



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 59 OF 2017

ABDI MAASAI CHEMANGENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. D.K Matutu – SRM dated 12th May, 2017 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 596 of 2016)

JUDGMENT

1. The appellant, ABDI MAASAI CHEMANGENG, was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act (‘the Act’). The particulars of the offence were that on diverse dates between 14th April 2016 and 28th April 2016 within Narok County, he intentionally caused his penis to penetrate the vagina of JN, a girl aged 14 years. He was convicted and sentenced to twenty (20) years imprisonment.
2. The thrust of the appellant’s case contained in his petition of appeal, supplementary grounds of appeal and written submissions is that the offence against him was not proved to the required standard. In considering this issue, I am required to re-evaluate the evidence afresh and come to my own independent conclusion as to whether to uphold the conviction making allowance for the fact that I neither heard or saw the witnesses testify (see **Okeno v. Republic {1972}EA 32**).
3. The child (PW 1) testified that she was aged seventeen (17) years and a student in class seven at the local primary school. She knew the appellant as a friend and he was also a neighbour. She stated that between 14th April 2016 and 28th April 2016 they had sexual intercourse. She recalled that during that period she had run away from home.
4. PW 1’s father PW 2 told the court that on 14th April 2016, the school had closed and PW 1 had disappeared from home. He looked for her and in due course he received information from an informer that PW 1 had been seen with the appellant. Through the informer, who was also an intermediary, PW 2 was informed of the appellant’s intention to marry PW 1 and the fact that he was willing to pay two cows as dowry. It was agreed through the intermediary to arrange a meeting to finalise the arrangement.
5. The meeting was arranged on 28th April 2018. PW 3, a boda boda rider testified that the appellant approached him to ferry both him and PW 1 to meet PW 2 and make the marriage proposal. He took them to the meeting which was also attended by PW 4, a clan elder. PW 4 testified that PW 2 had told him that his daughter had gotten a partner and that a meeting had been arranged to discuss dowry. On 28th April 2016, he attended the meeting when PW 1, the appellant and PW 3 came to the meeting and were welcomed but was sooner arrested and taken to the police station.
6. PW 5, police officer, stationed at Kilgoris Police Station recalled that on 28th April 2016, the appellant and PW 1 were brought to the police station by PW 2. She issued a P3 Form and PW 1 was taken to TransMara District Hospital.
7. PW 6, a clinical officer at Trans Mara District Hospital, told the court that he examined PW 1 on 29th April 2016. He noted that PW 1’s hymen was broken with fresh blood stains and whitish discharge noted. He concluded that there was defilement.
8. In his sworn defence, the appellant denied the offence. He admitted that he lived in the neighbourhood and knew PW 2. He testified that on 28th April 2016, he was arrested while coming from his shamba and accused of defiling PW 1.
9. The issue in this case is whether the appellant caused the act of penetration to a child.
10. It is clear from the evidence that the appellant and PW 1 were not strangers to each other. They lived in the same neighbourhood, a fact admitted by the appellant. PW 1 explained how she ran away from home and went to stay with the appellant where she had sexual

intercourse with him over that period. The testimony of PW 1 was sufficient to sustain a conviction in light of the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that the testimony of the victim of a sexual offence is sufficient to support a conviction if, for reasons to be recorded, the court is satisfied that the victim is telling the truth. In this case the trial magistrate concluded that:

“I had the opportunity of hearing the alleged victim testify on oath. She is a class seven pupil and very knowledgeable. She is forthright and never minces her words. It was her testimony that they had sexual intercourse with the accused.”

11. Although PW 1’s testimony was sufficient, there was sufficient corroborative evidence to support her testimony. First, PW 1 confirmed that during the material period, PW 1 had run away from home. Second, PW 3, the boda boda rider saw them together and took them to negotiate dowry. Third, PW 4 was present when PW 1 arrived with the appellant and PW 2 to the meeting whereupon they were arrested. Fourth, the medical evidence of PW 5 confirmed that there had been penetration.

12. In light of the testimony of the witnesses I have set out, the appellant’s defence was sterile as he did not give a reasonable explanation why he was with PW 1 for the period and why he was taking her for ‘dowry negotiations’. I am satisfied therefore that the appellant did an act of penetration to PW 1. The conviction is therefore affirmed.

13. PW 1’s age was also proved by her own testimony, that of PW 2 and the age assessment by PW 4. It is not in doubt that PW 1 was a child and as she was 14 years old the sentence imposed was within the bounds of section 8(3) of the Act. Consequently the sentence, being the minimum, under the law, is affirmed.

14. The appeal is dismissed.

Dated and delivered at Kisii this 19th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.