



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 87 OF 2013

(Being an appeal arising from the judgment of Kitale Resident Magistrate P. Kulecho delivered on 11/7/2013 in Criminal case NO. 2499 of 2012)

PETER WEYAO MANYONGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between the 15th day of May 2012 and 7th October 2012 within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of L J a child aged 16 years**.

The alternative count is committing an **Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offence Act No 3 of 2006**. The particulars of the offence are that **on diverse dates between the 1st day of May 2012 and 7th October 2012 within Trans Nzoia County, intentionally caused the contact between his genital organ namely Penis and the genital organ namely vagina of L J a child aged 16 years**.

FACTS

The prosecution called several witnesses to establish its case. Their evidence can be summarised as hereunder.

PW1 the complainant told the court that the appellant was her boyfriend and that they had sexual intercourse sometimes in August 2012 at the appellant's parents place. She said that this was the only time they had sex. That on 7/10/12 she went to church and thereafter she decided to visit the appellant. In the process her mother bursted them. The appellant and his friend Sammy fled. She also ran away on seeing her mum. The following day on 8/10/2012 she was taken to Ndaluh Health centre where she was examined and referred to Kitale District hospital for further examination. She also produced her P3 form as well as a birth certificate showing that she was born on 9/6/1995.

PW2 J A is the complainant's mother. She said that on 7/10/12 the complainant went to church but she did not come back early as expected. At around 7 pm a neighbour told her that PW1 had been seen aboard motorcycle with 2 young men. She suspected that one of them was the appellant who she suspected to have had an affair with the complainant. She went to the appellant's home in the company of one Rose Jereda and upon knocking his door the appellant and one Sammy fled. They found the

complainant under the bed and she was drunk and had even vomited. She locked the house using a neighbour's padlock and inside the house was the complainant and the said Rose. She then sought assistance from the vigilantes as well as police officer. When they came to the house the door was already opened and Sammy together with the complainant were arrested. Later the appellant was arrested. She took the complainant to Ndalu Health Centre. On cross-examination she confirmed that the appellant was responsible for the complainant's pregnancy.

PW3 PC Job Lemaerige is based at Big Tree patrol base. Upon receiving report from PW2 they went to the scene and managed to apprehend a young man and the appellant was later apprehended. He took the minor as well as the 2 suspects to the police station.

PW4 Linus Ligare a clinical officer produced the P3 form which showed that complainant had engaged herself in Sexual activity and she was pregnant.

PW5 P.C. Calleb Yator is an officer based at Kitale police station child protection Unit. He was the investigating officer in the matter. Upon PW1 being brought to the station he escorted her to Kitale District Hospital and recorded the witness statements. He also produced the minor's birth certificate.

When put on his defence the appellant gave unsworn evidence. He denied ever defiling the minor.

DW2 Richard Situma is the Chairman of Big Tree Centre. He said that on that day PW2 was screaming that her daughter was in a certain mans house and that she wanted to report the issue at police station. He went to the house and found the minor drunk and hurling insults. Upon inquiry the minor said that she had gone to Wamboi Pub where her mother had sent her to collect some money from a bar maid and that the said barmaid had given her alcohol. Upon being drunk she decided to look for Sammy who she was to stay with until she was sober. Since she was found next to the appellant's house her mother suspected that it was the appellant who had made her drunk. He testified that he found the appellant at his uncles house watching TV and he denied having been with the complaint. He said that the complainant's mother could not hear any of this and she decided to go to the police.

Analysis and Determination

Both the appellant and the respondent have raised several points in their written submissions. The appellant has raised several grounds of appeal which can be summarised as hereunder;

- 1)The evidence as presented was uncorroborated**
- 2) No DNA examination was done on the alleged pregnancy**
- 3) The age of the appellant was not determined well**
- 4) Key witnesses were not called.**

It is now a cardinal principle that for the offence of defilement to be established, one must establish the age of the complainant, that penetration occurred and that the aggressor was properly identified.

From the evidence on record, there is no doubt that both the appellant as well as the complaint were neighbours and knew each other very well. The only issue is whether the complainant was indeed the appellant's girlfriend as she alleges. She said that they were friends from May 2012 and it was only in August when they had sexual intercourse and this was only once. Were it not that they were bursted by PW2 on 7/10/12 nobody would have known their relationship.

This argument was vehemently denied by the appellant though. Considering the evidence on record, is it possible to attribute the defilement of the complainant to 7/10/12 or in August 2012. PW4 testified that the hymen was torn and old looking.

There was no evidence to suggest that there was recent sexual activity, more so on 7/10/2012. This situation is further complicated by the fact that the complainant was found in the company of 2 young men, the appellant and one Sammy. Is it possible that either of the two was her boyfriend.

PW2 apparently zeroed on the appellant purely on the fact that the complainant was in his house and more so after being informed by the neighbour. Is there sufficient evidence to suggest that indeed the appellant defiled the minor? I find that it was her word against his. As correctly submitted by the appellant there was no 3rd party evidence to suggest that the two had even been seen together.

Obviously it is not possible in the absence of any further medical evidence to suggest as PW2 did that the pregnancy the complainant was carrying belonged to the appellant. In any case as earlier found there was no evidence that she had engaged herself in sexual activity on 7/10/12 when they were found by PW1.

I also find that there were glaring inconsistencies in the evidence as presented. First of all it appears from the evidence of PW1 that the appellant was arrested on the same day like her. PW2 on the contrary suggest otherwise. After fleeing away the appellant was arrested the following day.

PW1 also testified that she fled together with the complainant yet PW2 stated that she locked her inside the house until she came back with 2 vigilantes and a police officer.

Significantly also the prosecution did not explain the whereabouts of one Sammy and how he managed to evade being charged. If he was found in the house and in fact contrary to PW2 evidence he appeared not to have fled away. Why was he left behind? At worst he ought to have been a witness. More importantly is the absence of the evidence of one Rose who was with PW2 when she bursted the culprits. For some reasons her evidence was left behind yet in my opinion she would have been a credible witness especially to explain whether or not the appellant was present at the scene.

An allegation of the complainant being drunk was raised by PW1, her mother, as well as DW2. How did she get drunk and what happened? Is the source of her drunkenness a barmaid at Wamboi's pub or the appellant? Being a minor and underage, she was not supposed to be in that state. Is it possible that she was a delinquent and an habitual drunkard? Being 16 years and simply at home, not in school raises many questions in my mind. What stops her from engaging in sexual activities especially if she is known to abuse alcohol at that age? As indicated above it becomes difficult to believe that the pregnancy she was carrying belonged to the appellant in the absence of any medical proof.

Then there was the question of age. The appellant complained that she was a minor and the trial court ordered an age assessment. Dr Kiprop Jonathan found that the appellant's age was estimated at 18 years. That report was simply put in the file. The same was not produced as piece of evidence. It was not interrogated and the appellant did not have the benefit of cross-examining the author. The nature of the charge facing the appellant was grave and simply placing such a criminal document in the file was to say the least reckless. The same is in the status of other medical documents to be produced as exhibits and they ought to be produced as provided in the rules of evidence.

More importantly the report stated that the estimated age of the appellant was 18 years. This was a borderline age and more crucially there was every probability that the appellant would even be 17 years or thereabouts.

Conclusion

I have weighed this appeal anxiously and from the analysis above it would be unsafe to disallow it. As clearly stated the age of the appellant was not clearly determined or even if it was so determined not put to strict proof. Further there is no direct evidence to suggest that the complainant was defiled by the appellant. The only evidence is her evidence which dated back about 3 months away. The evidence of PW2 and her mother was full of hate, spite and suspicion especially having believed without any substantiated evidence that the appellant impregnated her daughter.

Neither could the complainant benefit from the provision of Section 124 of the Evidence Act. I do not find her testimony believable.

In the premises the appeal is allowed. The appellant set free unless lawfully held.

Delivered this 25th January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant