



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 103 OF 2012

BARISA NGUYO ARANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 59 of 2011

of the Chief Magistrate's Court at Malindi – N. Shiundu, PM)

JUDGEMENT

The appellant was charged with offence of defilement contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between the date of 9th and 12th October 2011 at [*particulars withheld*] Village, Fundi-Issa Location within Kilifi County, intentionally and unlawfully caused. penetration of his male genital organ namely penis into a female genital organ namely vagina of K M a girl aged 14 years.

The trial court convicted the appellant and sentenced him to serve 20 years imprisonment. The grounds of appeal are that the conviction is not safe, that no evidence was adduced by a medical doctor or analyst, that there was no evidence to prove that the complainant was a student, that the case was not proved to the required standard, that the appellant's defence raised doubt on the prosecution case, that the charge sheet was defective and essential witnesses did not testify.

In his written submissions, the appellant submit that defilement is only proved where there is penetration and the age of the complainant is established. The complainant alleged that she was pregnant. No medical evidence was adduced to prove that it was the appellant who made the complainant pregnant. The only evidence connecting the appellant to the offence is that the complainant was found at his place. He further submit that there was no expert evidence to prove that the complainant was sixteen years old or that she was in school. Her parents did not know her age. No medical officer testified. The onus was on the prosecution to prove its case beyond reasonable doubt. No birth certificate or other medical document was produced.

The state opposed the appeal. It is submitted that the appellant took the complainant to his house for a period of one week. The complainant's parents traced the complainant to the appellant's place. She was taken to hospital and found to be pregnant. PW1 testified that it was the appellant who took her to his house and defiled her. There was no need for a DNA test as defilement was proved. The fact that the medical officer did not testify was not fatal to the prosecution case. The charge sheet was not defective.

This is a first appeal and the court is required to evaluate the evidence adduced before the trial court and make its own conclusion. PW1 was the complainant. She informed the court that she was sixteen years old and a standard three pupil at [Particulars withheld] Primary School. She knew the appellant who used to stay with her brother in law. On the 9.10.2011 the appellant took her from their home as he wanted to tell her something. They went to his home and he told her that she would not return home since he had married her. They slept and he defiled her. She stayed with the appellant for one week until when the appellant's relative went to inform her parents. Her parents then went to rescue her. She was taken to Malindi District hospital and was found to be pregnant. Her age was assessed.

PW2 S M K is PW1's father. He was informed that PW1 was missing on 5.10.2011. They searched for her and discovered that she was with the appellant. PW1 was a pupil at [Particulars withheld] Primary School. His home is 4 km away from the appellant's home. He also testified that PW1 was thirteen years old in 2011. PW1 was taken to hospital and found to be pregnant. She was also taken for age assessment. PW3 P.C. GIDEON WAMBUA was based at Marereni Police station. On 14.10.2011 he got the report about the defilement. PW1 was taken to the station by her uncle called M. He investigated the case and found that the appellant had taken PW1 on 5.10.2011 and returned her at midnight. On 7.10.2011 the appellant took away PW1 until 12.10.2011. PW1 was found at the appellant's place. She was taken for medical examination and found to be pregnant. Her age was assessed by the doctor. PW4 S S is PW1's mother. On 9.10.2011 she was at home when her other children informed her that PW1 did not sleep in the house. She went and informed her uncle. PW1 was later traced in the appellant's house. She told her that the appellant had married her. The police were informed and the appellant was charged. PW1 was a pupil at [Particulars withheld] primary school.

In his unsworn evidence the appellant testified that he was arrested by two police officers on 14.10.2011. He was taken to the police station where he found PW2 who made the accusation. On 16.10.2011 he was taken to Malindi police station and later charged with the offence.

This court is required to determine whether the appellant defiled the complainant. The record shows that although there were a P3 form and age assessment report identified by the witnesses, the documents were not produced. The prosecution was called upon to close its case before the medical evidence was adduced. Apart from the lack of medical evidence, it is established that PW1 was defiled and became pregnant. By the time she testified on 12.3.2012, she told the court that she was seven (7) months pregnant. The alleged defilement occurred between 9th and 12th October, 2011. According to the evidence, PW1 was taken away on 5.10.2011 but was returned at midnight of the same day only to be taken away on 9.10.2011.

It is PW1's evidence that she was taken by the appellant. The appellant told her that he had married her. They stayed together until when she was rescued by her parent. The appellant contends that there was no evidence that the complainant was a student. The evidence of PW1 is that she was a pupil at [Particulars withheld] Primary School. The same evidence was given by PW2 and PW4. It is therefore established that PW1 was a pupil.

PW1 knew the appellant. They stayed together for about four (4) days. She could not have been mistaken as to the identity of the person she was living with for all that period. It is her evidence that during that period they slept in the same bed and the appellant defiled her. I do find that indeed it was the appellant who took away PW1 from her home on 9.10.2011 and stayed with her until when PW1 was rescued.

There is the issue of the age of PW1. The charge indicate that she was 14 years old. The evidence indicate that her age was assessed but the report was not produced. The complainant told the court that she was sixteen (16) years old. No medical evidence on age was produced. Age of the victim is quite essential in a defilement case as it determines the length of the sentence should the accused be convicted. However, if the exact age is not established or proved, that cannot be a ground for acquittal. No one is ageless. The court will have to be guided by the apparent age of the victim. The physical appearance of the victim as well as her school record. The complainant testified that she was in class three. However, she told the court that she was sixteen years old. The court cannot speculate on the age as the prosecution

had the opportunity to produce the age assessment report. PW3 who investigated the case could have produced the report. The trial court could have as well allowed the production of the age assessment report by PW3.

Given the fact that no medical evidence was produced to establish the age of the complainant and in view of the fact that both the typed and handwritten record of the proceedings indicate that the complainant testified that she was 16 years old. I do find that PW1, the complainant, was 16 years old as per the charge sheet.

I do find that the prosecution did prove that pw1 disappeared from home on 9.10.2011 and was traced at the appellant's house on 12.10.2011. The fact that no medical officer testified on the examination done on the complainant is not fatal to the prosecution case. The evidence of PW1 is that she was defiled and became pregnant. According to her, it is the appellant who defiled her. The absence of DNA tests does not weaken the prosecution case. The paternity of the child is not a pre-requisite for the offence of defilement to be proved. Not all defilements lead to pregnancy. What is important is the evidence adduced in each case. PW1 was not at home for about four days. She was with the appellant who alledged to have married her. The evidence of PW1 is believable. Section 124 of the Evidence Act, Cap 80 Laws of Kenya allows the court to convict an accused in Sexual Offences case if the court is of the view that the complainant's evidence is believable. The defence evidence does not raise any doubt on the prosecution case. I do find that PW1 was defiled and it is the appellant who defiled her. I also find that PW1 did not believe in a manner likely to suggest that she was an adult. The appellant took advantage of her young age and defiled her. I also find that PW1 was 16 years old and not 14 years old.

In the end, I do find that the appeal lacks merit and is hereby disallowed. Having found that the complainant was 16 years old, I do find that the appellant is guilty of the offence of defilement contrary to section 8 (1) as read with Section 8 (4) of the sexual Offences Act. The 20 years imprisonment imposed by the trial court is set aside and is replaced by the maximum sentence of fifteen (15) years imprisonment under section 8 (4) of the Sexual Offences Act.

Dated and delivered in Malindi this 8th day of February, 2017.

S.J. CHITEMBWE

JUDGE