



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 3 OF 2016

ISSACK NYAMU WANJIRU.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant Issack Nyamu Wanjiru was charged before the Principal Magistrate's Court at Wang'uru with the offence of defilement of a girl contrary to Section 8(1)(4) of the Sexual Offences Act Criminal Case No. 121/15. He pleaded not guilty but after a full trial he was found guilty, convicted and sentenced to serve fifteen years imprisonment.

2. He was dissatisfied with the conviction and sentence and filed this appeal raising the following grounds:

- a) Failing to conduct court as provided by Section 75 of the Children's Act.
- b) Failing to hold that the complainant is an adult.
- c) That the complainant produced exhibit 6 birth certificate indicating date of birth as 08/10/1998 while the appellant is in possession of one indicating date of birth was 08/10/1996.
- d) That the appellate court should invoke **Section 358(1) of the Criminal Procedure Code** to determine the age of the complainant.
- e) Meting a very stiff sentence in the circumstance.

He prays that the conviction be quashed and he be set free.

3. This being a first appeal, this court has a duty to analyse the evidence and come up with its own independent finding but bearing in mind that the trial magistrate had an opportunity to see the witnesses and their demeanor and leave room for that, **Okeno -vs- Republic (1972) E. A. 32** refers.

4. The particulars of the charge are that between 6 and 17/2/2016 at Mwea within Kirinyaga County intentionally caused his penis to penetrate the vagina of a child aged 17 years. The complainant DWN (PW-1-) testified that she was 17 years old and that she was born on 8/10/1998 as per the birth certificate exhibit-1-. On 6/2/2015 as she relaxed at home on the sofa set at about 3.00 Pm, four men who she knew by names entered. One was the appellant in this case. The men ordered her to remove her clothes from the house. Two of the men followed her to the bedroom and took her trouser and T-shirt from a suit case. Juma removed the suit case. She was ordered to board a motor bike which was outside by Nyamu. She was led to Ndoba Forest where the appellant told her not to worry as she would be married. She was led to a house where she was left with Nyamu, appellant. During the night the appellant had sex with her without her consent. She stayed up to 11/2/15 within which time the appellant used to have sex with her. The appellant informed her that her mother had circulated her photographs looking for her. She eventually managed to leave the house. She reported to the Chief and later to the Police. She was referred to hospital. A pregnancy test was positive. She later miscarried. PW-1- testified that the appellant used to send to her love messages and claiming he would marry her. She told the court that she did not scream at any stage because she was threatened.

5. From the evidence of the complainant, she knew the appellant before. She was with him for some days. She could not have failed to know him. From her birth certificate she was below eighteen. She testified that she had not consented to the sexual acts by the appellant.

6. PW-2- M K N who is the complainant's mother testified on how she found the complainant missing from the house on 6/2/15. She also found that her suitcase containing clothes was also missing. Later she got a text message from her telling her to ask Jimmy where she was. She reported the matter to the police. Later the complainant went to Chief's Office. Her clothes were returned. PW-1- informed her that the appellant used to have sex with her. She was pregnant and had a miscarriage. She told the court that she did not know that the appellant was

following the complainant with proposal to marry her.

7. PW-3- Andrew Githinji Warui who was the area In Charge had received the report from the complainants mother PW-2-. Later he heard rumours that the child was with Issack the accused. Later the complainant and the accused were taken to him by one 'Scenery'. He called the mother who said she would take them to Wang'uru. The complainant said her age was eighteen (18) years.

8. PW4 Lucy Wangari Kamau. She had spotted the appellant and the complainant outside the house. Thereafter she saw the complainant and the appellant for several days within the plot. According to her the appellant and the complainant would sit outside washing clothes and chatting on phone. They lived in the same house and at times she would see the complainant lifting a charcoal jiko. The complainant would go to nearby stream to wash clothes which the accused would help her carry them back to the house. This evidence tend to show that the complainant was free as she could sit outside chat on phone go to the river light a jiko and go on for several days. She could have escaped or call her mother.

9. PW-5- Cpl Ibrahim Mohamed was the Investigating Officer. On 18/2/15 the complainant was taken to the station by her mother who had earlier on reported that she was missing. The appellant was the suspect. The complainant alleged she was taken away from home by appellant and others and they told her she would be married by appellant. The appellant defiled her severally. He referred the complainant to hospital. The appellant alleged that the complainant was his longtime friend since 2012 and that the Assistant Chief was aware of it. The appellant took him to his house where he met PW4 who informed him that the two were cohabiting in the house between 11-2- and 17-2-15.

10. PW5 recovered a mobile phone which belonged to the accused from the complainant. The phone had photographs which the appellant and complainant had taken together in 2014. The photographs were exhibit 1a, b & c. They showed that accused and complainant knew each other before this incident. Later the DPP advised him to charge the appellant. He stated that he knew that the appellant and the complainant were friends since the year 2012 but the complainant's mother was opposed to it to the extent that she removed her to another school.

11. PW6 Kevin Wambua Murigi was the doctor who examined the complainant on 19/10/15 he testified that on examination no injuries were noted though the genitalia was tender and inflamed. Pregnancy test was positive. The hymen was missing. He produced the P3 form as **exhibit 12**. In cross –examination he stated that the person he examined gave her name as D W N not M which appears on her birth certificate. According to him, if the complainant said she was twenty two years he would have agreed.

12. PW-7- Cpl James Muriithi produced a CD from which he developed photographs which were produced as exhibits.

13. The appellant in his defence which was unsworn stated that the complainant went to his home according to plans they had. They lived together. The complainant's called him to say she was a school girl. He took her to the Assistant Chief. At the Assistant Chief's Office the complainant said she had attained the age of marriage. He told the court that he had taken photographs with the complainant during courtship.

14. I have considered the evidence which was adduced before the trial Magistrate. The evidence of the complainant that she was abducted by the appellant and others was not corroborated. She was not truthful when considering the testimony of PW4 which tends to show that the complainant was living with the appellant freely. The evidence by PW-4- disapproves the testimony of the complainant that she was abducted. There was also the testimony of PW-5- who stated that the complainant was a longtime friend of the appellant since the year 2012.

15. The defence of the appellant was not shaken. The appellant said that himself and complainant had plans to marry and she voluntarily moved to his house at Nyangati. This is confirmed by the testimony of PW-4- who witnessed the two living freely in the same house.

16. The appellant took the complainant to the Assistant Chief when the mother called him to say she is a student. At the Chief's Office the complainant said she had attained the age of marriage. It should be noted that the complainant was of borderline age as she stated she is seventeen years old. She must have misled the appellant that she is above eighteen years. The doctor stated that if the complainant stated that she was twenty two years old he could not have doubted. The complainant and the appellant were long time friends as shown by the photographs which were recovered from the mobile phone of the appellant and which were taken in the year 2015. The investigator PW-5- found that the complainant and appellant were friends but the mother was opposed to it. PW-3- the Assistant Chief testified that the complainant told him that she was eighteen years old. The evidence by the doctor is striking, the complainant gave her name as D W N which is not the name on her birth certificate. Nyamu is the name of the appellant.

17. My independent finding from this evidence is that the complainant and appellant were lovers. The testimony of the complainant that she was abducted is not true. She voluntarily moved in to live with the appellant and they lived together. The complainant misled the appellant to believe that she was eighteen (18) years old or she had attained the age of marriage. The evidence adduced does not support a charge of defilement. The complainant consented to sexual intercourse with the appellant after informing him that she was eighteen years old. The conviction by the trial Magistrate was clearly against the weight of the evidence. There was no criminal liability as the complainant had misled the appellant to believe that she is eighteen years old and she had consented to sexual inter course.

18. The evidence in support of the age of the complainant was very suspect. PW-5- informed court that the original birth certificate of the complainant got lost. He then said he had a copy of the birth certificate issued on 27/3/2015. He had issued a police abstract to show that the original got lost. As he was producing the copy of the birth certificate he told the court he had information that the original certificate has been found. It was handed over to him by the complainant's mother right there in court as he was giving evidence. At that juncture the court said after comparing the original birth certificate with a copy thereof it was admitted as **exhibit -6-**. Page 29 lines 4 -14. The copy which PW-5- had was not a copy of the original. The copy was issued on 27/3/2015 by the Registrar of Births. This was after this offence was committed. In the submissions by counsel for accused it is stated that exhibit -6- when compared with the annexures in their submissions differs in material respect as it is indicated that she was born in Nyeri while their annexure shows she was born at Kerugoya District Hospital.

19. I have looked at exhibit -6-. The birth certificate which was produced. It shows that birth was registered on 27/3/2012 and the complainant was born in Nyeri on 8/10/1998. The PW-5- had said a copy was issued on 27/3/15. The birth certificate annexed by the appellant shows she was born in 1996. The evidence on the age of the complainant was doubtful. There was a spirited effort to fabricate the age of the complainant. With the two conflicting birth certificates and the doctors evidence saying if complainant said she was 22 years old he would not doubt, it is not proved beyond any reasonable doubts that the complainant was below 18. There was a miscarriage of justice on how the birth certificate was produced in court and relied on to prove the age. There were discrepancies on the age of the complainant. The appellant prays that this court invokes **Section 358(1) of the Criminal Procedure Code** to come to the conclusion that the complainant was aged 18 years and therefore an adult. The section provides:

“In dealing with an appeal from a sub-ordinate court, the High Court if it thinks additional evidence is necessary shall record its reasons and may either take such evidence itself or direct it to be taken by the sub-ordinate court.”

I have considered the provisions. I however note that it would not be necessary to order the sub-ordinate court to take additional evidence. This is because, in sexual offences the age of the complainant is a crucial ingredient which must be proved beyond any reasonable doubts. This is because sentence under the **Sexual Offences Act** is considered based on the age of the minor. The prosecution did not discharge the burden to prove the age of the complainant. The evidence surrounding the age of the complainant was riddled with doubts and contradictions. The complainant herself had claimed to be an adult. I find that doubts on the age of the complainant must be given to the appellant.

20. The defence of the appellant was that he had planned with the complainant that they would get married. The complainant informed her that she had attained the age of marriage and she is the one who moved into his house and they lived together as husband and wife until the mother alleged she is a school girl and he took her to the Chief’s Office. It is important to note that this defence was not challenged.

21. It is therefore clear that the appellant had raised a defence that the complainant had alleged that she was an adult. The **Sexual Offences Act** avails a defence to an accused person where the complainant deceived him into believing she is an adult.

Section 8(5) of the Act provides:

“it is a defence to a charge under this section if –

a) It is proved that such child deceived the accused person into believing that he or she was over eighteen years at the time of the alleged commission of the offence, and

b) The accused reasonably believed that the child was over the age of eighteen years.”

The defence of the appellant laid bare this defence. The trial magistrate ought to have considered this defence in view of the circumstances of this case in the light of the evidence of the prosecution evidence, that is,

1. Evidence by the Assistant Chief (PW-3-) Andrew Githinji who testified that the complainant told him she was eighteen years.
2. Evidence of PW4 Lucy Wangari Kamau that accused and complainant were living together freely.
3. The evidence of the complainant that she was abducted was uncorroborated.
4. The age of the complainant was shrouded in doubts. The birth certificate showing she was born on 8/10/1998. The charge sheet stated she was seventeen years.

The trial magistrate ignored the defence and makes a misleading finding that the accused never stated that the complainant had told him she had attained the age of eighteen years. This was not only prejudicial but occasioned a miscarriage of justice as the trial Magistrate failed to consider the defence which was open to the appellant. Criminal liability was not established. This must be proved in criminal cases.

CONCLUSION:

I am of the view that the charge was not proved beyond any reasonable doubts. The conviction of the appellant was against the weight of the evidence. In the circumstances I find that the appeal has merits. I allow it and order that the conviction be set aside. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kerugoya this 3rd day of May, 2018.

L.W. GITARI

JUDGE

3/5/18.

Read out in open court,

Appellant Present,

Mr. Sitati State Counsel for State

C/A – Naomi

L. W. GITARI

JUDGE