistrate erred in summation in both law and facts by failing to appreciate the substantive truth that the prosecution case was not prove beyond any reasonable doubt as required by law.*

4. The state opposed the appeal both on conviction and sentence. Parties adopted their filed written submissions.

APPELLANT'S SUBMISSIONS

5. The appellant's submitted that the trial magistrate failed to appreciate the complainant's age was not substantially proved since there was contradiction from her birth certificate which was produced in the trial Court which showed she was born in the year 2000 and was therefore 17 years and the school examination register indicated she was born in 1997. He submitted that the school examination register was not in possession of the appellant and was found after he was convicted. He submitted that the complainant misled the Court whereas she was 20 years and a fake birth certificate was produced.

6. Further that the complainant was allegedly examined 3 months after the incidence but no document was produced in Court to show the appellant was defiled as the P3 form produced was not conclusive to convict the appellant.

7. The appellant further submitted that the Court relied on the testimony of one witness and the case was not proved beyond any reasonable doubt; that no proper investigations were carried out; that they misled the Court by producing a fake birth certificate. He submitted that he was not accorded a fair trial as he was convicted without sufficient evidence.

8. Appellant further submitted that the prosecution case was marred with contradictions and inconsistencies; that PW1 testified to having known the appellant as she used to see him at Masaiden police station while Pw4 the investigating officer stated that the complainant informed him she was in a relationship with the appellant.

9. The appellant urged the court to find that the prosecution evidence was not sufficient to secure any conviction, allow the appeal, quash conviction and sentence set aside and the appellant set at liberty.

RESPONDENT'S CASE

10. The State counsel **Ms. Rita Rotich** submitted that the prosecution gave overwhelming documentary and oral evidence in the trial court to prove the elements of sexual offence

11. On age, she submitted that the court conducted a voire dire examination on the complainant and found she was fit to testify under oath; she testified to be 17 years old, PW2, her father also testified she was 17 years and Pw4 produced the minor's birth certificate as exhibit 3

12. On penetration the state counsel submitted that Pw3 the medical officer examined the minor 11 weeks, 3 days after the incident and found the appellant pregnant, had broken hymen and discharge from the vagina; and treatment notes from Kuresoi Health Centre indicates he was bleeding in her vagina due to miscarriage and was admitted in Kericho Sub county hospital.

13. On identification, the state counsel submitted that the complainant knew the appellant by the name **Derrick Bett** and where he lived; she said he forced her into his house and defiled her; and also positively identified him in the dock as the person who impregnated her. The Appellant in his defence confirmed that he knew the complainant very well.

14. The state counsel further submitted that the appellant did not challenge age in the lower Court; she urged the Court to consider the severe physical and sexual violence, trauma on the victim and the impact on her and her wellbeing.

15. She finally submitted that the Court should not admit the appellant's additional evidence as a birth certificate is a government document and various case laws have been decided that it is a document used to prove age and **Rule 4 of the Sexual Offences (Rules of Court) 2014**, provides;

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

ANALYSIS AND DETERMINATION

16. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the First Appellate Court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

17. In view of the above, I have perused and considered evidence adduced before the trial Court and submissions herein and find the following as issues for determination: -

- i. Whether the ingredients of defilement were proved
- ii. Whether sentence imposed was harsh and excessive.

(i) Whether the ingredients of defilement were proved

18. For an offence of defilement to be proved, all the three ingredients of the offence of defilement being the age of the complainants, penetration and identification of the perpetrator of the offence have to be proved.

19. In respect to complainant’s age, the complainant testified that she was 17 years old born on 18th May 2000. She said appellant had sex with her on 3rd January, 2017 and she became pregnant. Her birth certificate was produced by her father PW2. It showed that she was born on 18th May, 2000. PW4 the investigating officer confirmed that the birth certificate indicate that the complainant was born on 18th May, 2000. It was issued on 15th December, 2017. The offence occurred on 3rd January, 2017. No other evidence was adduced to controvert evidence of age as shown in the birth certificate. He never adduced evidence to challenge the authenticity of the birth certificate produced.

20. Further the appellant also never adduced evidence to show that the complainant presented herself to him as an adult making him to reasonably believe that she is an adult. The appellant submission on age cannot therefore stand.

21. It is my conclusion that the prosecution proved the age of the complainants beyond reasonable doubt as the allegation of forgery raised by the appellant have not been substantiated. Further the document produced by the appellant challenging the age of the complainant cannot be used to challenge a document given by the government. In respect to penetration, penetration is defined as follows under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006**: -

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

22. PW1 testified she met with the appellant on 3rd January 2017, he took her to his house where he forced her and they had sexual intercourse, he did not use any protection. It was thereafter in school that she tested positive in pregnancy. PW2 was called in school and he took her to Kedowa Dispensary where she tested positive. PW2 testified indeed he took PW1 to the dispensary and she tested positive. They were issued with a P3 form after reporting the matter to police. PW3 testified to have filled the P3 form, on examining PW1 she found she was pregnant and advised her to start clinics. He formed the opinion PW1 had been defiled based on the history and physical examination. There is no doubt that there was penetration leading to pregnancy.

23. The appellant confirmed that he was known to the complainant as he met her in the village. Identification was not therefore an issue. From the foregoing, the three ingredients of defilement were proved beyond reasonable doubt.

(ii) Whether sentence imposed was harsh and excessive

24. Record show that the appellant was sentenced to 15 years’ imprisonment, the minimum sentence provided by **Section 8(4) of the Sexual Offences Act**. However, the **Supreme Court in Muruatetu Case** declared mandatory nature of sentences unconstitutional for taking away the discretion of judicial officer to impose sentence depending on circumstances of each case and mitigating factors. In view of the aforesaid decision of the supreme court, I have considered the appellant’s mitigation, I also note that the complainant was 17 years at the time of the offence and find it appropriate to reduce the sentence to 5 years’ imprisonment.

25. FINAL ORDERS

1. Appeal on conviction is dismissed
2. Appeal on sentence is allowed
3. Sentence is reduced to 5 years’ imprisonment to run from the date of sentence before the lower court on 13th November 2018.

Judgment dated, read and delivered at Nakuru via zoom

This 9th December, 2020

RACHEL NGETICH

JUDGE

In the Presence of:

Court Assistant – Jeniffer

State Counsel – Rita

Mr. Mongeri counsel for the Appellant