



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO. 163 OF 2015

[Being judgment by Hon. G.R Sagero, SRM arising from Bungoma criminal case no. 1136 of 2011]

ERICK WEKESA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The appellant **Erick Wekesa Simiyu** was charged with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act. He was also faced with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the said Act.
2. The trial court found the appellant guilty of the main charge convicted and sentenced him to 15 years. Being aggrieved with the judgment the appellant appealed to this court. His grounds of appeal may be summarized as follows; the trial court failed to properly analyze the evidence before it; there were contradictions in the prosecution case, the case did not adequately consider the defence case, the court failed to set out proper issues for determination and the prosecution failed to prove its case beyond reasonable doubt.
3. Prosecution consented to the appeal in that the complainant aged 16 could be married.
4. This is the first appellate court and it must consider the evidence on record afresh, analyze and evaluate the same in order to arrive at an independent decision **See Okeno Vs. Republic [1973] E.A.**
5. The prosecution's case in brief is that the complainant disappeared from the parents' home on the night of 6th of November 2012, and on 10th of November 2012, was traced to the home of the appellant who was her boyfriend. The two had sex for the time they stayed together. The complainant was at the time aged 16 years and a pupil at High Gate Education Centre class 6.

PW1 the complainant S M informed the court that on 10th November, 2012 she left her home to her in-laws. She received a call from the complainant who was her boy friend and she left for his house. She slept with him in his room and the next day at 5.00 a.m. police arrived and arrested them. She was later taken to hospital and a P3 form filled. She confirmed that on the material night they had sex twice.

PW2 M N M – she confirmed her daughters disappearance on the night of 6th November, 2012 and on 7th she was found at the appellants.

PW3 Michael Okimaniti Otobakana a clinical officer at Naitiri sub-county hospital recalled examining PW1 on the 10th of November, 2012. He confirmed her age as 16 years. He found no injury to the labia and majora. He however found the vagina wall was hyperemic. There were blood stains in the vagina swap and signs of penetration .

PW4 R M recalled PW1 disappearing on the 6th and how she was found at the appellants on the 7th of October, 2012. Her testimony differed with that of PW1, however in material aspect it confirmed that the complainant was found at the appellant's after she disappeared.

PW5 Peter Musinya was the investigating officer. He recalled that on the 7th of November 2012 he received instructions to investigate a case of defilement and on 10th of November, 2012 he went to the appellants house knocked and he found the complainant and the appellant together. He arrested them and he issued a P3 form.

6. The issues for determination are; whether PW1 was minor at the time of the alleged offence, whether she was defiled if so is the appellant culpable?

7. The age of the appellant was given as 16 years at the time of the incident. A birth certificate was produced. The defence did not challenge and therefore age is established to have been 16 years.

8. In his defence the appellant admits that PW1 was found in his house early morning just the two of them. His explanation of how and why the two were found there does not add up or ever dislodge the evidence of the prosecution.

9. In my view the inconsistencies in the prosecution case are too minor to dislodge the otherwise overwhelming evidence against the appellant.

10. The prosecution proved its case as required, beyond all reasonable doubt and for the said reason I am in concurrence with the trial magistrate's finding and see no reason to interfere with the same.

11. The conviction is also lawful and therefore the appeal must fail. It is dismissed.

DATED and DELIVERED at BUNGOMA this 10th day of November 2016

ALI-ARONI

JUDGE.