



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 25 OF 2016

(An Appeal arising out of the conviction and sentence of HON. G. ADHIAMBO – (SRM))

delivered on 5th February 2016 in Kapsabet SPM CR. Case No.1010 of 2016)

ROBERT KIBET CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Robert Kibet Chirchir 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 on 5th April 2014 at Tinderet in Nandi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JC (the complainant), a child aged fifteen (15) years. The Appellant was alternatively 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 on the same day, and in the same place, the Appellant intentionally and unlawfully caused his penis to touch the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the main count. He was sentenced to twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for basing her finding on the fact that the complainant was at the time aged fifteen (15) years and not over the age of eighteen (18) years as asserted by the Appellant. It was the Appellant's appeal that he had consensual sexual intercourse with the complainant. The Appellant took issue with the fact that when the Appellant changed his plea, he was not required to take a fresh plea as required by the law. He was of the view that the subsequent proceedings were therefore vitiated. The Appellant complained that the trial court did not take into account the age of the complainant before sentencing him to serve the custodial sentence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. In summary, it was the Appellant's case that he had consensual sex with the complainant. He asserted that he lived with the complainant for one (1) year in the capacity of husband and wife. He attributed the charge to a disagreement he had with the parents of the complainant when he failed to pay dowry. It was his case that the parents wanted to be paid dowry in form of land instead of cattle. He told the court that he was arrested when he was staying with the complainant. He denied the charge that he had defiled the complainant. He was of the view that the complainant had been influenced by her parents to give false testimony against him. He asked the court to take into consideration that in the period that he lived with the complainant, they had a child together. He pleaded with the court to consider the entire circumstances of the case and reach the verdict that the prosecution failed to prove the charge against him. He urged the appeal to be allowed.

Ms. Oduor for the State opposed the appeal. She denied the Appellant's assertion that the complainant ever lived with him. She submitted that this was a simple case of defilement. The Appellant lured the complainant, then a standard 8 pupil, into his house under the pretext that he was going to teach her maths, then sexually assaulted her. The ingredients to establish the charge of **defilement** were proved. The complainant did not consent to the sexual intercourse. She did not have capacity to consent since she was aged fifteen (15) years at the time. She urged the court to disallow the Appellant's plea to the effect that the complainant was an adult at the time of the sexual assault. She asserted that this was a case where the Appellant took advantage of the complainant and defiled her. She urged the court to ignore the issues that the Appellant raised on this appeal because the said issues were not raised by the Appellant in his defence before the trial court. The appeal should therefore be disallowed.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on 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 that was adduced before the trial court. It has also considered the submission, both written and oral made before this court on this appeal. For the prosecution to establish the charge of **defilement**, it must prove three elements of the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim. In the present appeal, it was the prosecution's case, that the Appellant lured the complainant into his house before forcefully having sexual intercourse with her. The complainant in her testimony testified that on the material day, she was at her home studying when the Appellant, a neighbour, approached her and told her that he could assist her with her studies. Because the complainant was having difficulty studying mathematics, she gladly took up the offer. She told the court that when she went to the Appellant's house, his wife was not at home. The Appellant locked the door and then forcefully removed her panties before forcefully having sexual intercourse with her.

The complainant was called to testify on two occasions. And in both occasions, she gave a detailed account of how the Appellant forced her onto a sofa, blocked her mouth so that she could not scream for help, removed her panties, before unzipping his trousers and having sexual intercourse with her. After the incident, the Appellant threatened her with death if she told anyone. Due to this fear, the complainant did not disclose the incident to her parents. Seven months later, her school teacher noticed that she was pregnant. He called her father PW2 AL and told him about her daughter's condition. Because the complainant was about to do her KCPE examinations, the teacher advised PW2 not to raise the issue with the complainant so as not to interfere with her confidence as she prepared to do the examinations.

After the examinations, the complainant disclosed to the parents that she had been sexually assaulted by the Appellant. A report was made to PW3 PC Gabriel Nyongesa then based at Mberere Police Post. The complainant was taken to Nandi Hills County Hospital where she was examined by PW5 Amos Kipruto Korir, a Clinical Officer and a P3 form issued. At the time of examination, the complainant had already delivered a baby. She delivered a baby girl named B on 5th January 2015.

After the birth of the child, a DNA examination was done to determine the paternity of the child. The DNA report was produced as prosecution's exhibit in the case. The report confirmed that the Appellant was the father of the child born of the complainant. The Appellant does not deny that he had sexual intercourse with the complainant. However, it was his case that the sexual intercourse was consensual. Having re-evaluated the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof that indeed the Appellant penetrated the complainant. The result of the penetration was the birth of the child, baby B whose paternity was established. The Appellant is the father. The complainant's oral evidence coupled with the DNA evidence established to the required standard of proof beyond any reasonable doubt that there was penetration. As regard the Appellant's defence alleging that the sexual intercourse was consensual, this court was convinced by the complainant's testimony which was to the effect that she was lured by the Appellant into his house before she was sexually assaulted. She did not consent to the sexual intercourse. In any event, she had no legal capacity to consent to the sexual intercourse because she was a minor at the time.

The prosecution also established the age of the complainant to the required standard of proof. Her birth certificate was produced as an exhibit in the case. The birth certificate indicated that she was born on 25th June 1999. In April 2014, she was aged fifteen (15) years. The Appellant's assertion that the complainant was an adult, or appeared as an adult at the time, does not wash. It was clear from the evidence adduced by the complainant that she did not have a relationship with the Appellant at the time. Indeed, if the complainant had not conceived at the time, most probably she would not have disclosed the sexual assault due to the threats that she received from the Appellant.

As regards the identity of the perpetrator, the prosecution was able to establish that it was the Appellant who sexually assaulted the complainant. The Appellant does not deny that he had sexual intercourse with the complainant. However, it was his defence that he had a consensual intercourse with the complainant. The Appellant told the court that he had lived with the complainant as husband and wife for a period before he disagreed with the parents over the payment of dowry. He further said that he had a land dispute with the complainant's parents. On analysis of the Appellant's defence as compared with the testimony of the complainant and her father, it was clear to the court that at no time did the complainant reside with the Appellant as claimed in his defence. The complainant lived with her parents from the time she was sexually assaulted to the time she delivered the baby. In fact, at the time she testified before court, she had resumed her education and was in secondary school. She was still living with her parents. This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the offence. The Appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, the Appellant was sentenced to serve a custodial sentence of twenty (20) years imprisonment. This was in accordance with **Section 8(3)** of the **Sexual Offences Act**. The sentence was legal. This court cannot interfere with it. The Appellant's appeal against sentence is hereby dismissed. The upshot of the above reasons is that the conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE