



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 113 OF 2015

BETWEEN

JEREMIAH WAFULA WAMALWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 888 of 2014 in the Senior Principal Magistrate's Court at Webuye by Hon. S.N.Abuya (PM) on 10.6.15)

JUDGMENT

The Trial

1. The Appellant herein **JEREMIAH WAFULA WAMALWA** 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 diverse dates between 5.9.14 and 10.9.14 in Bungoma East District within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of SKW a girl aged 16 years

Prosecution case

2. The prosecution called two (2) witnesses in support of its case. PW1, the complainant stated that she was born on 10.3.98 as shown on her certificate of birth **PEXH. 1**. She recalled that on 5.9.14 at about 2.00 pm, she left her grandmother's home to visit an uncle at M. It was her evidence that on the way, she met the appellant and two others and the appellant bought her lunch at a hotel after which he took her home and she agreed to marry him. She said that after 3 days, her mother I gave her 100/- to go home but she remained in appellant's house. It was also her evidence that the appellant gave her money to go home but she went to her uncle's house for a day and returned to the appellant's house. She further told court that she talked to her father using her mum's, (I's) phone and she informed him that she was married. It was her evidence that she lived with the appellant for 3 days within which time they engaged in sexual intercourse and that she only left the appellant's house after police arrested her and the appellant. PW2 Letisia Mballo, a clinical officer examined complainant on 10.9.14 and found she had no hymen and had vaginal warts and a foul smelling vaginal discharge. She produced complainant's treatment book, P3 form as **PEXH. 2**.

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 gave an unsworn defence. The appellant did not deny that he engaged in sexual intercourse with the complainant but stated that he did not know that she was a student.

4. *In a judgment delivered on 10th June, 2015, appellant was convicted and sentenced to serve 15 years imprisonment.*

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal on 1st July, 2015. From the 6 grounds of appeal and written submissions filed on 6th November, 2018, I have deduced three grounds of appeal as follows:-

1. *That the prosecution case was not proved beyond reasonable doubt*

2. That failure to call vital witnesses should be interpreted to mean that their evidence was prejudicial to the prosecution case

6. When the appeal came up for hearing on 6.11.18, 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 opposed the appeal and submitted that complainant's certificate of birth shows that she was minor born on 10.3.98. He also submitted that evidence that complainant was defiled was corroborated by evidence contained in the P3 form **PEXH. 2** produced by PW2. Counsel finally submitted that the prosecution had called all necessary witnesses to testify.

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.

11. In dealing with this appeal, I will separately address the 4 grounds summarized above.

1. Was the prosecution case proved beyond reasonable doubt?

12. In order to consider this issue it is important to note that key ingredients necessary to establish a sexual offence under the Sexual Offences Act are as follows:

- i. Age of the victim.
- ii. Penetration.
- iii. Identity of the offender

16. To begin with the question of complainant's age, the complainant testified that she was born on 10.3.98 as shown on her certificate of birth **PEXH. 1**. No doubt she was 16 years when the offence was allegedly committed.

17. With reference to the question of penetration, evidence contained in the P3 form produced by PW2 Letisia Mbalo as **PEXH. 2** shows that complainant had no hymen and had vaginal warts and a foul smelling vaginal discharge.

18. As stated hereinabove, the appellant did not deny that he engaged in sexual intercourse with the complainant but stated that he did not know that she was a student.

19. The issue in question is whether the appellant's defence falls within the meaning of a defence under the provisions of the Sexual Offences Act.

20. Section 11 of the SOA provides:-

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

21. Complainant told court that she met the complainant for the first time on that on 5.9.14 and that when he bought her lunch at a hotel after and took her to his home, she agreed to marry him. She conceded that she was given 100/- as bus fare to go home both by her mother Imelda and also by the appellant but she stayed on at the appellant's house. She even told court that she went to her uncle's home, spent a night and returned to the appellant's house. Further to the foregoing, she told court that she talked to her father using her mum's, (I's) phone and she informed him that she was married.

22. The complainant's mother and father who evidence discloses knew that the complainant was staying with the appellant were not called as witnesses. They also do not appear to have made any report to the police concerning the appellant cohabiting with their daughter who the certificate of birth shows was underage. I therefore agree with the appellant that the complainant's parents were not called to testify because their evidence might have been prejudicial to the prosecution case.

23. There is evidence that after the complainant informed her father that she had married the appellant, the appellant talked to the complainant's father and asked him to send complainant fare to return home which he never sent nor informed the appellant that complainant was a child. I find that the appellant presented complainant's father with an opportunity to make certain the age of the complainant but he did not inform him that complainant was a child. The conduct of the appellant was in my considered view not one with a guilty mind.

24. From the foregoing, I find that had the trial court carefully considered the conduct of the complainant and her parents *vis a vis* the appellant's defence, it might have arrived at the conclusion that the appellant was deceived and reasonably believed that complainant was over the age of eighteen years.

Decision

25. 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 -

For the State - Mr Oimbo