



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 189 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. A. ALEGO – (PM) delivered on 28th November 2012 in Eldoret CM CR. Case No.3134 of 2011)

JOSHUA TENYA AMIANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joshua Tenya Amiani was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that between 5th and 7th September 2011 at [particulars withheld], Sango Sub-Location, Likuyani in Kakamega County, the Appellant unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of JM (the complainant), a girl aged fourteen (14) years. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that between the same dates and in the same place, the Appellant unlawfully and intentionally allowed his genital organ (penis) to come into contact with the genital organ (vagina) of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main charge and sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his constitutional rights to fair trial were infringed in that he was not provided with the prosecution witnesses' statements prior to the trial. He pointed out that one of the witnesses, PW4 testified even though she had not recorded her statement with the police. The Appellant faulted the trial magistrate for convicting him on the basis of evidence that was gathered after shoddy and inconclusive investigations. He took issue with the fact that the complainant's testimony was admitted into evidence despite the fact that it was incredible and unreliable. The Appellant was aggrieved that he was convicted despite the fact that crucial witnesses were not called to testify in the case. He was of the view that the medical evidence did not exhaustively establish that he had committed the offence. The Appellant, in the circumstances, urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. The Appellant submitted that the evidence adduced by the prosecution witnesses clearly proved that the complainant was older than the age that she claimed she was in her evidence. The Appellant submitted that it was clear from the evidence that she was the one who went to his house and voluntarily stayed in his house for the period in question. The Appellant insisted that the prosecution's claim that he was the one who had enticed the complainant had no basis at all because the sexual act between the Appellant and the complainant was consensual. The Appellant told the court to re-evaluate the evidence and find that the trial court erred in failing to consider the totality of the evidence adduced and reach the finding that he was not guilty as charged. He urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution established, to the required standard of proof, that the complainant was fourteen (14) years old at the time of the incident and was indeed penetrated by the Appellant. Medical evidence established penetration. The identity of the Appellant was not in doubt because the complainant told the court that the Appellant was her boyfriend. She urged the court to find that the Appellant, being an adult at the time, had no legal right to have sexual intercourse with the complainant who was a minor at the time. She urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence so as to reach its own independent determination whether or not to uphold the conviction of the Appellant by the trial court. In its determination, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make comments regarding the demeanour of the witnesses. (See **Okeno –vs- Republic [1972] E.A. 32**). In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate in light of the submission made on this appeal. The prosecution was required to establish three ingredients of penetration, age of the victim and the identity of the perpetrator in order to prove the charge of defilement that was brought against the Appellant. The facts of this appeal are disturbing because of the tragic consequence that was visited upon the Appellant. There was no doubt that the complainant and the Appellant were boyfriend and girlfriend. They had a relationship. On the material day of 5th September 2011, the complainant went to the Appellant's home at 7.00 p.m. She stayed in that home for three days during which time she had "**consensual**" sexual intercourse with the Appellant. She did not inform her parents where she had gone to. When she failed to return home on the material evening of 5th September 2011, her father PW2 II and her brother SS went to search for her. They could not trace her in her friends' homes. They reported the incident to the village elder.

On 8th September 2011, while PW3 was walking past the house of the Appellant, he saw the complainant. He went and reported the matter to PW2 and the village elder. They went to the Appellant's house. The village elder, JM testified as PW4. They found the complainant seated on the Appellant's bed. On being questioned, the complainant told the party that the Appellant was her boyfriend. The Appellant and the complainant were then escorted to Kogo Police Patrol Base. The Appellant was detained while the complainant was taken to Likuyani District Hospital where she was examined by PW6 David Kibet, a Clinical Officer based at the hospital. On physical examination, he did not notice any tears, blood stains or any soiled clothes. On examination of her vagina, he noted that although the hymen was absent, both labias were normal, the cervix was intact. There were no tears nor were there any lacerations. There was no discharge. He produced the P3 form as a prosecution exhibit in the case. Of particular significance to this case, is what the Clinical Officer noted in the P3 form:

"Brought to our facility on 8/9/11 under the escort of the father and police officers with H/O [history of] having been defiled by one person well known to her while at Sango area, Lugari District on 7/9/11."

When the Appellant was put on his own defence, he denied knowing the complainant. He did not make any comments regarding the evidence that was adduced against him by the prosecution witnesses.

From the above evidence, it was evident that the prosecution established that there was penetration and that the Appellant was the one who had sexual intercourse with the complainant. As regard the age of the complainant, the prosecution produced an immunization card which showed that the complainant was born on 18th February 1997. A letter written to the court by the Headteacher of Sango Primary School where the complainant was schooling indicated that the complainant was a pupil in the school. At the material time she was a Standard Four (4) pupil. This was in the Year 2006. The prosecution therefore established that the complainant was fourteen (14) years and seven (7) months at the time of the incident. The Appellant was twenty one (21) years old at the time.

This court earlier stated that the facts of this case were rather disturbing. This is because there is no evidence to suggest that the Appellant enticed or lured the complainant to go to his house. There is further no evidence to suggest that the Appellant coerced or forced the complainant to stay with him in his house. In fact, from the testimony of the brother of the complainant (PW3), when they went to fetch the complainant, they found her relaxing in the Appellant's house while sitting on his bed. It was apparent from the manner in which the complainant was treated after being found by the father and the brother, that the prime mover of the Appellant's arrest was the complainant's father. That is not to say that a parent cannot take action to actively pursue justice on behalf of their children. The question that this court asks itself, being conversant that defilement is a case of strict liability where the age of the victim is a material factor, whether in a case such as the present one where the Appellant did not actively participate in luring or enticing the complainant to his house, whether the court should relook the sentence of the Appellant so that the ends of justice can be met.

In the present appeal, it was clear to this court that although the prosecution proved the charge of defilement against the Appellant in the strict sense, the ends of justice will not be served if the court does not take into account the circumstances in which the offence was committed. This court is of the view that the justice of this case will be served if the sentence of the Appellant is reviewed taking into consideration the fact that he has been in lawful custody since 9th September 2011 when he was first arraigned before the trial court.

In the premises therefore, this court will dismiss the Appellant's appeal against conviction. It will consider the Appellant's appeal against sentence after a probation report is prepared. The probation officer shall specifically interview the complainant so that the court may be put into the complainant's perspective of the events of the particular period. This is because the complainant is the actual victim in this case. The report shall be presented to the court within fourteen (14) days after the delivery of the Judgment for its consideration. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE