



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 23 OF 2016

GILBERT KIPKIRUI CHEMWOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Cr Case No. 49 OF 2015 PM's Court Sotik – Hon. Omwansa –PM)

JUDGMENT

The appellant herein was convicted and sentenced to 20 years imprisonment for the offence of defilement C/S 8 (1) as read with S. 8(3) of the sexual offences Act 3 of 2006.

The particulars are that on the 5th day of October 2015 at [particulars withheld] village in Buret Kericho County, intentionally and unlawfully caused his penis to penetrate the vagina of PC, a child aged 15 years.

Being aggrieved of both the conviction and sentence, the appellant lodged this appeal.

This is the first appellate court. It has a duty to re-consider and evaluate the evidence on record a fresh so as to arrive at its own conclusions. - **Okeno –V-R1972 EALR**

The prosecution in this case called 4 witnesses with the defence calling one.

BRIEF FACTS

The complainant testified as (PW1) and did inform the court that on the 2nd day of October 2015 at about 7.000 p.m, she was on the way to the shop when she met Gilbert kipkorir who proposed to marry her. She had agreed to the proposal. She went and bought the cooking oil, she had been sent and took it home. Thereafter she prepared herself and proceeded to the house of Gilbert which is about 300 metres from her homestead. She went and slept in Gilbert's house. She testified that nothing happened that night. The following day, she went and slept at neighbours house. She returned to Gilbert's house on 5/10/2015, they had sexual intercourse that night. Same with the following day. On 7th October 2015 Gilbert had friends who wanted to sleep in his house. These were Victor and Isaiah and their girlfriends SC and C. She slept with Gilbert in the bedroom while Isaiah and Sharon slept in the sitting room. At about 4.00 a.m, the area chief and the administration police officers went and arrested them. They were taken to Buret Police Station and later to Roret Hospital where she was examined.

The father of the complainant DM (PW2) testified to have gone to work as a watchman at [particulars withheld] Academy leaving his children behind. The following day he did not find the complainant and her sister C at home. He commenced searching for them. He later got information that they were at Gilbert's home. The area chief and police went and recovered them from house of Gilbert. Gilbert was arrested and later charged with this offence.

John Langat is the assistant chief of [particulars withheld] Sub-location. He got information from his colleague assistant chief of [particulars withheld] one Albert Korir who told him that there were girls detained at Gilbert's house. They invaded Gilbert's house at 4.30 a.m and found inside, the accused and three girls, F, B and C. B and C are daughters of PW2 (DM). F said that Victor was her boyfriend. Victor was not in the house at that time. They arrested the accused person Victor and the girls and took them to police station.

PW4 is the clinical officer who examined the complainant. He found that she had normal external genitalia with no bruises or tears on the perineum. No vaginal discharges noted.

Urinalysis was done and numerous pus cells were noticed indicating urinary tract infection. High Vaginal Swab indicated presence of spermatozoa. The doctor's opinion was that there was evidence of penetration.

In his defence the accused testified that he was not aware of anything having taken place on 5/10/2015 for he was working on his farm. On 8/10/2015 the area chief went to his house at about 5.00 a.m woke him up and took him to Litein police station and thereafter he was charged with this offence.

It is unfortunate that investigating officer in this case was not called to testify. The chief who effected the arrest did testify on the role he played in arresting the accused person.

Issues for this court determination

1. Age
2. Penetration
3. Identification and corroboration

Age

The complainant testified to have been 16 years old at the time of testifying and 15 years at the time of the incident. She testified to have been a standard six pupil at [particulars withheld] primary School. She relied a clinic card. I have perused the list of exhibits. It refers to:

1. P3 form for the complainant
2. Treatment sheet
3. P3 form for the accused

There is no reference to a clinic card. The one before the court is a PF 10 Prisoner Health Records which is for the accused. The father of the complainant did testify, however, that his daughter was born on the 6th June 2000.

The incident is said to have taken place on 5/10/2015 which places her age at the time of the incident at 15 years.

Penetration

The complainant evidence is that the accused had offered her the hand of marriage and she agreed. She had stayed with him from the 5th day of October to the date of the arrest which was 8th of October 2015. She testified that they had sexual intercourse on the same period. The Doctor who examined the two found that she had urinary tract infection as a result of unprotected sex. There was evidence of penetration as a vaginal swap on the vagina of the complainant showed the presence of spermatozoa.

Identification and corroboration

The accused was a neighbour of the complainant. The accused had proposed to the complainant in marriage to which she had agreed.

This is a case of early childhood marriage which the law frowns upon. The girl was standard seven pupil at the time and she was aged 15 years old. The accused is shown to have been 22 years old at the time.

There was overwhelming evidence against the accused /appellant. The conviction was safe and the sentence lawful.

The appeal has no merit and it is disallowed.

Judgment delivered dated and signed in open court this 6th day of December 2018 in the presence of learn counsel for the prosecution.

Appellant in person present.

Court assistant Mr. Rotich.

M. MUYA

JUDGE

6/12/2018