



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 111 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 73 OF 15)

(Being an appeal against Conviction and Sentence in Naivasha Criminal Case No. 1482/2010- E. BOKE SRM)

BALKOI OLE TEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Balkoi Ole Teka, the Appellant herein was tried for the offence of Defilement of a girl contrary to section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In that between the 27th May and 21st June, 2010 at [particulars withheld] farm he caused his genital organ to penetrate the genital organ of A.P. a girl aged 16 years.

2. He was convicted and sentenced to serve 16 years imprisonment. He has appealed to this court against the conviction and sentence. He filed amended grounds of appeal before the hearing date, as follows:

“1. That, may the Hon. Court be pleased to observe that the trial process was irregularly conducted by the pundit trial magistrate as a *voire dire* examination wasn’t conducted to determine the competency of PW1 (victim) as to whether she was honest.

2. That may the Hon. Court be pleased to find that the charges against me are defective in form (charge).

3. That, may the Hon. Court be pleased to find that investigation carried and in the present case were faultly conducted.

4. That, may the Hon. Court be pleased to find that as a first offender and by exercising its discretion, this honorable court by further exercising its unlimited powers consider me remorseful; Fully changed and ready to live an upright life in society, and be further pleased to find that the lost trust and confidence have been restored.”

3. In his written submissions on appeal, the Appellant faults the trial court for failing to conduct a *voire dire* examination before receiving evidence of the complainant minor. He asserts that there was variance between the charge and evidence the latter which indicated that he was a husband to the complainant’s mother hence the correct charge should have been incest.

4. With regard to ground 3, he argues that the complainant's age was not proved, and that the Complainant was capable of giving consent to sexual intercourse, and did so willingly in this case. The last ground is a plea for a non-custodial sentence.

5. Mr. Kibelion for the DPP opposed the appeal. He asserted that the age of the complainant was proved through the complainant, her mother and medical evidence as 16 years. He reiterated other evidence relating to the sexual relationship between the Appellant and the complainant, and in particular the cohabitation of the two as man and wife after leaving the Complainant's home.

6. In the case of **Okeno -vs- Republic (1973) E.A 32** the court of appeal set out the duty of the first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.”

7. I have considered the evidence tendered in the lower court. The prosecution case was that **A.P. (PW1)** was aged 16 years in May, 2010 and lived at Mai Mahiu with her grandmother (**M.A.E.) PW2** and grandfather (**L.A.L.)** in the material period. Her mother **M. L. (PW2)** also lived at Maai Mahiu and was the Appellant's lover. **A.P.** was a pupil at a local primary school.

8. It would seem that in the material period the Appellant was making advances towards the Complainant, which culminated in the two 'eloping' on 25th May, 2010 and residing at a rented room at Uaso. During the said 'cohabitation' they had sex. The police eventually traced the Appellant on 21/6/10 and arrested him. They found the Complainant in the Appellant's room.

9. In his defence, the Appellant made an unsworn statement. To the effect that he did not commit any offence and the Complainant fled home because her grandfather chastised her. He said that the Complainant's grandfather owes him money and that the charges were trumped up by the said man in order to escape the debt.

10. There is no dispute that the Appellant, the Complainant and her family were known to each other. With regard to the age of the Complainant, PW1 testified that she was 16 years old, in November 2010 when she testified. Her immunization card marked **Exhibit 1C** indicates that she was born on 4/3/95, which means she had just turned fifteen in March of 2010 and going to 16 years the next year.

11. She was therefore past her 15th birthday in May, 2010. The P3 forms indicate that she was 17 years old at the time of the examination on 23/6/10. The trial magistrate decided to go by the immunization card as she could not tell why the examining doctor assessed her aged at 17 years in the P3 form. The said examining doctor did not testify but the P3 form he completed was tendered by a colleague **Dr. Njiru (PW7)** under Section 77 of the Evidence Act. Possibly, the doctor relied on the age indicated by police in part I of the P3 form. Ditto the and PRC1 and the treatment card (**Exhibit 1B & 1D**).

12. This variance of age does not present a major contradiction or defect in the prosecution evidence. In any event, there was no indication that she was over 18 during the offence. The trial magistrate who had the opportunity to observe PW1 testify stated in alia:-

“I will therefore take her age as 16 years because even from her appearance she didn't look aged near or above 18 years. She is thus a minor falling under (the) age bracket between 16

years and 18 years.”

The Appellant's submissions appear not to take issue with the Complainant's age as 16 as he reiterated this age and asserting that a *voire dire* examination should have been conducted. The trial magistrate was entitled to conclude as she did regarding the evidence before her.

13. It was not necessary in my considered view to conduct a *voire dire* examination in respect of a girl aged 16 years or thereabouts. She was not a child of tender years by any stretch of imagination. A child of tender years is one aged or apparently aged under 14 years (**See Kibangeny arap Kolil -vs- Republic (1959) E.A. 92**). The requirement for the conduct of a *voire dire* examination in Section 19 (1) of the Oaths and Statutory Declaration Act relates to children of tender years.

14. The Court of Appeal had this to say on this aspect in **Haro Guffil Jillo –V-Republic [2014]EKLR:-**

“PW2 was aged 17 years, she gave sworn evidence; the age of seventeen cannot by any stretch of imagination be regarded as that of a child of tender years....The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possessed sufficient intelligence to understand the duty of speaking truthfully.....”

15. Similarly, in this case, the complainant was aged between 16 and 17 years and gave sworn evidence. She did not fall under the category of a child of tender years and therefore there was no requirement for the conduct of a *voire dire* examination. The Appellant's complaint on that regard therefore has no basis.

16. Regarding the issue of penetration, the evidence tendered through **PW2-4**, the Complainant's relatives, was that she disappeared on 25/5/10, the same period when the Appellant stopped spending nights at the house of his lover **PW2**, the complainant's mother. He was eventually traced to a room in Uaso where he was staying with the Complainant.

17. The Complainant said she had engaged in sexual intercourse with the Appellant on several occasions during this period. The penetration was confirmed by medical evidence which documented the torn hymen. The Appellant denied the offence and testified that the case was put up by **PW1-4** in order to assist **PW4** escape a debt he owed the Appellant. From the Appellant's questioning of **PW1-4** during the trial, it was evident that the Appellant had a relationship with **PW1's** family as **PW2's** lover.

18. Arising from the relationship he gave money and gifts to **PW1** and her grandparents **PW3 & 4**. He also supported **PW2** financially during their love relationship. The gifts and help were freely admitted by the witnesses, particularly **PW3 & 4** who viewed the Appellant as a potential son-in-law. But at no time did the Appellant suggest to **PW4** that he owed him Ksh.60,000/= . Instead this statement was put to the complainant's mother **PW2** who denied it, while confirming other gifts based on the relationship between her and the Appellant.

19. Even if **PW4** owed the Appellant money, this fact cannot displace the evidence of **PW1**, and other witnesses that the Appellant took **PW1** away and kept her at Uaso where he had sexual intercourse with her. The fact that the Complainant, rather than return to her grandparents' home or go to school went to live with the Appellant irked her grandparents and her mother. If indeed **PW4** only wanted to escape paying a debt, I doubt that he would have been a party to a conspiracy of such a nature with a view to 'fixing' the Appellant. From their testimony, the grandparents of **PW1** were morally outraged by the Appellant's conduct. Besides the Complainant ran off with the Appellant after **PW4** chastised her for failing to return to school. In my own evaluation the evidence tendered by the prosecution was overwhelming and dislodged the Appellant's defence.

20. Regarding other complaints, the Appellant was not a father to the complainant as indeed he was not even wedded to her mother. The two were lovers who at some point may have considered marriage. Hence a charge of incest could not have been appropriate in this case. Secondly, consent or lack of it is

not an element of a charge under Section 8 (1) and (4) of the Sexual Offences Act. Nothing therefore turns on the grounds 1-3 raised in this appeal.

21. Regarding the sentence, the court imposed a punishment of 16 years imprisonment. The section under which he was convicted carries a minimum sentence of 15 years. The sentence imposed cannot therefore be said to be excessive and I will not interfere with it. In the result, the appeal has failed in its entirety and I will dismiss it accordingly.

Delivered and signed at Naivasha, this **3rd** day of **June, 2016**.

In the presence of:-

For the DPP : Miss Waweru

For the Appellant : In person

Court Clerk : Barasa

Appellant :

C. MEOLI

JUDGE