



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 220 OF 2015

JAMES KANYERE NGANGA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at

Nakuru Hon. M. I. G –Principal Magistrate delivered on

the 16th April, 2015 in CMCR Case No. 233 of 2012)

JUDGEMENT

The appellant **JAMES KANYERE NGANGA** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Nakuru Law Courts. The appellant had been arraigned before the trial court on 8/10/2012 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the offence were that

*“On diverse dates between 13th day of September, 2012 and 4th day of October, 2012 in Nakuru North District of the Rift Valley Province, unlawfully and intentionally committed an act by inserting a male genital organ namely penis into a female genital organ namely vagina of **S N G** a child aged 14 years which caused penetration”.*

Additionally the appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges. His trial commenced on 21/11/2012. The prosecution led by **SUPT WAMBUA** called a total of five (5) witnesses in support of their case.

The complainant **S N G** testified as **PW1**. She told the court that she lived with her mother at the IDP Camp in Maili Sita. The complainant’s father who was separated from her mother lived in Eldoret. The complainant told the court that she met the appellant in the IDP Camp. The child further informed the court that she was a class 7 pupil at St. Johns Mercy School in Bahati but during the prolonged teachers strike, she stopped attending school.

PW1 told the court that her mother used to leave their home each Thursday to attend church services and

would stay away until Sunday. On 13/9/2012 while the mother had gone to church **PW1** left home in the company of the appellant and went to the appellant's rural home in Molo. Here they began to cohabit as man and wife. The complainant made it very clear that she voluntarily accompanied the appellant to his home and that she considered herself as his wife.

PW3 A M told the court that the complainant was her 1st born daughter. **PW2** stated that on 13/9/2013 she left her home at the IDP Camp and went for a prayer meeting. While she was away her second-born daughter 'P' called to inform **PW2** that her eldest child 'S N' had left with the appellant and had not returned home. **PW2** began to search for her daughter.

Eventually **PW2** found the complainant living with the appellant in his home in Molo. She tried to persuade the complainant to return home and continue with her education but the child adamantly refused.

The matter was reported to Molo Police Station. The police raided the house and removed the complainant. The appellant was also arrested and charged with the offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he admitted having co-habited with the complainant for a period of about 3 weeks. However the appellant's defence was that he did not know that the complainant was a minor. He claimed that he believed her to be 18 years old.

On 16/4/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve fifteen (15) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

MR. MARAGIA learned Counsel argued the appeal on behalf of the appellant while **MR. CHIGITI** learned State Counsel opposed the appeal.

Being a first appeal this court is obliged to re-examine and re-evaluate all the evidence adduced during the trial and to draw its own conclusions on the same. **(see AJODE Vs REPUBLIC 2004 KLR). In MWANGI Vs REPUBLIC [2004] 2 KLR 28** the Court of Appeal held that

"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"

The first ground of appeal raised by the counsel is that the charge sheet was defective as it made reference to Section 8(1)(3) of the Sexual Offences Act which does not exist. Counsel submitting that this mis-citing of the charge prejudiced the appellant.

I have perused the charge sheet. I note that the same reads **'Defilement contrary to Section 8(1) (3) of the Sexual Offences Act 2006'**. I do agree with the counsel that no such Section exists. The charge ought to have read **'Section 8(1) as read with'** Section 8(3) of the Sexual Offences Act, 2006.

Was this error fatal to the charge and did it prejudice the appellant? I think not. The charges were clear and the particulars were also set out clearly. The appellant was under no misapprehension at all about the nature of the charges he faced. This was a mere inadvertent error in the wording of the charge. Article 159(d) of the Constitution exhorts courts to administer justice **'without undue regard to technicalities'**. This error in my view was a mere technicality and was not fatal to the charge at all. I therefore dismiss this ground of the appeal.

The second ground of appeal raised by counsel concerned the age of the complainant. Counsel submitted

that there was confusion concerning the age of the complainant and that the same was not proved as required in law.

There is no doubt that proof of the age of the victim in a Defilement case is of paramount importance. This is because the sentence to be imposed if one is convicted of the charge will depend on the victim's age. In **KAINGU ELIAS KASOMO Vs REPUBLIC Malindi Criminal Appeal No. 504 of 2010** the Court of Appeal held that

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim”.

In this case the charge sheet gave the victim's age as 14 years. The complainant in her evidence said that she was 16 years old. During the voire dire examination **PW1** stated at page 4 line 12

“I am S N. I am 16 years old” (own emphasis)

PW2 the complainant's mother stated in her evidence at page 6 line 4

”S is my first born daughter. She is almost 16 years, she was born in 1996 March.....”

This was the evidence of the biological mother the one who gave birth to the complainant. In the case of **RICHARD WAHOME CHEGE Vs REPUBLIC [2014] eKLR** the Court of Appeal stated as follows

“What better evidence can one get than that of the mother who gave birth”.

In this case **PW3** the mother of the complainant has stated the month and year when she bore her child. What better evidence of age can one get?

Finally on this issue of age **PW5 CORPORAL JULIUS KIPTOO**, who was the investigating officer produced the complainant's birth certificate as an exhibit **P. exb 3**. This document which provides official and conclusive proof of the age of the child indicates that she was born on 3rd February, 1996. Thus in September, 2012 when this incident occurred the complainant was aged 16 years old.

I am mindful of the fact that the child's mother gave the month of her birth as March while the birth certificate states that she was born in February. This to my mind is an inconsequential error by **PW2** regarding the month when she bore her child. The year remains the same. Many rural parents are unable to recall the exact date and month when their children are born. I do not find this to be a significant contradiction.

Based on all the available evidence I am satisfied that it has been proved that the complainant was born on 3/2/1996 and she was therefore aged about 16½ years when this incident occurred. I find no ambiguity on the question of age and I dismiss this ground of appeal.

On the question of the fact of defilement there is no real controversy. **PW1** told the court that on 13/9/2012 when her mother left for church she went with the appellant to his rural home in Molo and began to cohabit with him there as his wife. **PW1** freely admits that she and the appellant engaged in sexual intercourse several times during the period from September, to 4/10/2012 when police came and removed her from that home.

PW4 DR. SAMMY GITUTU was the doctor who examined the complainant at Bahati District Hospital. He noted no physical injuries on the complainant but noted that her hymen was missing. This was a sure sign that penetration had occurred. **PW3** filled and signed the complainant's P3 form which he produced before the court as an exhibit **P. exb 2**.

In his defence the appellant does not deny that he and the complainant engaged in sexual intercourse during the month that they cohabited. There is no doubt that the complainant voluntarily accompanied the appellant to his home and there can also be no doubt that she was a willing participant in the sexual activity between them. **PW1** in her testimony defiantly states at page 5 line 6

“We were staying as husband and wife. We had married each other.....”

Under cross examination **PW1** reiterates that

“I was not forced. I am the one who liked to marry you”

Clearly **PW1** was not happy that the man whom she loved and had decided to ‘marry’ was facing charges of Defilement. She therefore appeared determined to make it very clear to the trial court that their relationship was fully consensual.

Be that as it may the consent and/or willingness of the complainant is not a defence to the charge of Defilement. A child under the age of 18 years has no legal capacity to consent to sexual intercourse and the law outlaws marriage of a girl under the age of 18. Therefore notwithstanding the consent, willingness and participation of the complainant the fact that she was under the age of 18 years makes any sexual activity with her an offence for which the appellant is criminally liable.

The appellant in his defence stated that he did not know that the complainant was a minor. He stated that the complainant told him that she was 18 years old. As stated by the trial court the fact that the appellant never put to the complainant that she misled him concerning her age, makes it clear that this defence is nothing more than an afterthought. In her evidence the complainant said that she was 16 years old. It is unlikely that she would have told the appellant that she was 18 years old.

The appellant conceded that he and the complainant were neighbours in the IDP [*particulars withheld*]. The complainant indicated that they had lived as neighbours for about 2 years. All this time the complainant used to attend school in Bahati. She only stopped attending school in September, 2012 due to the teachers strike. The appellant in his defence admits that he had known the complainant from the year 2008. I do not accept that having known her all this time, the appellant was unaware that the complainant was a student. The fact that the complainant was a student was a clear indicator that she was a minor. It is pertinent that the appellant only raises this question in his defence. I do agree with the trial magistrate that this defence is nothing but an afterthought and an attempt by the appellant to evade responsibility for his actions.

The appellant claims that he was himself only 17 years old at the time of his arrest. Again this allegation comes as a mere afterthought during his defence. There is no evidence to show the appellant age. No birth certificate. No testimony from his parents. The appellant under cross-examination at page 19 line 18 states as follows

“When I went to the camp in 2008 I was 17 years old”

Having been 17 years in 2008, by the year 2012 when this incident occurred, the appellant was at least 21 years old. Thus he was **not** 17 years old at the time of his arrest.

The complainant herself stated that she knew the appellant’s age to be 22 years. Thus I reject the appellant’s claim that he was a minor at the material time.

Finally counsel raises the issue of the attempt by the complainant’s mother to withdraw the charge. However this came far too late. The record indicate that **PW2** made this request **after** the court had delivered its judgment and sentenced the appellant. As pointed out by the trial magistrate the court was by then ‘*functus officio*’. At no time during her testimony did **PW2** indicate any desire to have the case withdrawn. In any event **PW2** was not the complainant and had no capacity to seek to withdraw the charge.

As pointed out by the learned trial magistrate only the DPP can give consent for the withdrawal of such a charge. There is no indication that the consent the DPP was ever sought or obtained to withdraw the charge. Thus the application made by **PW2** to have the charge withdrawn has no bearing at all on this trial.

On the basis of my own analysis of the evidence adduced during this trial. I am satisfied that the charge of Defilement was proved beyond reasonable doubt. I therefore uphold the conviction of the appellant by the trial court. Although the charge sheet cited section 8(3) of the Act, given that the complainant was proved to have been aged 16 years at the material time the applicable section on sentencing is actually section 8(4) of the Act. Section 8(4) of the Sexual Offences Act, 2006 provides for a minimum sentence of 15 years upon conviction where the child is aged 16-18 years. I therefore confirm the sentence of 15 years imprisonment imposed upon the appellant. Finally this appeal fails and is dismissed in its entirety.

Dated and delivered in Nakuru this 2nd day of June, 2017

Mr. Maragia for accused

Mr. Motende for DPP

Maureen A. Odero

Judge