



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 5 OF 2019

(Being an Appeal from the Judgement of Hon. M. I. Moranga in Criminal Case No. 87 of 2015)

CHRISTOPHER WAITHAKA MWANGI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Defilement of a child contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence was that on a date between 1st December, 2014 and 31st December, 2014 within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of VW a child aged 17 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 charge was that on a date between 1st December, 2014 and 31st December, 2014 within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and genital organ namely vagina of YW a child aged 17 years.

3. The Appellant was convicted and sentenced to 15 years imprisonment hence this appeal. He has raised some home-grown grounds of appeal which has essentially attacked the entire evidence adduced at the trial court and in particular that the same was full of contradictions' not capable of sustaining any conviction.

4. Before looking at the veracity or otherwise of the said appeal, it shall be worthwhile to summarize the evidence as presented during trial and thereafter proceed to analyse the same.

PROSECUTION CASE

5. **PW1, the complainant** testified that she was 19 years old having been born on the 13th January, 1998 and that she was a form 4 student at Secondary school. She said that on the December of 2014 she visited her grandmother at Estate Kitale. In the morning while at her grandmother's home the Appellant whom she knew well came and persuaded her to go to his place. Since she was not busy she accepted and they went to his one roomed house. While there in the appellant forcefully had sexual intercourse with her. She thereafter left for her home but she did not inform anybody of the incident.

6. She then went back to school in January 2015. She testified that it was only in May, 2015 that the pregnancy was discovered by her mother. She was taken to the hospital and later the matter reported at Kitale police station. A P3 form was filled at the hospital and the Appellant was arrested and charged with the offence.

7. When cross examined by the defence counsel she admitted that she did not disclose to any other person the whole incident until the pregnancy was discovered. In the act she did not bleed despite this being her first time to have had sexual activity.

8. **PW 2 LW**, the complainant's mother testified that indeed the Complainant had gone to visit her grandmother in the month of December, 2014 and she came back in January so as to go back to school. She said that in April, 2015 she noticed her healthy and physical appearance changing and she did not disclose to her that she was pregnant. She requested her friend to find out and indeed it was found that she was pregnant. She told her that it was the Appellant who was responsible. She informed her husband who organised for the arrest of the Appellant.

9. **PW3 KIRWA LABATT**, the clinical officer from Kitale district hospital examined the complainant whom she found to be pregnant. He filled the p3 form which he produced as evidence as well as the treatment discharge summary.

10. **PW 4 PC PETER KWATENGE** from the Gender desk at Kitale police station took over the file from **PC Michael Muchiri** who had since been transferred. He relied mainly on the evidence which he had gathered and nothing more. According to his findings the appellant and the Complainant met on the road where he seduced her and forcefully defiled her in his house.

DEFENCE CASE

11. When placed on his defence the appellant in his sworn evidence denied the charge and that he did not commit the offence as he did not meet the complainant anywhere. He agreed that they knew each other with the Complainant. He said that he learned of the pregnancy when it was read during plea. He denied that he has ever had any relationship with the Complainant.

ANALYSIS AND DETERMINATION

12. The court ordered this matter to be disposed by way of written submissions. The Appellant did submit and I have not been able to receive the written submission by the respondent. This being the first appeal the court is expected to analyse the evidence a fresh and come up with an independent findings taking caution that unlike the trial court it did not have the benefit of seeing the demeanour of the witnesses during trial.

13. The grounds which are expected to be established in proving the defilement offence are generally threefold, namely the age of the victim, the act of defilement and the identity of the perpetrator.

14. In regard to the issue of the complainant's age, the same is indisputable and the certificate of birth as well as the minors' evidence and that of her mother buttress this. At the time of the incident she was 17 years and about 11 months.

15. As to whether she was defiled the pregnancy she carried was clearly proved by the production of the p3 form as well as her evidence and that of her mother.

16. Was the appellant responsible for the offence? There was no eye witness to the incident. It was therefore her word against that of the appellant. In reaching whatever decision therefore, the provision of Section 124 of the Evidence Act, especially the proviso thereof must come into play. The same in a nutshell provide that in sexual offences involving minors, where there is no eye witness the court shall convict if it believes that the minor was talking the truth.

17. Having examined the evidence of the minor and the denial by the Appellant, the easier way out of such competing evidence would have been to undertake a DNA exercise. This would have foreclosed the matter. Nonetheless and based on what was presented to the court, I did not find the evidence of the complainant sufficient enough to be trusted. This court states so for the simple reason that considering her age, I did not find it impossible to have raised any alarm if indeed she was defiled forcefully.

18. The above reasoning is premised from her evidence that she went with the appellant willingly and without any coercion. Why did she accept to go with him if it is not what the investigation officer said that she had been seduced on the way?

19. Even then, she did not offer any resistance nor in any way raise any alarm considering that the appellant was not armed in any way. Further which in my view is the crux of the matter, she did not tell anybody including her grandmother, her mother nor anybody else of what she had gone through immediately after the incident. Any sensible and reasonable 17 year old girl at least in the normal happenings would have confided to her friend the way she allegedly told one H when she was discovered.

20. It appears also that had she not conceived she would not have told anybody. In fact it was the threats from her mother to tell her father that forced the complainant to open up. In light of her character I find that despite her emotions at the trial court, the Complainant as a matter of urgency and priority should at least have raised an alarm noting that during cross examination she admitted that there were other houses within the area.

21. More importantly, she should have notified her grandmother or her mother of the incident immediately or even within a reasonable time. One cannot be left to speculate that she would not have disclosed had she not conceived.

22. In the premises, on the character of the Complainant alone I find that this appeal is meritorious. The state should have applied for a DNA process to be undertaken noting that there was no eye witness to the incident.

23. The appeal is otherwise allowed, the Appellant set free unless lawfully held.

Date signed and delivered in open court at Kitale this 12th day of November, 2019.

H K CHEMITEI

JUDGE

12/11/19

In the presence of:

Mr. Omooria for Respondent

No appearance for the Appellant

Appellant present

Court Assistant – Silvia

Judgement read in open court.