



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 24 OF 2015

JOSHUA KIFOROAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kilgoris PMCR NO. 24 of 2015) (Hon. A.K Mokeross - SRM.)

JUDGMENT

(1) The appellant, **Joshua Kiforo**, appeared before the Senior Resident Magistrate at Kilgoris charged with defilement, contrary to **S. 8(1)** as read with **S.8 (3)** of the Sexual Offences Act.

It was alleged that on diverse dates between the 12th and 13th January 2014, at [particulars withheld] area Transmara West district, the appellant defiled E L, a girl aged fourteen (14) years.

(2) In the alternative, the appellant faced a charge of indecent act with a child, contrary to S.11 (a) of the Sexual Offences Act, in that on the material date and place he intentionally and unlawfully caused his male sexual organ to come into contact with the aforementioned complainant's sexual organ.

(3) The appellant pleaded not guilty to both counts. He was tried, convicted and sentenced to serve twenty (20) years imprisonment on the main count.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds of appeal contained in the petition of appeal filed herein on 26th March 2015.

(4) The appellant's main and relevant complaints are that he was convicted on the basis of hearsay evidence and without the trial court considering his age. That, both the conviction and sentence were irregular and bad in law.

At the hearing of the appeal, the appellant appeared in person and presented written submissions which he fully relied on in urging this court to allow the appeal.

(5) Learned Prosecution Counsel, **Mr. Otieno**, opposed the appeal on behalf of the State/Respondent by submitting that the prosecution case against the appellant was proved beyond reasonable doubt as it was established that the complainant aged 14 years old was defiled and impregnated by the appellant.

That, the appellant was identified as the person responsible for the complainant's pregnancy and therefore his conviction by the trial court was correct.

(6) The learned prosecution counsel submitted further that the sentence imposed upon the appellant was lawful. He urged this court to dismiss the appeal, but in his rejoinder, the appellant contended that the trial was conducted while the necessary statements had not been supplied to him and that he was not legally represented.

(7) This is a first appeal. The duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (see, **Okeno Vs. Republic (1972)EA 32** and **Soki Vs. Rep (2004) 2KLR 21**).

(8) In brief, the case for the prosecution was that at the material time the complainant **E L (PW 1)**, was of the age of about fourteen (14) years and a secondary school pupil at [particulars withheld] Secondary School. She was in school when she fell sick and was granted permission to go home and seek treatment. Her mother, **M O (PW 2)** and uncle, **J K (PW 4)**, took her to hospital where was found to be pregnant and suffering from typhoid.

(9) After returning home from hospital, the complainant remained there for a few days and then disappeared for about two or three months. A report to that effect was made to an assistant chief, **Saitoti Konjori (PW 5)**, who carried out his own investigations and traced her in the company of the appellant who was apprehended and handed to the police through, **APC Ayub Thuraira (PW 6)**.

(10) The complainant was taken for medical examination which was conducted by **Julius Munyendo (PW 3)**, a clinical officer at Transmara District Hospital. He confirmed that the complainant was pregnant after being defiled allegedly by the appellant.

PC Peter Maina (PW 7), investigated the matter and eventually preferred the present charge against the appellant.

(11) In his defence, the appellant denied the charge and indicated that the complainant was chased from home by her parents and ran to him for protection. She threatened to take poison and kill herself if he declined to help her. He felt pity on her and decided to shelter her. He only assisted her but her parents later turned against him although he continued providing for her and her baby. He pleaded with the court to forgive him if helping the complainant was wrong.

(12) After having considered the evidence in its totality, the trial court arrived at the conclusion that the complainant was indeed defiled and that her pregnancy was as a result of the unlawful act.

The trial court, also concluded that the appellant was the person who defiled and impregnated the complainant. His defence was rejected by the court.

(13) In this court's opinion, the ingredients of the offence of defilement were duly established by the complainant's evidence as corroborated by that of the clinical officer (PW 3) and to some extent by that of her mother (PW 2) and uncle (PW 4).

It was thus credibly established that the complainant was a child aged fourteen (14) years at the material time of the offence and that she was impregnated after engaging in a sexual relationship with a male person while being a secondary school student.

(14) Being a child, the complainant's consent in engaging in a sexual relationship with a male person was immaterial. Therefore, her partner in the unlawful act was criminally liable for the offence of defilement.

The appellant denied that he was the alleged partner and implied that his act of being a "good Samaritan" turned against him and that was the main reason for his arraignment in court.

(15) It was not the duty of the appellant to prove his innocence. The obligation to prove beyond reasonable doubt that he was responsible for defiling and impregnating the complainant lay squarely with the prosecution.

In fact, the bone of contention in this matter was whether the appellant was the person responsible for defiling the complainant.

(16) The learned trial magistrate was of the view that the appellant was responsible for the offence because he could not have so readily given aid to the complainant by offering her shelter, food and support for her child if he was indeed innocent. Besides, he did not report the matter to the authorities if indeed the complainant was being mistreated.

With respect to the learned trial magistrate, his view was based on speculation and bordered more on suspicion that the appellant was the culprit since she was his “girlfriend” and they must have engaged in sexual relationship as indicated by the complainant.

(17) Suspicion no matter how strong can never be evidence of commission of a criminal offence in the absence of any other credible evidence. Nobody saw the appellant defiling the complainant at any one time. There was no evidence showing that the complainant had never engaged in a sexual relationship with any person other than the appellant. There was also no evidence to show that the appellant impregnated the complainant and was the father of her child.

(18) It beats reason why the investigating officer did not arrange for a DNA report to confirm the complainant’s child paternity and hence establish beyond reasonable doubt that the appellant was responsible for defiling and impregnating the complainant.

As it stood, the prosecution evidence merely established that the complainant was defiled and impregnated but fell short of proving that the appellant was responsible for the offence.

(19) It is therefore the holding of this court that the appellant’s conviction by the trial court was neither safe nor sound. It is hereby quashed and the resultant sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

[Delivered and signed this 15th day of June, 2017].

J.R. KARANJAH

JUDGE

In the presence of

State Counsel - Mr. Imbali

CC Mohe

Appellant present in person