



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 69 OF 2018

ROBERT RUPIA SELASYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by M. I. Shimenga, RM, dated 9th May, 2018 in Butere Magistrates Court Sexual Offence Case No. 8 of 2017)

JUDGMENT

1. The appellant was charged in the trial court with offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006 on the main count and an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.
2. Particulars on the main count was that the accused on the 26.2.17 at [particulars withheld] Estate in Butere Market, Kakamega County, intentionally caused his penis to penetrate the vagina of FE a child aged 16 years. Particulars on the alternative count being that on the same date and place the appellant intentionally touched the vagina of FE a child aged 16 years with his fingers.
3. To prove the case the prosecution called a total of 5 witnesses. The learned trial magistrate after hearing the case convicted the appellant on the main count and sentenced him to fifteen (15) years in jail.
4. Being dissatisfied with the conviction and sentence the appellant has filed this appeal basing it on the following grounds:-
 1. ***THAT I did not plead guilty to the charges.***
 2. ***THAT the learned trial Magistrate grossly erred in law and fact in presiding over a trial that seriously offended Section 198 (4) of CPC.***
 3. ***THAT the trial Magistrate grossly erred in law and fact in not observing that I was not subjected to corresponding medical investigation as required by the law under Section 36 (2) of the Offence Act No. 3 of 2006.***
 4. ***THAT the learned trial Magistrate grossly erred in law and fact in finding penetration proved even in the wake of flimsy and inadequate evidence.***
 5. ***THAT the learned trial Magistrate grossly erred in law and fact in rejecting my defence without proper evaluation.***
5. The appeal is opposed by the State.
6. This being the first appeal it is the duty of this court to re-evaluate the entire evidence tendered in the trial court and to establish its own view based on the revaluation.
7. PW1 was FE the complainant in this case who gave a sworn evidence after *voir dire* was conducted. PW1 told the court that she was a Form 2 student at [particulars withheld] Girls in Vihiga. She recalled on 26.2.2017 at 11 a.m. they closed schools for holidays when she decided to go to her friend's home in Kakamega. Instead she proceeded to Shianda where with apparent prior agreement the appellant went to pick her and they went to his home. This was at about 2 p.m. The appellant bought meals which they ate. At about 10 p.m. they had sexual intercourse. The next morning the appellant went to Butere Girls where he worked. As the complainant prepared to shower and get

dressed the Chief knocked on the door, and soon thereafter the appellant came in and the Chief took both of them to Butere Police Station to report. Both appellant and PW1 were taken to Butere Sub-County Hospital for treatment and issued with treatment notes. The next day she was taken home. In cross examination PW1 confirmed that she knew the appellant very well. She confirmed she used her own money to travel from school to accused home. She testified the appellant did not force her into sex.

8. PW2 was the complainant's mother who confirmed that her daughter was born on 25.7.2001 and produced the birth certificate. She testified that she learnt that her daughter was on half term but had not arrived at home. She received information that her daughter was at Butere Police Station so she went there to get her. PW2 testified that she knew the appellant because she had seen him at a funeral back home. She also confirmed that she was present when they both went to hospital.

9. PW3 was the Assistant Chief of Shirotsa who confirmed that on that day 27.2.2017 at 10 a.m. he received phone call from an informer that a student had been seen entering the appellant's house. He went to the appellant's house and found PW1 in uniform, sitting on the bed. As he was talking to her the accused walked in and they both were arrested and taken to Butere Police Station.

10. PW4 was a Clinician from Butere Sub-County Hospital. He confirmed to have examined the girl who complained that she had been defiled. He said her private parts were swollen and had bruises. She was examined and all lab tests were negative. The doctor testified that there was proof of defilement because of the bruises. He also stated that the accused tests were all negative. He said it's possible that the complainant sustained injuries from elsewhere but that she had a history of defilement.

11. PW5 was the Investigations Officer Miriam Chelagat, who testified that she received the two while at the station on 27.2.2017 at 11 a.m. in the escort of the Chief. The report was that PW1 had been found in the accused house. PW5 testified that as she was carrying out investigations, the complainant lied to her, but later told her that appellant had defiled her. She took them both to hospital and after investigations were done she charged the accused with the offence before court. This marked the close of the prosecution's case. The court placed the accused in his defence.

12. DW1 was his sole witness and gave an unsworn statement. He testified that on 27.2.2017 at 10 a.m. he was at work when a gate keeper called him only for him to find PW1, assistant Chief and village elder at the school gate. He testified that he had bought the complainant a bag which the complainant had gone to collect from his house.

13. I have carefully considered the prosecution and appellant's evidence. From the testimony of PW1 it is clear that the complainant and the appellant knew each other very well and were probably in a love relationship. However, the appellant at all times denied that he met the complainant on the material day or that they had sex as alleged. The appellant states in his defence that he had met the complainant in a funeral in 2013. Further the appellant denies that he lived in Sofia in the alleged house where the complainant minor was found. The appellant avers that he was framed in the whole affair.

14. In her testimony, the complainant states that she used a phone to call the appellant. However, that phone details was never investigated by the prosecution. The prosecution also never made any attempts to establish whether indeed the alleged house in Sofia where the minor and appellant were picked from belonged to the appellant. This fact was relevant since it was already in the statement of the appellant.

15. The testimony of PW2, who is the complainant's mother, and that of PW3, the Chief of Shirotsa, appear to me to be so smooth. PW3 states that he received a phone call from an informer that a student had been seen entering the appellant's house. On that basis he went to that house and found the minor, and shortly thereafter, the appellant walked in. PW3 does not say who his informer was and why the said informer could not be called to give evidence of what he saw. It is noteworthy at all times that the appellant denied renting a house at Sofia, and therefore any allegation that he was the owner of the alleged house ought to have been proved as required in law. The appellant instead states that he was at work as a cook in Butere Girls when the gate keeper called him to go to the gate where the complainant and a village elder from assistant Chief's office were waiting for him. This was material evidence on where the appellant was, and since he had rejected renting the house in Sofia, the prosecution ought to have investigated his allegation that he was arrested at his place of work. This court cannot rule out the possibility of the appellant being framed in this offence. Once there is a doubt that the appellant committed the offence, the same cannot stand.

16. Of paramount importance however, is the evidence of PW4, Cedric Wanyama, a Clinician at Butere Sub-County Hospital. PW4 testified that on 27.2.2017 at about 3.40 p.m. she examined the complainant and established a history of having been defiled by a person well known to her the previous night. Her private parts were swollen and had bruises. All test labs were negative. Her hymen was missing. PW4 testified that bruises were proof of defilement. But upon cross-examination by the appellant, PW4 stated that:-

“...it is possible that she could get bruises elsewhere ... There were no sperms or semen. It is possible that bruises can occur. She had lost her hymen but it wasn't fresh.”

17. PW4 also examined the appellant. In his testimony in chief PW4 stated in regard to appellant's examination:-

“... His private part did not have any lacerations.”

18. In my view the finding on the examinations of the complainant did not show that the bruises she had in her vagina were as a result of sexual intercourse with the appellant. If that were to be so, then why would the appellant's penis have no bruises or lacerations? Further, PW4's evidence is clear that the bruises found in private parts of the complainant may have been obtained elsewhere. The net effect of PW4's testimony was to cast a doubt in the guilt of the appellant, and it is the rule of law in criminal proceedings that a doubt is always disposed to the benefit of the accused, since it is the evidential burden of the prosecution to prove its case beyond reasonable doubt. It may as well be true that indeed the appellant did defile the minor. However, such finding must come by way of testimony and evidence. What is clear in this matter is that the appellant, the complainant, her mother and other people are related and are known to each other. It is also clear that the complainant and the appellant knew each other well before the matters the subject matter of this appeal arose. Under these

circumstances it is not farfetched, the submission of the appellant that somebody is framing him for offence he did not commit. The evidence surrounding how the appellant was arrested does not give this court the confidence to say that the case against him has been proved. It raises much more doubts, the result of which is that the appeal succeeds.

19. Accordingly the appellant's conviction and sentence are hereby set aside and the appellant freed and set free unless held for valid reasons.

Right of appeal within 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ongige – State Counsel

Appellant -

Court Assistant – Mr. Erick