



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 79 OF 2017

(From original conviction and sentence in Sexual offences case No. 89 of 2015 in the Chief Magistrate's court at Kitale delivered by G.N. Sitati Resident Magistrate on 6/10/17).

JANE MUMBI GICHUHL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of the **Defilement of a child contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that **on diverse dates between 26th April 2015 and 11th May 2015 at [particulars withheld] within Trans-Nzvia County intentionally caused her vagina to be penetrated by the penis of B N I a child aged 17 years.**

2. The alternative charge was **committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 26th April 2015 and 11th May 2015 at [particulars withheld] within Trans-Nzvia County intentionally caused contact between her genital organ namely vagina and genital organ namely penis of B N I a child aged 17 years.**

3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. Before looking at the grounds contained in the said petition of appeal, it shall be worthwhile to summarise the evidence as presented during trial.

4. PW1 the minor (BN1) testified that he was a form 3 student at **[particulars withheld]** secondary school and was born on 19/10/1998. He said that on 26/4/2015 at 10.00 am he went to take milk to the dairy when he met the appellant. She then requested him to go to her house where they had breakfast and she proposed to him that they become lovers. He agreed and they exchanged their telephone numbers.

5. On 29/4/2015 they met at her place and they had sex after breakfast. Subsequently, the complainant would go to the appellant home and would engage in sexual activity.

6. On 11/5/2016 when the complainant was opening school, the appellant told him to go to **[particulars withheld]** instead of going to school. They left together. The complainant had his fees amounting to kshs 5,000/- and was in school uniform as well as some home clothes. He changed into home clothes in some house and gave the bag to the appellant.

7. The complainant then stayed at **[particulars withheld]** with some friends till late at 3.00 am when he was arrested with other friends for being without an identity card. He called the appellant who promised to come but she did not. Later the complainant met his mother whom she narrated everything to her. The matter was reported at Kitale police station where a P3 form was issued for it to be filled at Kitale District hospital.

8. When cross-examined by the defence counsel, the complainant confirmed that he had sexual intercourse with the appellant and that he decided to stay at Mbuni bar as there was no other place he could spend the night.

9. PW2 H M M the complainant's mother testified that the complainant was a form 3 student at **[particulars withheld]** secondary school. That she had come back from Nairobi on 12/5/2015 when she was told by one G M that she had information that the complainant had not gone to school on 11/5/2015. She called the school and the teacher as well as the bursar confirmed so. A report was made to the village elder who reported to the AP Camp. They searched the appellant's house and did not get the minor. Later she came to Kitale police station and was told that the complainant had been arrested. The complainant then narrated to her the relationship he had with the appellant.

10. **PW3 G O M** testified that she was a neighbour to the complainant. That she was told by one Mama N of a suspicious relationship between the appellant and the complainant. She told her that the appellant had sexual liason with the complainant.

11. She was on 11/8/2015 told that the appellant had been seen with the minor. She reported the matter to the village elder. She equally notified PW2.

12. **PW4 Elizabeth Makhanu** is the village elder and both PW2 and PW3 are her subjects. She stated that she was told by PW3 that a woman had been seen going into PW2's house and that the two had sexual liason. Later she was told that the minor had not gone to school. They got 3 AP officers who went to the appellant's house but they did not get the minor.

13. **PW5, Masake** the clinical officer from Kitale District Hospital produced the P3 forms as well as the treatment notes. In his analysis and upon examining the minor he did not find anything out of ordinary. He merely relied on the history as presented by the complainant. There was no sexually transmitted disease infection.

14. **PW6 P.C. Micheal Muchir** carried out the investigations, and recorded statements from the witnesses. According to his findings, the appellant and the complainant had several times had sexual intercourse. He also produced the birth certificate of the minor. He said on cross-examination that the complainant was arrested for drinking after hours.

15. When put on his defence, the appellant denied the charge. She said that she was a business lady dealing with boutiques and that the complainant was a son to her neighbour. That they lived 300 metres apart and her mother PW2 was her business friend. She further stated that they would visit each others homes where they would watch movies. She denied the offence stating that she was infact a married woman with one child.

Analysis and Determination

16. The court has perused the proceedings herein as well as the submissions by the parties on record. The court is enjoined to re-evaluate the evidence afresh with a view of reaching a new findings taking however caution that it did not have the chance and opportunity to see the witnesses as they presented their evidence. (*See Okeno Vs Republic (1973) E.A. 32.*)

17. The appellant has raised several grounds in the appeal which centered majorly on whether the evidence as presented was sufficient enough to have led the trial court arrive at the verdict it did.

18. Obviously, this is a very unique and rear case where a female is accused of defiling a male minor. Nonetheless the standards expected do not change. The grounds will always remain the same regardless of the gender.

19. On the first question of whether or not the complainant was a minor, the same was not contested. Although the certificate of birth produced dates 01/02/2017 and as explained, the same seemed to have been produced for purposes of the case as the earlier one was lost during post poll chaos, the same was not however disputed. Consequently I find the age of the minor not disputed.

20. The next issue which is really germane is whether the appellant defiled the minor. Its appreciated from the evidence on record that there was no direct eye witness. All that seemed to have happened was pure suspicions as the appellant was seen with the complainant at the latter's home. Even one Mama Neema who apparently did not testify told Gladys, that;

“ a woman came to the house of A and had sex with B.”

21. On cross-examination she stated that Mama N became suspicious because the appellant hugged the appellant.

22. Having stated so, it appears clearly that it was now the complainant's word against the appellant. The medical reports produced as well as the P3 forms did not elicitate much. As a matter of fact the clinical officer stated that he did not find anything extraordinary when he examined the complainant.

23. The proviso to Section 124 of the Evidence Act comes into play when faced with such situation. The same states as follows:

“ -----Provided that in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth” - (underlining mine)

24. I have anxiously weighed the evidence of the complainant and I find that there are various caps which needs filling or at least some explanation. This explanation will aid the court in answering whether the totality of his evidence as presented was truthful.

25. First of all he stated that he was a form 3 student at **[particulars withheld]** secondary school. At the same time PW2 her mother stated that she telephoned both the complainant's teacher as well as the school bursar of “manor house” which I believed was the complainant school.

26. Are these two schools the same? Are they different.? Whatever is the answer there was no evidence produced that the minor was a student in either of the school.

27. More fundamentally are the movements of the complainant from the day they exchanged telephone numbers with the appellant. It appears that if they had sexual intercourse, it was purely a consensual affair. Infact PW2, stated that her son was so truthful that he would tell her anything. If this was so, surely, there was nothing to stop the minor in confiding to her mother the luring the appellant was doing to him.

28. The issue of exchange of telephone numbers should have been a backbone of this case. No evidence was presented to suggest a telephone handset or a number for that matter. Even if there was one, there was no difficulty in the prosecution providing the same for the court. To simply state that we exchange messages was too pedestrian. Infact PW2 stated that;

“ The boy said M was his girlfriend and he showed me all the messages that were sent which showed that I had relationship. He called her “Mzee wangu” in the messages.”

29. Clearly this would have been incriminating evidence if at all it had been produced.

30. The other issue which I find intriguing and begs a lot of questions is the complainant's explanation of why he ended up at **[particulars withheld]**. The earlier evidence seemed to suggest that they had agreed to go to Endeless with the appellant instead of going to school. He in the process changed to civilian clothes in a certain cafe and gave the bag to the appellant together with other belongings and I suppose including ksh 5000/= his school fees. From there he entered up at **[particulars withheld]** from 8.30 pm till 3.00 am when he was arrested by the police for being there without an identity card.

31. Save to state that the appellant had told him that they go to **[particulars withheld]**, the whereabouts of the appellant thereafter was not explained. Neither was the appellant at Mbuni bar.

32. The arrest by police of the complainant appear far and independent from his escapades. He stated on cross-examination that;

“ In [particulars withheld] I was at the dance floor and I took sodas and when I was at toilet I was arrested.”

33. He went on to state that;

“I could not go with uniform in a bar because I know it was wrong for me to go in a bar without an identify card.”

34. mentioner the presence of the appellant at the said bar. Neither was any evidence produced to suggest that the complainant was actually in the said bar.

35. In my view the complainant was economical with the truth. One could easily conclude that the complainant was a truant who had squandered the school fees as well as his pocket money and that the only way out was to implicate the appellant.

36. If indeed he was truthful enough, he would have called at least some of his friends whom he was at **[particulars withheld]** that night.

37. Having stated so, I do not find the evidence of PW2, her mother very truthful. I hold so because when it came to whether she knew the appellant, she blew hot and cold. At some point she stated that she did not know and at times she told the court that she lived 500 metres away and that the appellant knew that her husband died in October 2014. Clearly these were neighbours who knew each other contrary to PW2 assertion.

38. The complainant if at all had sexual intercourse with the appellant presented himself as though he was an adult. Infact the fact that he could change from school uniform to civilian, go into a bar and spend the night away, does not indicate a minor who was innocent.

39. The appellant should benefit from the provision of Section 8(5) of the Sexual Offences Act, which provides inter alia that:

“ 5) 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 the age of eighteen years at the time of the alleged commission of the offence;

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

6) The belief referred to on sub section (5) (b) is to be determined having regard to all the circumstances including any steps the accused person took to ascertain the age of the complainant.”

40. Further and more fundamental is the fact that there ought to have been undertaken medical assessment in respect to the appellant. Although as clearly explained by the clinical officer there was no significant finding when the complainant was examined, I belief that it could have added more weight had she been examined.

41. The complainant equally stated that he left his bag with the appellant which I suppose had his school uniform. When PW2 and the rest raided the appellant's house no search was undertaken. No apparent explanation was given even by the investigating officer why they failed to do so. Had they done so maybe the complainant's bag with its contents would have been recovered.

42. The upshot is that, I do not find the evidence s presented sound enough to have sustained the charge. The evidence of Mama N would have been crucial as it was her who triggered the allegation that the appellant and the complainant were having sexual affairs. No reason was given why she did not testify. The case of *Bukenya & others Vs Uganda (1972) EA 549* squarely applies herein.

43. In my view, the entire episode was based on rumours and conjecture. No hard facts were presented by the prosecution to suggest that the appellant had lured the minor into the offence. The minor on the other hand was economical with the truth. His character therefore appears questionable. Clearly, the first person whom he would have opened up to as he claimed to trust was his mother.

44. The offence facing the appellant is grave and it needs hard evidence. Section 124 of the Evidence Act does not aid the prosecution. In short this appeal succeeds. The appellant is set free unless lawfully held.

Delivered, signed and dated at Kitale this 10th day of May 2018.

H.K. CHEMITEI

JUDGE

10/5/18

In the presence of:

M/S Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.