REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 46 OF 2017

VICTOR MIKE RATEMO.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

[Being an Appeal against the Sentence and Conviction of Hon. J. Kahara – Resident Magistrate dated and delivered on the 15th day of August 2017 vide Keroka Principal Magistrate's Court Criminal Case No. 588 of 2015]

JUDGEMENT

The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars of the charge are that on diverse dates of 26th to 28th May 2015 at Keroka Township in Masaba North District within Nyamira County he intentionally caused his penis to penetrate the vagina of S M M a child aged 16 years.

The appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars being that on the same diverse dates and place he intentionally touched the vagina of S M M a child aged 16 years with his penis.

The appellant pleaded not guilty to the charge. The prosecution called four witnesses. The complainant (Pw1) told the court that the appellant was her boyfriend. She testified that on 26th May 2015 she went to the appellant's house at Keroka to get her phone back. She stated that she was then a student at [Particulars withheld] Salon in Keroka. When she went to the appellant's house he asked her to live with him. She agreed and stayed there until 29th May 2015 when they went to her home. She stated that they had sexual intercourse on the day she went there, the next day and the day after. Although she expressed the will to leave he convinced her to stay and she did and they had sex but the appellant used a condom. She stated (which was confirmed by Pw4) that on 30th May 2015 she was taken to Keroka District Hospital. Pw4, Joel Ongaro, a registered clinical officer then working at Keroka District Hospital testified that when he examined the complainant and the appellant he found that both had pus cells which is evidence of a urinary tract infection (UTI). He was however forthright enough to admit that although the complainant's hymen was broken, he did not know when it was broken and that it was in relation to this case. The prosecution produced a birth certificate to prove that the complainant was sixteen years old at the time.

In his testimony, the appellant stated that he was a boda boda rider aged 19 years and that on 28th May 2015 he took a client to [Particulars withheld] Salon in Keroka town. He stated that he did not know the name of the client as it was the first time he had seen her. He then stated that she was called S M M and that they had disputed. He stated she was his girlfriend and she did not tell him she was a student. He admitted that he went and lived with her and only got to know she was a student later. He reiterated that she had not told him she was a student.

After evaluating the evidence by both sides, the trial magistrate found the appellant guilty of defilement, convicted him and sentenced him and after hearing and considering his plea in mitigation, sentenced him to fifteen years' imprisonment. Being dissatisfied with the conviction and sentence he preferred this appeal. The grounds of appeal are that: -

> **"1. The trial magistrate erred in law and facts by passing judgement and sentence against the weight of the evidence on the face of the records therein.**
>
> **2. The trial magistrate erred in law and facts by passing out judgement in total disregard of the Appellant's case.**
>
> **3. The trial magistrate erred in law and facts by passing judgement without giving reasons for the same."**

By this appeal the appellant urges this court to quash the conviction and sentence and set him free or pass such other orders as the ends of justice may call for.

The appeal was canvassed orally. Mr. Moracha, Advocate for the appellant testified that there was a variance between the charge sheet and the evidence in regard to the date the offence occurred. He stated that whereas in the charge sheet it was stated that the offence occurred between 26th to 28th May in the proceedings it is alleged it occurred on 26th May 2015 and 27th June. Counsel submitted that 27th June is not in the charge sheet. He pointed out that the complainant said she kept quiet until 30th May yet her P3 Form is dated 25th May 2015. Counsel stated that although the complainant alleged to have stayed with the appellant for 3 days 26th May to 29th May is 4 days. Counsel contended that the appellant was never examined. Counsel contended that the evidence of the Doctor was that he examined the complainant after 3 days i.e. on 30th May 2015 and that the offence took place on 30th May and no spermatozoa were seen but the hymen was broken. Counsel submitted that of importance was the doctor's evidence that he could not tell why the hymen was broken and whether it was in relation to this offence. Counsel questioned why UTI was seen if the appellant used a condom. Counsel questioned why the complainant's brother, his wife and a police officer from Bondeni were not called to corroborate the evidence of the complainant. He urged this court to find merit in the appeal, quash the conviction and set aside the sentence.

Mr. Ochieng, Principal Prosecution Counsel submitted that the evidence was consistent throughout. He submitted that there was typographical error where the date 27th June is mentioned stating that throughout the trial it was clear that the offence occurred between 26th to 29th May 2015. Counsel submitted that regarding Counsel's submission that the P3 Form was dated 25th, the only document that could confirm that is the P3 Form yet it was not included in the record of appeal. He contended that the submission was a mere allegation. Counsel further submitted that the absence of sperm can be explained by the fact that the appellant used a condom. Counsel contended that in any event presence of sperm is not a must to prove a sexual offence. He submitted that age and penetration which are the main ingredients for the offence of defilement had been proved. Counsel further submitted that although the appellant tried to invoke the defence provided in Section 8 (5) of the Sexual Offences Act it came out as an afterthought; that the appellant did not explain what measures he took to confirm that the complainant was an adult. Counsel submitted that there was also evidence that the appellant had tried to extort money from the complainant's father and that he therefore knew she was a child and was only using her for his evil intentions. Counsel stated that the witnesses called were sufficient to buttress the case and that it was done at the discretion of the prosecution. Finally, Counsel submitted that the judgement was well reasoned. He urged this court to dismiss this appeal.

In reply, Mr. Moracha submitted that proceedings are proofread and certified before they are issued. He reiterated that the evidence of the complainant and the charge sheet are not consistent. He contended that the charge sheet must be specific to corroborate the evidence on record.

I have considered the submissions by Counsels carefully but as an appeal is in the nature of a retrial, I understand my duty is to reconsider and evaluate the evidence in the court below so as to arrive at my own conclusion while considering and making provision for the fact that I did not see nor hear the witnesses give evidence – see **Okeno V. Republic [1972] EA 32.**

The appellant admitted that the complainant was his girlfriend and that he had lived with her thereby confirming that what she told the court was true. His only **"defence"** was that she did not tell him she was a student and only got to know that she was later. It is my finding that the fact that she was a student but had not told him is not what made it an offence to have carnal knowledge of her or to **"live with her"** as he called it. What makes it an offence is that she was sixteen years old and hence a child. As a child she was incapable of consenting to sex and it mattered little that she was or was not a student. The only defence to a charge of defilement is provided in Section 8 (5) of the Sexual Offences Act which states: -

> ***"(5) It is a defence to a charge under this section if –***
>
> ***(a) It is proved that such child, deceived the accused into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) The accused reasonably believed that the child was over the age of eighteen years."***

However, Sub-section (6) states: -

> ***"The belief referred to in subsection 5 (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."***

There was no allegation in the appellant's defence that the complainant deceived him into believing that she was over the age of eighteen years, and even granted that she did not disclose that she was a student he did not state that he made any efforts to ask her how old she was let alone take any steps to ascertain her age. It would appear that to him it was lawful to have sexual intercourse with a child provided she was not a student. There is evidence that he took advantage of her by taking her phone and requiring her to go for it in his house. I agree with the trial magistrate that his case does not fall within the defence provided in Section 8 (5) of the Sexual Offences Act and that the charge was therefore proved against him beyond reasonable doubt. His Advocate submitted there was variance between the charge and the evidence regarding the dates of the offence. With due respect there was no such variance. The complainant testified that she lived with the complainant between 25th May 2015 and 29tha May 2015 and that they had sexual intercourse on 25th, 26th, 27th and 28th. That is the same period in the charge sheet and hence there was no inconsistency. In the typed proceedings the complainant is recorded as stating: - **"we also had sex on 27th June 2015"**. I however agree with prosecution Counsel that that was a typographical error. This is because the handwritten proceedings have her stating – **"we also had had sex on 27th May 2015".** I believe that the reason an appellate court is required to call for the lower court record is to cure these kinds of mischief and that the court is entitled to peruse the original record should such an issue, as the one raised, arise.

It is my finding that where the typed proceedings differ with the handwritten record then the latter must prevail. The handwritten proceedings are clear and have no alteration and record the complainant making reference to a date in May and not June and it is my finding therefore that there was no variance.

The clinical officer testified that in addition to examining the complainant, he also examined the appellant. His Counsel's submission that he was not examined is not therefore correct. Moreover, there was no necessity for him to be examined. In **Geoffrey Kioji Vs. Republic Criminal Appeal No. 270 of 2010 (Nyeri)** where a similar argument was raised the Court of Appeal stated: -

> ***"where available medical evidence arising from examination of the accused linking him to the defilement would be welcome. We however, hasten to add that such medical; evidence is not mandatory or even the only evidence upon which as accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, cap 50 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

Section 124 of the Evidence Act provides that the court may convict on the evidence of the victim of a sexual offence if she is the only witness and it believes her. In **Mohamed Vs. Republic [2006] 2 KLR 138** the court of appeal asserted: "***It is now settled that the courts shall no longer be hamstrung by the requirements of corroboration where the victim of a sexual offence is a child of tender years if is satisfied that the child is truthful."***

It is therefore immaterial that the witnesses adverted to by the accused's Advocate were not called as witnesses. The complainant struck me as a very forthright witness. She needed no prodding to reveal that the appellant was her boyfriend and that she had lived with him on the mentioned dates and had sexual intercourse with him. The evidence of the other witnesses called by the prosecution became irrelevant when the appellant admitted that he had lived with her. His defence confirmed to me that she was a credible and reliable witness and that her testimony was trustworthy. A birth certificate was produced to prove she was indeed sixteen years old. I find no merit in this appeal and as the sentence imposed is the minimum provided under the law the same is lawful.

Accordingly, the appeal is dismissed and the conviction and sentence are upheld.

It is so ordered.

Signed, dated and delivered at Nyamira this 22nd day of November 2018.

E. N. MAINA

JUDGE