



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 50 OF 2015

KUNONA KINYAGA.....APPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. T.W. CHERERE**—Chief Magistrate dated 19th MARCH 2015 in Nanyuki Chief Magistrate’s **Court Criminal Case No. 792 of 2013**)

JUDGMENT

1. **KUNONAKINYAGA** is the appellant in this appeal. Before the Chief Magistrate’s Court Nanyuki he was charged with the offence of defilement **Contrary to section 8(1)(3) of the Sexual Offences Act Cap 62A**. In the alternative he was charged with the offence of indecent act with a child **Contrary to Section 6 (a) of Cap 62A**.
2. Appellant was convicted by the trial court on the main count of defilement and was sentenced to 20 years imprisonment. He now appeals against his conviction and sentence.
3. In his amended grounds of appeal appellant stated that his conviction and sentenced was based on flawed and inconsistent evidence and that his defence was wrongly rejected by the trial court.
4. This is the first appellant court. As such I am duty bound to look a fresh at the evidence adduced before the trial court and re-evaluate and re-examine the same and thereafter reach my own conclusion. In doing so. I will bear in mind that I did not see the witnesses testify. As the first appellant court I will also not interfere with the finding on credibility unless I find that no reasonable tribunal could make such a finding. See **GEORGE MIRITIKALUNGE & ANOTHER -v- REPUBLIC [2013] Eklr.**
5. The appellant was represented by Learned Counsel Mr. Abwuor. While the state was represented by the Principal Prosecution Counsel Mr. Tanui.
6. It was submitted on behalf of the appellant that the complaint EJ (P W 1) tendered her evidence not on oath. That accordingly her evidence ought to have been corroborated. I have perused the trial court’s proceedings and I have found that after EJ was taken through vior dire examination the court found that she was fit to tender her evidence under oath. She did indeed take the oath before testifying.
7. EJ, a 15 year old school going girl, after taking the oath she stated that she first met the appellant

in the year 2012. She was born on 4th March, 1999. That would make her 13 years in the year 2012 when they first met and the appellant requested EJ to be his girlfriend. Appellant is a motor cycle (bodaboda) operator. EJ declined to be appellant's girlfriend but in the year 2013 she agreed to be his girlfriend because, as she said, he promised to marry her on finishing school. It was thereafter that appellant used to visit EJ's home at night and she stated:

"We used to have sex when accused (appellant visited me at night."

8. EJ used to sleep with other girls at the house that the appellant used to visit her at night.
9. The Liaison between EJ and the appellant continued for three months until August, 2013 when EJ realized she was pregnant. EJ gave evidence of how appellant took her to Sagana where a man gave her tablets which she chewed as instructed. She was shown a room to sleep and she was there from 9th to 13th September, 2013 when appellant collected her. After chewing the tablets EJ began to bleed. EJ in evidence stated: -

"I felt pain after I swallowed the 4 tablets I was given at Sagana. I then realized that I was taken to Sagana to procure an abortion... I was accused's (appellant) girlfriend for 3 months. Accused is from my village."

10. P W 3 Kenneth Kiprop, the clinical officer examined EJ. He found she had blood stains in her underpants and in her genitalia. The pregnancy test was positive because as he explained, although EJ had successfully procured an abortion, the test can be positive ten days after an abortion because the hormones remain present in the blood and urine.
11. Learned counsel for the appellant submitted that prosecution failed to call the other girls who slept in the same house with EJ and also failed to call the man who procured the abortion. It was further submitted that the prosecution failed to prove the case against appellant on the required criminal standard.
12. Learned counsel for the state opposed the appeal and submitted that prosecution met the required standard of proof. Counsel submitted that under the Sexual Offences Act a minor, such as EJ cannot consent to having sex.
13. Contrary to what had been submitted by the appellant Learned Counsel for the state submitted that the appellant had not put up an alibi defence.

ANALYSIS AND DETERMINATION

14. Appellant did not cross examine EJ on her testimony that he used to go to her house and have sex with her. By that failure the court finds that appellant accepted as truth that testimony of EJ. It follows that appellant at this late stage, and having failed to question EJ on her testimony relating to their sexual affair cannot poke holes at the prosecution's evidence by questioning its sufficiency. Appellant having accepted the testimony of EJ the prosecution did not need to call, if at all, the other girls who slept in the same house with EJ. No adverse inference can be drawn from the fact that those girls were not called.
15. Appellant in his unsworn defence denied committing the offence. He blamed his owes of facing the criminal charge to what he alleged was a grudge between his parents and EJ's parents.
16. He called two witnesses who essentially were his character witnesses. They stated that appellant was a disciplined and a good person.
17. That evidence in my view did not rebut the prosecution's evidence which, this court just as the trial court finds was clear. The trial court in its judgment stated:

“Evidence that complainant was defiled is clear, from the evidence on record: I have no doubt in my mind that it was accused that defiled complainant. Complainant’s detailed evidence of how accused took her to procure an abortion is well corroborated by the fact that complainant missed school from 9th September, 2013 and returned home on 12th September,2013 looking sickly is well corroborated. As stated herein above; accused’s defence does not cast doubt on the well corroborated prosecution case and it is rejected.

18.Having re-evaluated the trial court’s evidence I find I am in agreement with the trial court’s conclusion.

19.This appeal has no merit and it is dismissed.

Dated and Delivered at Nanyuki this 7THApril, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

Appellant: Morris Mutwiri

For state

For Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE