



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 62 OF 2017

BETWEEN

DANCAN BARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 2671 OF 2014

in the Chief Magistrate's Court at Bungoma by Hon. E.N.Mwenda (SRM) on 24.5.17)

JUDGMENT

The Trial

1. The Appellant herein **DANCAN BARASA** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as *the Act*). The particulars of the main count are that:-

On 31.10.14 at [particulars withheld] village, Chwele location in Bungoma Central within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of JM a girl aged 15 years

Prosecution case

2. The prosecution called seven (7) witnesses in support of its case. PW1, the complainant stated that she was born on 14.1.99 and was in form three. She stated that on 31.10.14 at 11.00 pm, she went out for a short call and when she got back into the house, someone followed her, took her to her parents' bedroom, defiled her and they slept until about 4.00 am when they were awoken by her parents who had returned home from safari. It was her evidence that she did not know the appellant before the material date. PW2 M M and PW6 J M, complainant's parents recalled that they returned home on 1.11.14 at 4.00 am to find the appellant in their house. It was also their evidence that they did not know the appellant before the material date. PW6 produced complainant's certificate of birth as **PEXH. 3** which shows she was born on 14.1.99. PW3 Ngetich, a clinical officer examined complainant on 1.11.14 and found she her hymen was broken. He produced complainant's P3 form as **PEXH. 2**. PW4 CPL Elizabeth Mukhebi and PW5 APC Kelson Migare the appellant from complainant's parents' home on 1.11.14. PW7 Maurice Ogola, the investigating officer upon receiving complainant's report on 1.1.14, recorded witness statements and charged the appellant. He told court that investigations revealed that complainant and her parents knew the appellant before the material date.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant who stated that he was born in 1998 gave sworn defence in which he stated that the complainant was his girlfriend but denied defiling her or having been arrested from their house. He told court that both complainant and her parents knew him well before his arrest.

4. In a judgment delivered on 24th May, 2017, appellant was convicted and sentenced to serve 15 years imprisonment.

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal on 21st June, 2017. From the 7 grounds of appeal and written submissions filed on 8th November, 2018, the main ground is that witnesses lied to court and the prosecution case was full of contradictions.

6. When the appeal came up for hearing on 9.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel for the state conceded to the appeal on the trial court had observed that complainant and her parents were untruthful witnesses and the appellant ought to have been given the benefit of doubt.

Analysis and determination

8. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld

9. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and on behalf of the state.

11. The certificate of birth produced as **PEXH. 3** which shows she was born on 14.1.99. No doubt she was 15 years when the offence was allegedly committed.

12. On penetration, the complainant’s P3 form **PEXH. 2** produced by PW4 the clinical officer showed that her hymen was broken.

13. Complainant told court that she as defiled by the appellant. Complainant’s evidence that the appellant was in their home on the material day is corroborated by her parents PW2 M M and PW6 J M who told court that they returned home on 1.11.14 at 4.00 am to find the appellant in their house. On the other hand, PW4 CPL Elizabeth Mukhebi and PW5 APC Kelson Migare told court that they arrested the appellant from the house of complainant’s parents where he had been locked up.

16. The issue that troubled the trial magistrate was whether the complainant was defiled or she willingly engaged in sex. The trial court after considering the complainant’s evidence determined that she lied to court that the appellant was a stranger. He also concluded that the complainant well knowing that her parents were away had willingly welcomed the appellant who was her boyfriend home, had sexual intercourse with her and not knowing when her parents would return, both fell asleep until about 4.00 am when they were awoken by her parents who had returned home.

17. Further to the foregoing, the trial court made a finding that in an attempt to secure a conviction, the complainant and her parents lied to court that appellant was unknown to them. The court held that there was a conspiracy between the complainant and her parents to have a certain version of events come out before the court.

18. Having come to the conclusion that the complainant and her parents were unreliable witnesses, the court should have been courageous enough to give the appellant the benefit of doubt especially considering that the appellant’s evidence that he was 16 years was not controverted.

19. From the foregoing, I agree with the state that the circumstances in this case do not favor a conviction and sentence that is safe.

Decision

20. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

DELIVERED AND SIGNED AT BUNGOMA THIS 9TH DAY OF NOVEMBER 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Ribba & Diannah

Appellant -Present in person

For the State - Mr. Oimbo