



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. 8 OF 2018

PETER ROTICH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Bomet PM's

Cr Case No. 10 of 2017– Hon P. Achieng– PM)

JUDGMENT

The appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement C/S 8(1) (4) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 7th day of February 2017 at Masare Sub location within Bomet County he intentionally and unlawfully caused his penis to penetrate the vagina of F C a child aged 17 years.

In his amended grounds of appeal, the appellant states that:-

1. That the learned trial magistrate erred in law and in fact by failing to analyze the entire evidence in totality and failed to make a finding that the evidence was manufactured to fix him.
2. That evidence against him was contradictory and inconsistent in nature.
3. That the learned trial magistrate did not appreciate the prosecution witnesses were related to each other.
4. That the conviction was against the weight of evidence adduced.
5. That his defence was not considered.

This is the first appellate court. It has a duty to re-evaluate and to reconsider the evidence on record so as to arrive at its own conclusion. – **Okeno –vs- R 1972 EALR Brief Facts**

The complainant testified that she is a student at [particulars withheld] Primary School in class 6 and is aged 17 years. It is her evidence that on the 7th day of February 2017 at about 6.00 p.m she was on her way to buy salt at a kiosk belonging to one T. On the way she met Peter who held her by the hand and greeted her. She did not know him before but she came to know later that he was a village elder.

He pulled her into a bush where he tore her clothes including her biker and pants and defiled her. He had taken off his trouser and boxer pants. They had sexual intercourse for close to three hours. He threatened to kill her if she screamed for help. When she screamed for help he bit her finger and the shoulder. She ran home and reported the matter to her mother who in turn reported to W the village elder. On their way to report to W, they met a child whom they asked the name of the accused. She said that she had met P on the way. He was running and he appeared very drunk. The complainant said that the person who defiled her was drunk as he was smelling of liquor.

From W's home they returned and the following day they went to Bomet Health Centre and reported the matter at Bomet Police Station. She was taken to Longisa county Referral Hospital for examination and filing of P3 form. After laboratory tests were done she was found to be HIV positive.

She later attended an identification parade where she identified the accused. She further told the court that no identification parade was conducted by police. That she identified the accused at Sachora chiefs office.

The witnesses told the court that she had no birth certificate or birth notification to prove her age but she was assessed at Longisa Hospital.

The mother of the complainant PW2 testified to the effect that her daughter was aged 14 years and was born in the year 2003 and that on the 7th day of 2017 at 6.00 p.m. she had send her to the nearby kiosk to buy salt. She waited for her and when she did not return she went to check for her. She did not find her and she returned home. Later she heard screams. In the company of her father they went to check. The complainant told them that she was beaten by Peter Rotich. They reported the matter at Bomet Police Station the following day and were referred to Longisa Hospital for examination and treatment.

The accused was arrested on 31st February 2017 by APC Dennis Nyakundi (PW3) and another after he was identified to them by G K, (the mother of the complainant). The accused was found in his house.

The clinical officer (PW4) examined the complainant on 9th February 2017 and upon examination found that she had lacerations on her genitalia, bruises on her left little finger. There were bruises on the labia minora. The hymen was broken but not recently. High Vaginal Swab showed presence of epithelia cells. Syphilis test was positive.

The investigating officer produced an age assessment report which showed the age of the complainant as below 18 years.

In his defence, the accused testified to have been at home on the 22nd day of February 2017 when at about 5.30 a.m. he was woken up by police officers who informed him that he was wanted in connection with the defilement of the complainant. He was taken to Sachora Camp and later Bomet police Station where he was charged with this offence. The complainant did not seem to know who defiled her and mentioned one W as the one who had told her. W was called but he was not able to respond. Later he was charged with this offence.

The accused is charged with defilement. The main ingredients of the offence are :-

1. Penetration
2. Age assessment
3. Identification
4. Corroboration

Penetration

The complainant testified to have had sexual intercourse with the accused/appellant for close to 3 hours. He had removed and tore her clothes and bit her little left finger and shoulder when she attempted to scream.

The Doctor who examined her found that she had lacerations on the left should and left little finger (human bites) on her genitalia, he found that she had bruises on labia minora. The hymen was broken (though not recently). High Vaginal Swab showed presence of epithelia cells. Urinalysis showed presence of pus cells. Syphilis test was positive. The presence of epithelial cells confirmed that there was friction.

Age

In her evidence in chief the complainant informed the court that at the time of the defilement she was aged 17 years old. Under cross-examination she told the court that at the time of the offence she had left school but returned recently. She further told the court that she was born in the year 2000.

The complainant's mother G K testified that her daughter was born in the year 2003 and that she was aged 14 years at the time. She was not able to produce her birth certificate arguing that same was eaten by rats.

The investigating officer produced an age assessment report which showed that the age of the complainant was below 18 years.

Upon a clear analysis of the evidence on age assessment, it is evident that there is material contradiction between the age given by the complainant herself of 17 years and that of her mother which is 14 years. This situation has not been resolved by the doctor who did the age assessment who merely stated that the complainant was below the age of eighteen years. Below eighteen years can mean anything. Even one year old is below eighteen.

I am not satisfied that there was proper proof of the age of the complainant more so when there is evidence that at the time of the alleged defilement she was already a mother of 1 ½ year old child.

Identification

The complainant testified that she did not know the accused before. That she was later informed by one Willy that the accused was called

Peter and that he was an elder in the area. Willy had allegedly seen the accused at the time of the incident. The complainant told the court that after she was defiled she went home and reported the matter to her mother who in turn went and reported the matter to Willy the village elder. She testified that they told Willy that the assailant was dark in colour and he was short. Willy said that he was to inform the father of the suspect. The trial magistrate at that instant noted "not clear how the description fitted the accused herein". She further testified that on the way to Willy's home they met a small girl by the name S C who told them that the name of the accused was Peter and that she had seen him running away and appeared drunk. She informed the court that the person who defiled her was drunk. She further told the court that the little girl had said that the person she saw running away was short.

From the above, it is clear that the complainant was not able to identify the one who had defiled her. The learned trial magistrate did observe that the description given by the complainant did not fit that of the accused. It's apparent that she relied on the girl called Sharon so as to get the name of the accused and one Willy a village elder. The said S C and Willy the village elder were not called in court to testify. The complainant had testified that an identification parade was undertaken at the police station only to change her mind and state that there was none.

I am not satisfied that there was proper identification of the accused. Secondly, the age of the complainant was not properly ascertained. The conviction was not safe and the sentence was not lawful. The appeal has merit. It is allowed. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 7th day of December 2018 in the presence of learned counsel for the prosecution.

The appellant in person –present

Court assistant Rotich.

M. MU YA

JUDGE

14/12/2018