



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO 61 OF 2015

JOSHUA OGANGA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence of Kilgoris SRM court dated the 10th day of July 2015)

JUDGMENT

1. The appellant was charged as follows in the lower court; Count No. 1” **Defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.** The particulars of the offence were that,” On diverse dates between 23rd of November 2013 to 1st December 2013 in ETAGO District of the KISII County caused his penis to penetrate into the vagina of CN a girl of aged (15) fifteen years. The alternative charge was, “Indecent Act with a child contrary to **Section 11(1) Sexual Offences ActNo. 3 of 2006.” The particulars of this offence were that,** “On diverse dates between 23rd November 2013 and 1st December 2013 in ETAGO District of the Kisii County unlawfully and indecently assaulted CN a girl aged 15 years by touching her private parts namely vagina.” .COUNT 2 was one of, “Child trafficking contrary to **section 14 (a) OF SEXUAL OFFENCES ACT NO. 3 OF 2006.” The particulars of the offence were that,** “On the 22nd day of November 2013 in Transmara West District of the Narok County knowingly and intentionally took CN a girl aged (15) fifteen years out of custody of her parents from [particulars withheld] village to ENKETI village at KISII County about 50 Kilometers away with intent of facilitating the commission of any Sexual Offences against CN.”

2. The appellant was convicted and sentenced to 20 years on count no. 1 and 10 years on count no.2. His appeal is against sentence and conviction. His grounds of appeal are that;

i. **The trial Magistrate misdirected himself when evaluating the evidence on record before occasioning a miscarriage of justice due to error of procedure.**

ii. **The learned trial Magistrate totally to consider the evidence on record as a whole.**

iii. **The trial Magistrate erred in law and fact by finding the appellant guilt of the offence charged and the evidence on record never supported the said charge and the sentence melted is unreasoned and erroneous in law.**

iv. **The learned trial Magistrate failed to note that the evidence of the independent witness was contradictory.**

v. **The learned trial Magistrate never considered evidence adduced by the appellant in his defense after being forced to proceed in absence of his counsel.**

vi. **The learned trial Magistrate’s evaluation of the whole evidence was wrong as a fact on the following grounds.**

vii. **The defect on the charge**

viii. **Absence of proper corroboration**

ix. **Inadequate interpretation of language**

x. **Wrongful admission of evidence**

xi. **Unlawful sentence arising from erroneous decision in law.**

3. As a court of first appeal it's my task to evaluate the evidence adduced in the lower court, reevaluate it and draw my own conclusion bearing in mind that I did not see or hear the witnesses (See **Okeno vs. R [1972] E.A.**).

4. Pw1 testified that she is 15 years old. On the 12/11/2013 after leaving home the appellant called and told her that he would take her to his home for 3 days. Her parents did not know of her whereabouts. She stayed with the appellant at his house and they had sex 3 times during the night. The next day they took a motorcycle to his home at Enketi village and they stayed for a week and they used to sleep in the kitchen. She testified that before going to stay with the appellant she had sex with him. That their relationship started in April 2013. That the appellant knew she was below 18 years, that she told him her age but he insisted. That during their stay the appellant never told her to go back home. That they stayed as husband and wife. After a week the appellant was arrested. She was taken away by her mother after she went to the appellant's home with some elders. She was examined and a P3 form was filled. Her age was assessed and she was found to be 15 years old. She used to love the appellant but she does not love him anymore.

5. Pw2 testified that the Pw1 is her daughter her fourth born aged 16 years. Pw1 was staying with her other daughter. She was called by her daughter that Pw1 had been taken from home. She went with her daughter's husband D to look for Pw1 who was said to be in Kisii. The chief took her to the appellant's home and she found Pw1. She took her daughter away and took her to hospital. Pw1 is back in school. She produced Pw1's birth certificate dated 20/11/2012 and Pw1's result slip.

6. Pw3 was EM, he testified that he accompanied Pw2 to EE to a farm at [particulars withheld]. The appellant was called by the chief and he informed them where Pw1 was. They found Pw1 at the home of Eric the appellant's uncle.

7. Pw4 was the investigating officer, he testified that on the 29/11/2013 whilst at a Lolgorian police station he received a report from Pw2 about Pw1. The appellant was charged with defilement and trafficking.

8. Pw5 Irene Nelep a clinical officer testified that she did not examine the complainant but she was standing for Dr. Nyaangah who was on maternity leave. She testified that she had worked with the said doctor for 3 years and she was familiar with her handwriting. The P3 form was filled on the 5/12/2013. Pw1 was aged 15 years. On general examination there was no abnormality detected. The urinalyses showed pus cells and presence of protein. The hymen was absent though not done to fresh penetration, there was evidence of sexual intercourse. According to the doctor's findings there was sexual intercourse though not done to fresh penetration. Age assessment showed she was 15 years old.

9. The appellant gave an unsworn statement. His defense was that he is a plumber. That the complainant went to his farm at [particulars withheld] and he gave her work. She worked many days. He left the farm and went to Enketi and continued with his plumbing works. On the 22/11/2013 the complainant went home and his aunt welcomed her and she lived with his aunt. He left for work and returned after a week. He found the complainant he told her to call her parents and to disclose her location. The next day he went to work and on returning from work he found that her parents had collected her. Later he was arrested at Magena, he was taken to the police and was informed of the charges at 2pm. He taken to crime office and the complainant's mother talked to an officer in Luhya and his finger prints were taken and he was charged on the 4/12/2013. He testified that the girl went to his home as a guest and he could not chase her away.

10. Parties filed submissions which I have carefully read and considered. I will refer to them as I consider each ground. Ground No.1 and 2 are on the evidence adduced before the trial court. Ground no. 6 is the main grounds of appeal. The first issue is that the charge is defective. In count no 1 the appellant was charged under section 8 (1) as read with section 8(2) of the sexual offences Act. The correct section should have been section 8 (3) and not section 8 (2). The complainant's age was indicated as 15 years. Section 382 of the Criminal Procedure Act provides as follows, "*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*" I have gone through the proceedings and there was no objection raised by the appellant nor his counsel. The sentence was lawful it supported the offence of defilement as per section 8 (3). There was no miscarriage of justice as alleged. In my view the errors are curable under section 382 of the Criminal Procedure Code.

The next issue is that there was the absence of corroboration. Pw1's evidence was that she left her home and went to meet the appellant they stayed for 3 hours and went to his place of work they stayed for at his place. They had sex 3 times that night the next day he took her to his home at Enketi village and she was welcomed by his auntie. She stayed there for a week and she was later collected by her mother. There was medical evidence that the complainant had had sexual intercourse and this evidence corroborated the complainant's evidence that she had had sex. The medical evidence was properly admitted Pw5 laid the basis of her producing the report. There was no objection from the appellant nor his counsel. There is the issue that the appellant was not taken for medical assessment. The Court of Appeal in **Geoffrey Kionji -vs- Republic Criminal Appeal No.270 of 2010 the Court of Appeal** stated as follows;

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement."

I agree that there is no legal requirement to that effect. The appellant was not prejudiced in any way nor was the prosecution case dented.

On inadequate interpretation of language. At the time the plea was taken the charges were read to the appellant in Kiswahili in a language he understood and his response was that "It is false". He was cross-examined in Kiswahili before he engaged counsel to represent him. Pw1 was even recalled and examined again by his counsel. The allegation that there was inadequate interpretation fails. On wrongful admission of the evidence I find that the appellant has failed to demonstrate the wrongful admission of evidence. The trial court recorded evidence and there is no indication that there was an objection of admission of any evidence by the appellant or his advocate.

On the age assessment Pw1 was a minor of 15 years. The proceedings show that when she testified she gave sworn evidence. There is no record to show that the court examined her on her age. Her age was assessed at 15 years old there was the medical evidence and the documents which showed she was 15 years. The appellant's age was not an issue in the matter. It was the complainant age that needed to be proved. Being a child of 15 years the complainant did not have the capacity to give consent. There was nothing to show that the complainant deceived the appellant that she was an adult. The appellant did not raise this in his defence.

On representation by counsel. I have gone through the record. The trial court accorded the accused sufficient time to get his lawyer. Even after he appeared on a subsequent date during the hearing the complainant was recalled and was cross examined. The appellant was ably represented by Ms Sagwe Advocate. At the time of his defence the appellant opted to proceed on his own after informing the court that he had called his advocate and his advocate was not coming. He informed the trial court that he was ready to proceed with the defence hearing. The trial court informed him of the provisions of section 211 and he gave his defence which the trial court considered in its judgment.

On calling of the chief I agree with the submission by the state that there is no number of witnesses required to prove a fact. The prosecution called witnesses who lead evidence to prove their case. Section 143 of the Evidence Act Cap 80 provides that, **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required to any fact"**.

Analysis of the defence. The trial magistrate considered the prosecution and defence case. She observed the witnesses she concluded that, "Having analysed the entire evidence I find it insufficient to displace the solid evidence given by the complainant and by Pw5". The defence was considered and it did not outweigh the prosecution case.

Evidence supporting the charge. The complainant informed the court that she was 15 years old. There was sufficient medical evidence to support this evidence. Her evidence was that they had sex with the appellant who was known to her. The medical evidence upon examination was that; "Urinalysis showed pus cells and presence of proteins. The nature of the offence was defilement. The hymen was absent, though not due to fresh penetration and there was evidence of sexual intercourse". This evidence coupled with the complainant evidence supported the charge of defilement.

On the offence of Trafficking. It was established that the complainant was 15 years old. Thought the complainant went to meet the appellant he allowed her to stay in their home and subsequently the aunt's home. The appellant did not seek the permission of the complainant's mother neither the sister she was staying with. Whilst with the complainant he had sexual intercourse with the minor. They had sex 3 times. From the evidence the appellant conduct of keeping the complainant at their place and having sex with her indicates that his actions were wilful and intentional.

On sentence the conviction was under section 8 (3) and not 8 (2) this was a proper sentence as provided in law as provided under sections 8(3) and 14 (a) of the sexual offences Act. They are to run concurrently. I therefore find no merit in the appeal. It is dismissed. The conviction on both counts are upheld.

Dated signed and delivered this **18th** day of **October 2018**.

R.E.OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Otieno

For the State

Nyantika h/b Mr. Sagwe

For the Appellant

Rael Court/ clerk