



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 24 OF 2017

MARTIN MUCHIRA NGONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence in Criminal Case SO No.34 of 2016 of the Chief Magistrate's Court at Embu)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the sexual offences Act No 3 of 2006. The particulars of the offence are that on diverse dates between 17th March 2016 to 26th September, 2016 at Kianjuki Sub-location of Manyatta division within Embu County intentionally caused his genital organ 'penis' to penetrate the genital organ 'vagina' of EWN a child aged 15 years.

The appellant was also charged with an alternative count of indecent act contrary to section 11(1) of Sexual Offences Act. The trial court convicted the appellant on the main count and sentenced him to twenty years imprisonment. The grounds of appeal are THAT:

- 1. THAT the appellant pleaded not guilty to the charge.***
- 2. That, the trial magistrate erred in both points of law and facts when he failed to consider that the complainant came up with the case as an afterthought after the appellant had discovered that the complainant in this case had stolen ksh 5,000 from the appellant.***
- 3. That, the trial magistrate erred in both points of law and facts when he failed to consider that there was no supporting evidence to the complainants allegations that she had been married by the appellant before court.***
- 4. That, the trial magistrate erred in both points of law and facts when he failed to consider that no independent witness was called to support the allegation by the complaint that she had been married to the appellant.***
- 5. That, the trial magistrate erred in both points of law and facts when he failed to consider that no D.N.A was conducted in this case.***
- 6. That, the trial magistrate erred in both points of law and facts when he failed to consider that the appellant's right to an attorney was violated.***
- 7. That, the trial magistrate erred in both points of law and facts when he rejected the plausible defense on weak grounds.***

The appellant submit that he used the legal process of reporting a case of theft of money and that is how he was arrested and charged in court. The complainant did not report any offence. The complainant told the court that she dropped out of school and started looking for employment. It is also submitted that the appellant was not examined by a doctor. The prosecution evidence was incredible. In the defence the appellant explained how his money was stolen and he reported to the assistant chief. The assistant chief insulted him and he went to the District Commissioner. The defence was not given adequate consideration.

The prosecution opposed the appeal. Miss Nandwa submitted that PW4 stated that she had sexual intercourse with the appellant. This was on numerous occasions. PW4 was below 18 years and therefore a child. She was 15 years old. A birth notification was produced. Under section 43 of the Sexual Offences Act a child cannot give her consent to sexual intercourse. Penetration was proved by the medical evidence. The

appellant committed the crime continuously for a period of six (6) months. The prosecution proved its case beyond reasonable doubt. Section 36(1) of the Sexual Offences Act does not make DNA testing compulsory. The trial court did not find it necessary to order for DNA test.

This is a first appeal and the court is duty bound to re-examine the evidence afresh and make its own conclusion.

PW1 NICASIO NYAGA MBOGO was the assistant chief of Kianjuki Sub-location. On 26/9/2016 at about 10:00am the appellant went to complain about theft of Ksh 5,000 from his shop. The appellant was with the complainant. The complainant told him that she had stopped attending school in class 7 and went to look for a job. The appellant hired her. She said she was 17 years old. They went to her parents and the birth notification showed that she was 15 years old. He later found out that the two had been living together for months. The complainant told him that the appellant was her husband and they had sexual intercourse during the period they lived together. The appellant was arrested on the same day.

PW2 ROBERT IRERI ONESMUS was the assistant chief of Itunguri Sub location. On 26/9/2016 at 10:00am he was at PW1's office. The appellant and the complainant went to the office. The appellant was complaining that the complainant had stolen Ksh 5,000 from him. The complainant appeared to be under age. They looked for her parents and it was revealed that she was 15 years old. The complainant confirmed that she was selling at the appellant's shop and they lived together. They also had sex.

PW3 Dr. PHYLIS MUHONJA examined the complainant. It is her evidence that the appellant is 29 years old and was the husband of the victim. The complainant had an old ruptured hymen. She did not have any sexual disease. She concluded that penetration had occurred due to the cohabitation. The complainant was quite okay with clear speech, good memory and concentration. She lacked insight about the offence.

PW4 is the complainant. She told the court that she was 16 years going to 17 years. This was on 21/02/2017. Her verbatim evidence is as follows:

I am E W. I attend school at St. M. in class 7. I know Martin Muchira. We lived together we started cohabiting in March, 2016. I stopped going to school and I started looking for employment. I met Martin who promised me a job at his shop. I went to his place and I lived with him for 3 months. He left me a shop and went to Voi. I was living as his wife. We had sex and I cooked and washed for him. The sex was consensual.

When he went Voi he asked me for money and I sent him Kshs. 500/= he came the following day and demanded for money which I did not have. He started beating me up. He brought me to his mother who asked him to go back to his shop and find out what had been lost. We went back to his house and he locked me in and left. He came back and started beating me he locked the door and I called for help. People came and rescued me. The sub area who rescued me is the same one he claimed I gave the proceeds from the shop. I ran to his sister's house and the accused said he was going to report me. He went to Manyatta at the DO's and he was referred to Kavote and then to Manyatta Police Station.

We lived together for 6 months. I had not had sex prior to living with the accused confirm that we used to have sex. Accused identified.

PW5 P.C Timothy Ndiwa was stationed at Manyatta Police Station. He investigated the case that was reported on 26/9/2017. It is his evidence that the appellant went to the Assistant Chief to complain about theft of Ksh 5,000 by the complainant. The complainant and the accused lived together for six months. The complainant was unable to live with her parents. The appellant was charged with the offence.

In his sworn defence, the appellant testified that on 22/07/2017 he reported to the Assistant Chief that some cash was missing from his shop. The Assistant Chief insulted him. He proceeded to the DC's Office in Manyatta. He was in Voi when the alleged incident took place. The complainant was a street girl and a prostitute not a student. The Chief trumped up the charges because he reported the loss of his money. If he was to blame he could not have gone to the Chief to report. The complainant was living in his house with other family members. She was being assisted by his parents.

The issue for determination is whether the complainant was defiled. The charge sheet reads that the defilement occurred between 17th March to 26th September 2016. This is a period of over six(6) months. According to the evidence of PW4, she dropped out of school in class 7. She went to look for work and the appellant hired her in his shop. According to the Investigating Officer, the complainant could not live with her parents. It is not stated why she could not live with her parents. The appellant admit that he was living with the complainant.

According to the evidence, no one reported the alleged defilement. The appellant went to report that the complainant had stolen Ksh 5,000/=. According to PW1, the complainant's mother had reported to him about the issue of the complainant living with the appellant. He did not explain when the complainant's mother reported to him. As an Assistant Chief of the area why didn't he report to the police if indeed he was aware of that issue. In his evidence, it was as if he was seeing PW4 for the first time and became curious when she referred to the appellant as her husband yet she appeared to be a young girl.

Section 8(1) of the sexual offence Act defines the offence of defilement. Section 8 (1) states as follows:-

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Under section 43 (4) a child cannot give consent to having sex. The effect of the above section (43 (4)) is that any sexual intercourse with a child is defilement. The law presumes that a child is not mentally capable of giving her consent to Sexual Intercourse.

The Sexual Offences Act did realize that there will be exceptional circumstances that will require curious examination by the courts. These are the circumstances provided under section 8(5) of the Sexual Offences Act.

Section 8(5) of the Sexual Offences Act states as follows:-

(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, and

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

Section 8(6) states as follows:-

The belief referred to in subsection (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.

The complainant's evidence is that she was looking for a job. She was hired by the appellant. They lived together for three months and the appellant went to Voi. She was living with him as his wife. They had sex and she would cook and wash for him. While in Voi, she would send him money. They had sex. When he came back he asked for money and he started beating her. The complainant went to report about the loss of his money. His evidence is that the assistant Chief insulted him and he went to the District Commissioner. The Investigation Officer confirmed that the appellant was referred back to the chief by the D.C.

Given the facts of this case, can it be held that the appellant defiled PW4 or can it be objectively held that PW4 was lured by the appellant to have sex with her. It is quite easy to conclude, as the trial court did, that PW4 was defiled since she was 15 years old. She could not give her consent to have sex.

Section 8(6) of the Sexual Offences Act calls upon courts to have regard to all the circumstances of the case wherever a defence under section 8(5) arises. Section 8(6) states that such circumstances **include** the steps taken by the accused to ascertain the age of the victim. The word "include" is used in addition to the other circumstances of the case. In other words, courts should not insist on seeking to know what steps the accused did to ascertain the victim's age. The circumstances of the case can as well explain that there was no need to ascertain the victim's age.

The complainant was comfortably living with the appellant as her husband. The problem only arose when money got lost and the "husband" went to report his "wife" that she had stolen the money. The issue for consideration is whether the community was not aware of the appellant's relationship with PW4. According to the doctor (PW3), the child was away from home for six (6) months. Where were the parents. None of the parents was called to testify. The two assistant Chief's went to PW4's home and met her mother. Why was she not called to testify and explain why PW4 had dropped out of school. Why didn't the mother report to the Police for a period of six (6) months that her child had disappeared from home. The circumstances of the case are that the appellant and PW4 were living within the same area as PW4's parents. In my view the parents were aware of the fact that PW4 had dropped out of school and was working for and living with the appellant.

Given the evidence on record, I do find that PW4 behaved like an adult. She went around looking for employment as an adult. She was ultimately hired by the appellant. In his defence, the appellant referred to PW3 as a street girl and not a student. There was no need for the appellant to take steps and ascertain PW4's age. This was someone who was looking for employment and not in school. She lived with him for six months and they had sex. He was in Voi and when he went back he realized Ksh 5,000 was missing. The case could not have come to the limelight had the appellant not gone to complain. The case could not have arisen. The area Assistant Chief was aware that the appellant was living with PW4. His evidence that the complainant's mother went to report to him about the appellant's affair with PW4 cannot be true. He did not take any action before the appellant reported to him the loss of his money.

In my view, despite the fact that there was Sexual Intercourse between the appellant and PW4, that incident falls within the provisions of section 8(5) and 8(6) of the Sexual Offences Act. It can be presumed that PW4 was passing off as someone who was over 18 years. She told the Chief that she was 17 years while knowing that she was 15. When she testified she was 16 heading to 17. In effect, PW4 was quite in a hurry to become an adult. By the time she testified she was 16 but was quick to add that she was about to turn 17.

The Sexual Offences Act is intended to protect children from early sexual encounter before the age of 18 years. What is the situation if the child is the one who went to look for employment and the employer become her husband. The appellant comfortably left her at his home and went about his duties in Voi. There is no child to be protected. PW4 was already behaving like a wife. She told the court that she was living as the appellant's wife. The law took into account such instances and the appellant is entitled to the benefit of the defence under section 8(5) of the Sexual Offences Act. PW4 is already aware of what sex is and was living with the appellant as her husband.

The upshot is that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and signed at Marsabit this.....day of June, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 10th Day of July, 2018

F. MUCHEMI

JUDGE