



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.10 OF 2016

ISIAH NANDI SORE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No.9 of 2014 the Chief Magistrate's Court at Kakamega (Hon F. Makoyo, R.M.) dated 20th January, 2016.)

JUDGMENT

1. The appellant, **Isiah Nandi Sore**, was charged before the Chief Magistrate's Court at Kakamega (**Hon. F. Makoyo RM**) with the offence of defilement contrary to **section 8(1)(3)** of the Sexual Offences Act (No.3 of 2006). Particulars of the offence stated that on the 17th January 2014 at (withheld) in Kakamega South District, within Kakamega County, intentionally and unlawfully caused his genitalia to penetrate the genitalia of (withheld) a girl aged 15 years.

2. The appellant faced an alternative count of committing an indecent Act with a child, contrary to the said Act. Particulars were that on the same date the same place the appellant intentionally and unlawfully touched buttocks/breast/anus, vagina of (withheld), a child aged 15 years with his genital organ. The appellant faced a trial at the conclusion of which he was found guilty on the main count and sentenced to 20 years imprisonment.

3. The appellant then lodged an appeal to this Court on the following grounds:-

1.) THAT the learned trial magistrates erred in fact and law in convicting the appellant when the prosecution had not proved their case on (sic) required standards.

2.) THAT the learned trial magistrate erred in fact and law in convicting the appellant when the evidence adduced by the prosecution witnesses was characterised with material contradictions.

3.) THAT the learned trial magistrate erred in fact and in failing to properly analyse the evidence on record when convicting the appellant.

4.) THAT the learned trial magistrate erred in fact and law in rejecting the defence as presented by the appellant.

4. At the hearing of the appeal, learned counsel, **Mr Mukavale**, appeared for the appellant while **Mr Oroni**, was for the respondent. Mr Mukavale argued the grounds of appeal together.

5. Learned counsel submitted that although under **section 8(3)** the age of the victim should be between 12 and 15 years, the victim's age in the case before the trial magistrate was not resolved. Learned counsel pointed at the evidence of PW2 who, he submitted, had informed the court that she was 15 years at the time of the offence and 16 years at the time of the trial. However, PW1 again told the court that she had informed the appellant's parents that she was 18 years which she said she had been instructed by the appellant to do, and that she lied that she was 18 years of age so that she could continue to stay at the appellant's home.

6. Regarding PW4's evidence, learned counsel submitted that the witness, admitted that he did not assess the age of PW1. He also attacked the birth certificate produced in court as PEx1, submitting that it was doubtful. "**Whereas the offence was committed on 17th January 2014, the Birth Certificate (PEx1) was issued on 13th February, 2014** counsel submitted." PEx1 shows that PW1 was born on 19th October, 1998. Learned counsel further pointed to what he submitted was contradiction that although PW1 said she was born on 16th October, 1998, PW2, her mother, said PW1 was born on 19th October, 1998 as contained in PEx1.

7. On the Birth Certificate, learned counsel submitted that it was obtained purposely to aid the prosecution's case. **Mr Mukavale** took issue with the trial court for not addressing that issue in its judgment yet it had a bearing on the outcome of the case before him.

8. **Mr Mukavale** further submitted that the prosecution did not prove its case against the appellant beyond reasonable doubt, saying that there was no proof of penetration. Learned counsel submitted that PW4, the clinical officer never told the court that there was penetration, and that the P3 form and Post Rape Care form never contained such a finding. According to learned counsel, the P3 was signed on 20th January 2014, after 16 days from the date of the alleged offence but it is silent on penetration. Learned counsel concluded by submitting that with the above evidence, it was unsafe for the trial court to convict the appellant for the offence of defilement.

10. **Mr Mukavale**, drew the court's attention to the fact that this was a unique case where the complainant had testified for both the prosecution as well as the defence. She was PW1 and DW5. As a defence witness, PW1 said she had been asked by the police to lie that the appellant had defiled her. Learned counsel submitted that with all this, the trial court should have exercised caution and given the benefit of doubt to the appellant.

11. **Mr Oroni**, learned counsel for the respondent, conceded the appeal saying that the prosecution was faulty. According to learned counsel, the complainant testified both as PW1 and DW5 which was improper, and for that reason he did not support the conviction and sentence.

12. I have considered this appeal, submissions on behalf of both the appellant and the respondent. I have also perused the record of the trial court. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate the evidence analysed by itself and come to its own conclusion on the evidence that was before the trial court. The court should however appreciate that it neither saw nor heard the witnesses testify, and give due allowance for that (**Okeno v Republic** [1972] EA 32).

13. In the case of **David Njuguna Airiu v Republic** [2010] eKLR while relying on the case of **Okeno v Republic** (supra), the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court.”

14. The same court again stated in the case of **Joseph Njuguna & another v Republic** [2013] eKLR, that ***it is common place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record bearing in mind that it did not see or hear the witnesses, before making a determination of its own.***

15. PW1 SAM, a minor aged 16 years testified that on 4th January 2014 at 5 pm she had a misunderstanding with her father which forced her to run away to (withheld) Market. She met the appellant who was unknown to her, had a conversation and PW1 told him what had happened and due to her anger towards her father, she agreed to go with the appellant to his home. They spent the night together but did not engage in sexual intercourse. The following morning the appellant went to work and when he returned, he informed PW1 that his parents wanted to see her. The appellant asked her to inform them that she was 18 years old. PW1 told the appellants as much and from that moment, they started living together as husband and wife. On 17th January 2014 the appellant had sexual intercourse with PW1 without protection which did not please her. She contacted her relatives and left the appellant's place the following day. She met her mother, sister and cousin who had come for her and proceeded to report the matter to police.

16. In cross examination, PW1 told the court that she went with the appellant because she did not want to go back to her father; that she had no option but to go with the appellant, and that she would have complained if the appellant had had sexual intercourse with her without a condom. She also denied that she was pushed with her family to report the matter to the police. PW1 also admitted that she lied to the appellant's parents regarding her age so that she could continue to stay with him.

17. PW2 TK, mother to PW1 told the court that on 4th January 2014 she returned home at 6 pm and found PW1 absent. On inquiring from PW1's sister, she was told that PW1 had left to an unknown place with her bag. She learnt from her husband that he had had a quarrel with PW1. After almost a month, she asked PW1's father to report the matter to the police. On 12th January 2014, PW1 called her but hung up without revealing where she was. Later PW1 was found and together they reported the matter. According to PW2, PW1 was born on 16th October, 1998. In cross examination, the witness told the court that PW1 had sent her sister a text messaging informing her sister that she had been married to someone she loved.

18. PW3, LMM, a sister to PW1, told the court that on 6th January 2014 she called home and was informed that PW1 had disappeared from home. She tried to trace her to no avail. Later PW2 called her and informed her that PW1 had called her and informed her that she was safe and married. PW3 used the number and was able to talk to both PW1 and the appellant but did not know his name. PW1 informed her that she was living with the appellant's family well and that she was a house-wife. According to PW1, she persuaded the appellant to prevail on PW1 to go back to school. Later PW1 contacted her and told her that she wanted to leave but did not want the appellant to know. PW3 organised to have PW1 picked and they reported the matter to the police.

19. In cross examination, PW3 admitted that she did not know what PW1 told the appellant leading to their cohabitation. The witness further admitted that she had a conversation with the appellant but denied quarrelling with him.

20. PW4 **Patrick Mambiri**, a senior clinical officer testified that on 18th January 2014, PW1 was taken to hospital with a history of abduction and defilement. On examination, the outer genital was normal, hymen was torn with a fresh tear but there were no lacerations. Urinalysis and pregnancy test was negative, no spermatozoa, were noted. High vaginal swab was done which revealed epithelial cells which he said was normal. He produced laboratory results form as PEx2, P3 form as PEx3 and PRC as PEx4. In cross examination the witness told the court that he did not ascertain the age of PW1. He also told the court that he examined PW1 after 16 days.

21. PW5, **No.57848, Johnson Gichiri** told the court that on 18th January 2014 he received PW1 accompanied by PW2 who reported a case of defilement after PW1 was abducted on 4th January 2014 and stayed away until 18th January 2016. PW5 accompanied them to hospital where the P3 form was filled. He then recorded statements from PW1 who was 15 years and other witnesses. He arrested the appellant and charged him in court. He produced the birth certificate as PEx1. In cross examination, the witness told the court that the appellant informed him that PW1 had told him that she was over 18 years. According to the witness, offence of defilement took place on 17th January 2014 and a report was made on 18th January 2014.

22. In his sworn defence, the appellant told the court that on 4th January 2014 he was going about his work when he was informed by the complainant's family that their daughter had disappeared. He told them that he had nothing to do with it. The complainant who used to collect milk from them, borrowed his phone and used it to call someone unknown to him. PW1 went back to him again on 12th January 2014 and requested for his phone again. Later that evening someone called him and inquired the where about of PW1 was. He promised that he would ask the girl to call him when she returned but PW1 did not return. On 18th January 2014 the appellant demanded his phone from PW1 but was told that her relatives had taken it. When he insisted, PW1 threatened him with drastic consequences. On 21st January, 2014 PW1 they had an altercation. He was later arrested and charged with the offence. He denied that he committed the offence.

23. DW2, a friend and neighbour to the appellant, testified that after the appellant's arrest he went to see him but was surprised to learn that he was charged with defilement. He told the court that he had not seen PW1 at the appellant's place. PW3 MM, mother to the appellant on her part testified that on 21st January 2014 the appellant called to inform her that he had been arrested. She denied that PW1 had lived in her home with the appellant.

24. DW4, **AC** and brother to the appellant testified that he was surprised by the arrest of the appellant on allegations of defiling PW1. He told the court that he lives with the appellant in the same compound but never saw PW1 in their home.

25. DW5, **MSN** a minor aged 17 years testified that she left home and went to stay with her sister. She used the appellant's phone to call her sister and that she was asked by police officers to say that the appellant had defiled her and for that reason she gave false testimony against the appellant. DW5 is the same PW1 and complainant in this case.

26. This appeal has been conceded by the State. However, that does not mean the appeal will automatically succeed. The court sitting on appeal has a duty notwithstanding that the appeal is conceded, to consider the appeal, evaluate the evidence on record and come to its own conclusion on that appeal. The court is not bound by the concession and an appeal cannot be allowed on that basis alone. In the case of **Odhiambo v Republic** [2005] 1 KLR 564 the court held:-

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination on the evidence.”

27. The appellant's first ground of attack was that the prosecution did not prove its case as required that is beyond reasonable doubt. On this, learned counsel submitted that there was no proof of penetration, a major ingredient in the offence of defilement and rape. Counsel referred to the evidence of PW4, the clinical officer, the P3 form PEx3 and PRC PEx4 which are silent on penetration.

28. Under **section 8(1)** of Sexual Offences Act No.3 of 2006, a person is guilty of defilement if he/she **commits an act that causes penetration with a child**. **Section 2** of the Act defines **penetration** as the **partial or complete insertion of the genital organs of a person into the genital organs of another person**. Penetration is therefore a major ingredient in establishing defilement.

29. PW1's evidence was that she left home after differing with her father and went away. She met the appellant and went with him to his home. They did not have sexual intercourse on the first day but engaged in sex subsequently, until 17th January 2014. She got in touch with her family members and left the appellant's home on 18th January 2014. The matter was reported to the police and she was taken to hospital.

30. PW2 testified that she found PW1 missing and for some time she did not know where she was, until 12th January 2014 when PW1 contacted her but did not tell her where she was. PW3 on her part told the court that PW1 got in touch with her using the appellant's phone and informed her that she was married and was staying with the person who had married her.

31. PW4, the clinical officer testified that he examined PW1 and found the hymen torn with a fresh tear. There were no lacerations and no spermatozoa. He did not say what opinion he formed. The P3 form PEx3 and PRC PEx4 are also silent on penetration although they both say the hymen was torn.

32. Despite the fact that PW4 did not state his opinion that there was penetration, the fact of torn hymen with a fresh tear was in my view, evidence of penetration which was consistent with PW1's evidence that she had sex which established the fact of defilement. There was therefore sufficient medical evidence to establish defilement. Contrary to the appellant's submission that there was no penetration, I noted that the court reached the same conclusion.

33. **Mr Mukavale** again submitted that there was no proof of age of the complainant hence the offence was not sufficiently proved. According to learned counsel, there were contradictions on the age and pointed out the evidence of PW1, PW2 and PEx1 to show the contradictions.

34. For the offence of defilement to be complete apart from penetration, the victim must be below 18 years of age. PW1's evidence was that she was born on 16th October, 1998 while PW2 said PW1 was born on 19th October, 1998. The Birth certificate (PEx1) showed that PW1 was born on 19th October, 1998. **Mr Mukavale** has taken issue with the Birth certificate, submitting that whereas the offence was allegedly

committed on 17th January 2014, the Birth certificate was obtained on 13th February 2014 long after the offence which was suspect and arrived at aiding the prosecution.

35. I have perused the record of proceedings before the trial court. It is true PW1 told the court that she was born on 16th October 1998, while her mother, PW2, said she was born on 19th October, 1998. That is the date contained in the certificate of Birth. That discrepancy of three days is in my view immaterial because PW1 would still be 15 years. The certificate of birth also indicates that PW1's birth was registered on 8th December, 1998 although the certificate itself was issued on 13th February, 2014. I do not see any prejudice caused to the appellant because even without the certificate of birth, the court could still accept age as proved by evidence of PW2, mother to PW1. It was PW2 who gave birth to PW1 and was the proper person to tell the date of PW1's birth. On this, I agree with the holding in the case of ***Fautine Mghanga v Republic*** [2012] eKLR ***where the court stated that age may be proved by a birth certificate or particularly in the case of Africans, by the evidence of a person present at birth.*** This is because some births are never registered because they take place at home. I therefore accept the evidence of PW2 that PW1 was born on 19th October, 1998 and for that matter, she was a minor for the purposes of **section 8(1)(3)** of the Sexual Offences Act. The learned trial magistrate reached the same conclusion and there is no reason to differ with him.

36. After disposing of the fact of defilement, the critical question to determine is whether on the basis of the evidence on record, the appellant was properly convicted. The appellant's complaint is that the trial court did not properly analyse the evidence on record and fell into error in rejecting his defence. Learned counsel in his submissions pointed PW1 as untruthful and unbelievable. He pointed at her evidence where she told the trial court that she lied to the appellant's parents in order to stay with the appellant and also the fact that it was the appellant who advised her to lie that she was 18 years old.

The learned magistrate believed the evidence of the prosecution witnesses and concluded that PW1 was defiled by the appellant. He rejected the appellant's defence and his witnesses saying that it was an afterthought and that his witnesses' evidence was meant to get him out of trouble.

37. I have gone through the record of proceedings before the trial court. PW1, the complainant was recorded to have said in chief:-

“I was seated next to a kiosk near where he sold milk. He asked him me name (sic) and my age and I told him my name and my age which was 15 years. He asked me whether I would go to his house at first I refused but since I was still angry at my father I later agreed. We left for his house at about 6 pm and got to his house at 7.00 pm. He offered me food but I had no appetite. We spent the night together but he did not ask for any sexual intercourse. The next day he left home for work and returned in the evening. He told me that his parents wanted to see me and instructed me to tell them that I was 18 years and studying at [particulars withheld] and I was there to be his wife. This was happening outside his parents house. I met his parents and lied as per his instructions.”

38. In cross examination, PW1 stated as follows:-

“I was not planning to get married as this happened just abruptly. I went with him because I did not want to go anywhere near my father ... I did not have an option. I lied to his parents so as to continue living with the accused.”

39. In his defence, the appellant denied committing the offence and told the court that PW1 took his phone and when he demanded it, she threatened him with consequences. He called witnesses who denied that PW1 stayed in the appellant's home. They testified that they never saw her and were not aware of the alleged offence. Interestingly one of the appellant's witness was PW1 herself, who testified as DW5. This is what she told the court in chief:-

“I left home and went to stay with my sister SK at (withheld) market. I called my sister using Susan in law's phone. The in law Isaiah Nandi Sore, I was told by Isulu Police Station officer to say that the accused had defiled me. That is why I gave false testimony. That is all.”

40. PW1 had been subjected to a **voire dire** examination and the trial court was satisfied that she understood the need to tell the truth and was therefore sworn. She told the court that she had been instructed by the appellant to lie to his parents that she was 18 years old. In cross examination she admitted that she lied so that she could continue staying with the appellant. All of a sudden, she turned up as a defence witness and told the court that she was staying with her sister and that she had been asked by police officers to lie that the appellant had defiled her. Despite this and although the learned trial magistrate noted that the witness had committed perjury. He still went ahead to convict the appellant, relying on her evidence.

Which version of PW1's evidence should be believed? Was she defiled by the appellant or someone else? Was she told to lie against the appellant? In my view, having admitted on oath that she had lied to court against the appellant on the instruction of the police and taking into account the number of times she told the court she had lied on the instructions of the appellant, her testimony was unbelievable. The witness who was the only one who knew the defiler was inconsistent and deliberately lied to court thus rendering her testimony unbelievable.

42. The appellant faced a serious charge whose minimum sentence is twenty years in jail. An offence of such a serious nature requires to be proved beyond reasonable doubt and there should be no room for conjecture. I agree with learned counsel for the appellant, that on the basis of wavering testimonies of PW1, it was unsafe to convict the appellant on such evidence. And I have no doubt, learned counsel for the respondent properly conceded this appeal. The complainant's evidence could not be believed and could not be the basis of a safe conviction. The complainant having deliberately lied on oath, made her evidence worthless, and even though the trial magistrate noted this and ordered that she be arrested and charged for perjury, it was unfortunate that he did not direct his mind on the value of a perjured witness' testimony. She was either defiled by the appellant or not. Having chosen to be agree, this raised a doubt in her evidence and the appellant should have been given the benefit of doubt.

For the above reasons, I find that the appellant's appeal has merit and is allowed. I hereby quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 7th day September, 2016.

E.C. MWITA

JUDGE