



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 219 OF 2013

BETWEEN

EDWIN CHELESIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of 15 years imprisonment in Cr. Case No. 457 of 2013 by the SRM'S court at Vihiga delivered on 15.11.2013 by Hon Susan N. Mwangi Ag SRM)

J U D G M E N T

Introduction

1. The appellant herein Edwin Chelesi was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement of a girl child contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006. He was dissatisfied with the trial Courts Judgement conviction and sentence and has filed the present appeal based on the following grounds:-

- 1.) *The learned trial Magistrate erred in law by convicting the appellant when the prosecution had entirely failed to prove its case against the accused person beyond reasonable doubt.*
- 2.) *The learned trial Magistrate erred in law by [convicting] the appellant on the basis of suspicion.*
- 3.) *The learned trial Magistrate erred in law by convicting the accused person without proof of age of the complainant.*
- 4.) *The learned trial Magistrate erred in law by convicting the appellant on the weight of evidence that was totally contradicting and conflicting.(sic)*
- 5.) *The learned trial Magistrate erred in law by believing the complainant to be a truthful witness when her evidence was contradicted by other prosecution witnesses.*
- 6.) *The learned trial Magistrate was otherwise biased and did not write all that the appellant said in his defence.*

2. The appellant prays that the appeal be allowed, the conviction quashed and sentence set aside.

Submissions

3. The appeal was canvassed orally. Mr. Ariho for the appellant argued that the age of the complainant was not ascertained as there were two conflicting dates of birth and further that there was no explanation as to why a birth certificate was not produced by the prosecution. He also submitted that there were inconsistencies in the evidence by the prosecution witnesses touching on the age of the complainant and time of commission of the alleged offence and as such the conviction could not have been safe. He maintained that the case was not proved beyond any reasonable doubt as proof of age of the complainant was not given.

4. Mr. Oroni for the state opposed the appeal. He argued that the age of a child can be proved by an immunization card, birth certificate, school admission card e.t.c and that in the instant the prosecution case tendered an immunization card as proof of age of the complainant.

5. Counsel referred the court to the Chief Justice rules under the Sexual Offences Act which do not confine proof of age to birth certificates. He added that the evidence by the prosecution witnesses corroborated that of the complainant and that all elements of defilement under the Sexual Offences Act were proved to the required standard. He submitted that the offence of defilement is prevalent in the area and should be discouraged by courts giving stringent sentences as per the law and that the sentence meted to the appellant herein was justified and the same should not be disturbed.

Duty of this Court

6. This being a first appeal this court is well aware of its duty which is to re-evaluate the evidence on record, analyse it and come up with its own findings.

7. The court is also aware of the fact that it did not see or hear the witnesses as they testified which is best left to the trial Court. See the case of **John Irungu Macharia – vrs – Republic – Criminal Appeal No. 23 of 2008** where the Court of Appeal expressed itself as follows; *“That being so the appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and to have this court’s decision on that evidence. But as we do so we must bear in mind that we have not had the advantage(which the learned judge had) of hearing and seeing the witnesses and give allowance for that (see also Okeno – Vs _ Republic 1972 EA 32 Mwangi- vrs – Republic [2006] 2 KLR 28)”*

Prosecution Case

8. Pw1 the complainant herein was taken through a voire dire examination after which the trial court allowed her to give a sworn statement. In her testimony she said that on the 25.5.2013 at around 4.00pm, she was at home with her siblings when a boy named Collins called her and told her that the appellant (Edwin) wanted to see her. She left together with Collins and went to Collins’ house where they did not find anyone. Collins told her to wait there as he called Edwin. Later, Edwin came to the house alone and he told her to lie on the bed. She refused but Edwin grabbed both her hands and pushed her to the bed. He then removed his trousers and put on a condom and then asked her to remove her panty. She did so and Edwin put his penis into her vagina and they had sex. Edwin’s phone then rang and he received it. She testified that Edwin put on his cow boy underwear and trousers and left the house. The police came moments later and she explained to them what had happened. They took her to Kigodi AP Camp

9. PW2 M K, the mother to the complainant was called on the same day while at her shop by an AP Officer and was told what had happened to her daughter. She rushed to the scene and on the way she met with two Administration police officers with her daughter. The officers told her that they had found her daughter but the man who was with her had run away. She testified that the complainant was her 2nd born daughter and that she was 14 years at that time of the incident, having been born on 28.9.1997 as per the immunization card (PMFI 14). Together with PW1 and the AP Officers they went to Chavakali Patrol Base but they were told that since it was late they should go back the next day. At home that evening her daughter told her what happened that day. The next day they recorded their statements.

10. PW3, Patrick Ageri Majoli testified that on the 25.5.2013 at around 6.00pm, he saw the appellant in the company of the complainant as they entered the appellant's house. He was the one who called the police who arrived later at the scene. He testified that when the police arrived he showed them the house where appellant was with the complainant. They went together to the said house but only found the complainant as the appellant had already left. They found the complainant sitting on the bed. The police took the complainant and asked her to call her mother. As they were walking towards the Administration Police Camp they met the mother and explained to her what had happened. The following day he recorded his statement.

11. He stated that he was curious when he saw the appellant with the complainant because when they were at a school meeting, he had received complaints that the appellant had the habit of having sex with school children.

12. Loy Agwona a clinical Officer at Vihiga District Hospital was PW4. She examined the complainant on the 28.5.2013 after receiving her history of being coerced to have sex by a man known to her the previous day. On external examination of the complainant, she observed a whitish discharge on the labia majora, labia minora and vagina and also noted bruises on the labia minora. The tests done on the complainant were negative. High vaginal swab showed numerous epithelial cells were normally found in the vagina after sex but there was no spermatozoa.

13. She also noted that the complainant was under age and that it was not her (complainant's) first time to have sex. She also concluded that there was penetration. She produced the treatment notes lab request note and P3 form respectively as PEXH, 1, 2, 3 and the post rape care form as PEX 4.

14. On the same day she also examined the appellant and from the tests, the appellant was normal. The appellant's treatment notes and lab request form were produced as PEXH 5 and 6 respectively. She further stated that the girl's clinic card showed that the girl was born on 28.9.1997 and thus fourteen (14) years. The card was marked as "PEX 7".

15. PC Andrew Kanyora No. 47717 attached at Chavakali Patrol Base investigated this case after receiving a report on the 25.5.2013 at 9.30pm from the complainant who was brought by A.P officers from Kegodi accompanied by her mother. PC Andrew testified as PW5. The AP officers told him that they had found the complainant sitting on top of a bed where she had had sex with appellant who apparently ran away. He interrogated the girl who confirmed their statement. He then recorded their statements.

16. The next day the AP Officers returned to the Patrol Base with the appellant and he took both the complainant and the appellant to Vihiga District Hospital where they were examined and tested. He testified that the girl was 14 years old at the time of the incident as per the immunization card PEX7

17. PW6 No.2008135702 APC (W)Salome Wanyama attached at Kegodi Administration Police Post testified that on the 25.5.2013 at around 6.00pm they received a call from PW3 informing them that a person who was known to be defiling school children in a certain house had been seen with a young girl. They went to where PW3 was and he led them to the house which is usually abandoned.

18. They entered the house where they found the complainant sitting on a bed. She interrogated the complainant her and her story was that she was in that house with her boyfriend Edwin Chelesi who after receiving a call left a few minutes before they arrived. They went to Edwin's shop and found his wife who told them that Edwin had just left. They then went to Chavakali Patrol Base.

19. At about 6.00am she received a call from the appellant who wanted to see her and talk to her about what happened the previous day. She met the appellant later during the day and arrested him and took him to Chavakali Patrol Base.

20. The prosecution closed its case after all the six (6) witnesses had given their testimonies. The trial court found that a prima facie case had been established against the appellant. After the trial court

complied with section 211 of the Criminal Procedure Code it put the appellant on his defence.

Defence Case

21. The appellant gave sworn testimony and called one witness who was his wife. He testified that on the 25.5.2013, the day of the alleged incident he was at home with the wife the whole day and they never left their house, but in the evening he received a call from PW6 who asked him to meet her the following day at 7.00am. He met PW6 the next day and she told him that it was known that he had been destroying young girls' lives and that he had defiled one girl the previous day. It was then that other AP officers came and arrested him and took him to Chavakali Police Patrol Base and later to Vihiga district hospital where he was examined. He was thereafter arraigned in court with the charge of defilement.

22. In his further testimony he maintained that he was framed because of a business rivalry he had with PW3 and that the document showing the complainant's age was altered and that no one saw him in the act.

23. DW2 testified that she stayed with the appellant in their shop the whole of 25.5.2013. She also confirmed that he received a call at 8.00pm from PW6 who wanted them to meet. The next day he left to meet PW6 only to call her later to say he had been arrested for allegedly defiling a student. The defence also closed its case after the evidence of DW2.

Judgment of the Lower Court

25. In its judgment the trial magistrate answered the following pertinent issues;-

- 1.) Whether there was penetration
- 2.) Who was responsible for the penetration
- 3.) Whether the age of the complainant was established.
- 4.) Whether there was consent given by the complainant to the penetration.

26. The trial court in its judgment concluded that there was penetration which was not consented to, was forceful and intentional though protected which led to injuries to complainant's vaginal area. The trial court also found that the age of the complainant was proved to be fourteen (14) years and that the appellant was properly identified.

27. The court was also convinced that the complainant told the truth and in convicting the appellant it relied on the provisions of Section 124 of the Evidence Act.

Determination

28. In determining this appeal the following are the issues which this court will determine:-

- a) Whether the age of the complainant was proved
- b) Whether there was penetration.
- c) Whether it is the appellant who defiled the complainant

29. On the first issue the complainant told the court that she was in class 7 at [particulars withheld] School. During the voire dire examination she stated that she was fourteen years of age. Her mother, PW2 told the trial court that the girl was fourteen years of age as she was born on 28.9.1997 and also as shown in the immunization card PEX7. This was also confirmed by Loy Agwona PW4 who had the girl's clinic card which showed that she was fourteen years old when the incident occurred.

30. In the case of **Kaingu Elias Kasomo – vs – Republic Malindi Criminal Appeal No. 504 of 2010** the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism card, school leaving certificates in my view would also be useful in this regard.....”

31. I therefore agree with the submission by Mr. Oroni for the State to the effect that age can be proved through immunization card, birth certificate school or admission card.

32. In the instant case the prosecution produced the immunization card which showed that the child was born on 28.9.1997 and her age at the material time was fourteen years. In the case of **Joseph Kieti Seet – vs – Republic [2014] eKLR HC at Machakos Criminal Appeal No. 91 of 2011** the learned Judge held that “Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense....” In this case PW2 the mother of the complainant told the trial court that the complainant was fourteen years of age having been born on 28.9.1997. There is therefore no doubt about proof of the complainant’s age.

33. From the above therefore, I find that the age of the complainant was proved by the prosecution not only orally but by the production of the child’s immunization card which is a document which not only shows the date of birth of a child but the sequence of immunization the child took up to a particular stage. The mother also testified. For the above reasons, grounds 1 and 3 of the appeal must fail.

34. Having come to that conclusion and in dealing with the second issue, I do find that the main ingredient of defilement which is penetration was established. The complainant in her testimony said that she indeed had sex with the appellant. She stated that the appellant pushed her onto the bed and asked her to remove her panty which she did. The appellant then removed his trousers and put a condom on his penis before the sexual intercourse. PW5 the Clinical Officer examined the complainant and confirmed the presence of numerous epithelial cells on the outer lining which she stated is normal to find after sex although there were no spermatozoa cells. She also noted bruises on the labia minora and a whitish discharge on the labia majora and labia minora. She concluded that there was penetration.

35. From the record, the appellant was the only one with the complainant in the house. He was seen walking to the house by PW3. The complainant told the trial court that the appellant was her boyfriend and that it was not the first time she had sex with him. The trial court which observed the demeanor of the complainant concluded that she was a truthful witness. I have no reason to doubt the findings of the learned trial Magistrate. Further the complainant’s testimony was corroborated by the testimonies of PW3 and PW6. PW3 saw the appellant going to the house where the complainant had been taken by Collins “aka” “Collo” who was not called as a witness. PW3 informed the police but when they stormed the house the appellant had already left. Identification of the appellant was positive. The incident happened during the day and the principal witness who is the complainant started that she was with the appellant. PW3 also saw the two of them entering the house together.

36. I also therefore find from the evidence by the prosecution witnesses that it is the appellant who defiled the complainant. The evidence by the prosecution witnesses was straight forward and corroborative. I have no doubt that the appellant was properly placed at the scene with the complainant who was found sitting on the bed immediately after the act and who told the police she had had sex with the appellant who was her boyfriend.

37. I have no doubt that the trial court had all the time to observe the complainant and it found that she was a truthful person and it believed in her. I have weighed the appellant’s defence against the prosecution evidence and find that the defence does not shake the prosecution case in any way.

38. For the above reasons, I find that the appeal lacks merit and do add that the trial court recorded the evidence of the defence witnesses as precisely as it could.

The appeal is therefore dismissed on both conviction and sentence. The appellant has a right of appeal to the Court of Appeal within 14 days of the date of this judgment.

Orders accordingly,

Judgment delivered, dated and signed in open court here at Kakamega this 2nd day of May, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Miss Omoro (present).....for Appellants

.....Mr. Juma (present).....for Respondent

.....Polycap.....Court Assistant