REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 304 OF 2012

BETWEEN

MOGAN DIOGRAIOUS WAFULA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal against conviction and sentence of the Principal Magistrate, Hon. M.I.G Morang'a dated 1.11.2012 in Kakamega Chief Magistrate's Criminal Case number 1948 of 2011)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was arraigned before the Chief Magistrate's Court at Kakamega for the offence of defilement contrary to ***section 8(1) as read with section 8(3) of the Sexual Offences Act, number 3 of 2006***, the particulars being that on [divers] dates between 30th September 2011, and 2nd October 2011 at [particulars withheld] Village in Kakamega Central District within Western Province unlawfully [caused] his genital organ namely penis into [the] genital organ namely vagina of C.A, a girl aged 15 years.

2. 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, number 3 of 2006***, the particulars thereof being that on [divers dates] between 30th day of September 2011 and 2nd day of October 2011 at [particulars withheld] Village, in Kakamega Central District within Western Province, unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of C.A, a girl aged 15 years.

3. The appellant pleaded not guilty to the charges. The prosecution called six (6) witnesses in support of the case against the appellant. The appellant was the only witness for the defence.

Judgment of the Learned Trial Court

4. After carefully considering the evidence adduced by the prosecution, the defence as well as the law and the submissions, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant on the main count of defilement. The appellant was accordingly found guilty as charged, convicted and sentenced to 15 years imprisonment.

The Appeal

5. Being aggrieved by the entire judgment the appellant filed this appeal on the following grounds:-

> **a. [THAT] the trial court erred in law and facts by failing to weigh whether or not the appellant herein at the time he committed the offence was above the age of 18 years old.**
>
> **b. [THAT] the trial magistrate erred in law and fact as she failed to consider the fact that the age of the alleged PW1 was not proved as in the birth certificate and statement of the doctor and mother (sic)**
>
> **c. [THAT] the trial magistrate erred in law and facts as she failed to note that PW5 did [not] give history that the virginity of**

the alleged PW1 was long overdue to broken [hymen] and there was likelihood that it was not her first time to experience sex.

d. [THAT] the trial magistrate gave harsh sentence in the event.

6. The appellant has asked this court to allow the appeal, quash the conviction and set aside the sentence of 15 years imprisonment.

7. This is a first appeal and in this regard, this court is under a duty to reconsider and evaluate the evidence afresh with the view of reaching its own conclusions in the matter only remembering that it has no opportunity of seeing and hearing the six prosecution witnesses as well as the appellant when they testified during the trial. This was the position stated by Sir Kenneth O'Connor P in ***Peters versus Sunday Post [1958] EA 424***. The learned President of the Court of appeal also stated that whereas an appellate court has the jurisdiction to review the evidence in order to determine whether the findings of the learned trial court should stand, appellate courts should exercise caution in doing so. The learned JA also pointed out that, ***"It is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses."*** I shall bear the above in mind as I reconsider and evaluate the evidence afresh.

The Prosecution Case

8. C.A, the complainant in this case testified as PW1. After being taken through a *voire dire* examination and found suitable to testify under oath, she was duly sworn and told the court that she was 15 years old and a standard seven pupil at S. Primary School. She also testified that she knew the appellant well. She testified that on 30th September 2011, which was a Friday, she was walking home from school in the company of the appellant who was her boyfriend. When she saw her grandmother, E.K who testified as PW2, she ran away from the appellant and also ran ahead of her grandmother, got into the house, took off her uniform, changed into ordinary clothes and went back to where the appellant was. She thereafter accompanied the appellant to his house where they stayed together for 3 days. During the first night, the two engaged in sex. PW1 stated that she agreed to the sexual intercourse with the appellant because they had been friends for about one month.

9. When PW1 went missing E.K reported the matter to the area sub-chief and also informed PW1's uncle, one W K PW3, who in turn mounted a search for PW1 from among the relatives and neighbours. The area sub-chief Alex Mutende Oremo PW4, also joined PW1's family in searching for her. Later, it was established that PW1 was hiding at the appellant's house. The appellant was a teacher, at S. Primary School. PW4, together with W K in the company of number 78896 Cpl David Bor went to the appellant's house (the house actually belonged to teacher Patrick who was visually impaired and who had taken on the appellant to look after his (teacher Patrick's) children. Both PW1 and the appellant were arrested and taken to Kakamega Police Station. According to PW4, both the appellant and PW1 admitted that they were friends.

10. Dr. James Akhonya of Kakamega Provincial General Hospital, PW5 examined PW1 when she was taken to the hospital for treatment. On examination Dr. Akhonya established the following: PW1's hymen was absent due to what Dr. Akhonya explained as "**she was essentially a woman in regards to her genitalia but her hymen was absent. She was not a virgin. There was no discharge of any kind.**" Dr. Akhonga produced both the P3 form and post care rape form as exhibits P1 (a) and (b) respectively.

The Defence Case

11. In his sworn statement, the appellant gave his name as KIDUDU IVAN. He gave a long and winding statement in which he denied committing the offence. He also told the court during cross examination that at the time when he was arrested he was in the process of obtaining a national identity card which would have shown his correct names as Kidudu Ivan. The appellant did not call any witnesses, though he was given an opportunity to do so.

Issues for Determination

12. In a case of this nature, the prosecution is under a duty to prove:-

a. the age of the complainant

b. whether there was penetration

c. whether the appellant is the one who was responsible for same

13. It is to be noted that all the above ingredients must be proved and not just one of them. As this court considers the above issues in the succeeding paragraphs, it is worth remembering, and as was held in ***Hamisi versus Republic [1991] KLR 93***, it is immaterial that the victim consents to the sexual act, because "***by virtue of her age, she is legally considered incapable of consenting to sexual intercourse."***

14. The second point to note is that there is always a need for corroboration in cases involving sexual offences. However, as was held in ***Mugoya versus Uganda [1999] IEA 202,*** and pursuant to the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, ***"a court could convict on the uncorroborated evidence of a complainant if it warned itself of the dangers of doing so and was satisfied that the complainant was truthful.***" Also see ***Kibale – versus Uganda [1998] LLR 123 (SCU)*** and ***Chila & another versus Republic [1967] EA 722.***

15. As is the position in all criminal cases requiring corroboration, the nature of the corroboration spoken of is usually evidence which confirms in some material particular not only that the crime in question was committed but also that the person who committed it was or is the accused. See ***Chila & another case*** (above).

Analysis and Determination

16. From the evidence on record, there is no doubt in my mind that sexual intercourse took place between the appellant and PW1. This happened over a period of three nights although PW1 stated they engaged in sex only during the first night. There is also no doubt in my mind that penetration occurred as was confirmed by Dr. Alex Akhonya who testified as PW5. Dr. Akhonya stated that PW1 was not a virgin and that her hymen was absent. The doctor did not notice any discharge though it is noted that he examined PW1 on 3rd November, 2011 when the offence took place between 30th September and 2nd October 2011.

17. The only sticky issue in this case is whether the prosecution proved the age of the complainant. It is important to prove the age of the complainant because sentences under the Sexual Offences Act are commensurate with the age of the victim. Dr. Akhonya stated that the complainant was estimated to be 15 years old, though he did not carry out an age assessment. The complainant herself, who after being taken through the *voire dire* examination told the court that she was 15 years. She had confirmed to the court that she was going to tell the truth once she was sworn. Neither PW2 nor PW3 said anything about the complainant's age, but in her judgment, the learned trial magistrate referred to Pexh 2 the birth certificate which shows that the complainant was born on 6th May 1995. The age of the complainant was thus proved through documentary evidence.

Conclusion

18. From the evidence on record, both for the prosecution and defence, and upon careful consideration of the submissions and the law, I find and hold that the appellant's appeal is devoid of merit and the same is accordingly dismissed. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment. As I conclude this judgment, I give my unreserved apology for delay in judgment delivery. The same was caused by my sudden transfer to another court station.

It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 12th day of October, 2018

WILLIAM MUSYOKA

JUDGE

In the Presence of

N/A for Appellant

Mr. Ngetich for Respondent

Eric/Polycarp - Court Assistant