



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 18 OF 2014

MICHAEL OCHIENG JUMA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo

(Hon. B. R.. Kipyegon RM) dated the 21st March 2014 in Bondo PMCCR No. 66 of 2013)

J U D G M E N T

The appellant was charged and convicted for intentionally causing his penis to penetrate the vagina of L A O a child aged 17 years contrary to section 8 (1) (4) of the Sexual Offences Act. The offence was alleged to have occurred on 28th June 2012.

Being aggrieved by the conviction and sentence he filed this appeal and substituted petition raise the following grounds:-

1. **That the learned trial magistrate erred in law and in facts by failing to observe that he was never subjected to any medical examination as the DNA report read negative.**
2. **That the learned trial magistrate failed to notice that he was not culpable since the pregnancy was diverted to another culprit who never appeared before the honourable court.**
3. **That the learned trial magistrate erred in law and facts by failing to observe that there was no material evidence e.g. inner pant presented as exhibits.**
4. **That the actual age of the complainant was never established before the honourable Court.**

Substituted Grounds

1. **That the trial magistrate erred in law and facts by failing to observe that the DNA result which would have proved the alleged offence was not brought to Court and marked as exhibit.**
2. **That the trial magistrate erred in law and facts by failing to observe that the trustworthiness of the complainant was not proved since it is only the DNA and age that would have proved her genuineness.**
3. **That the trial magistrate erred in law and facts by relying on the verbal age given by the PW2 complainant without insisting on production of either birth certificate or age assessment to prove the age.**

Briefly the facts of the case were that when the K.C.P.E. results for the year 2012 were released on

1/2/2013 it turned out that the complainant in this case was the top student at *[particulars withheld]* Primary School. She was however nowhere to be found and so Mannas Omondi Osung, the area Assistant chief (PW1) started looking for her. He found her at Uhanya Beach and on interrogating her she confessed she was pregnant and that Meka was responsible. PW1 knew Meka was the appellant as he was his subject. He therefore arrested him and took him to Usenge police station where he was charged with this offence.

The complainant testified that sometimes in June 2012 she was sent home from school for lack of school fees and that on 28/6/012 the appellant promised to assist her. He had called her to his house and after promising to assist her he asked if they could have sex. At first she refused but gave in on condition that he used a condom.

Fifteen minutes into the intercourse she discovered he was not using a condom. He never paid her school fees and the next month she discovered that she was pregnant. She gave birth to a baby girl on 13/3/2013. she stated that prior to June 2012 she did not know Michael and that she had sexual intercourse with him only once. She gave her date of birth as 19th September 1997.

Sammy Ombaso Okumu (PW4) a clinical officer at Got Agulu Sub-District Hospital testified that he examined the complainant on 2nd February 2013. He noted that her hymen was missing but because she had taken long to go for examination no tests were conducted.

On his part the appellant testified that he was a fisherman at Uhanya village and that on 5th March 2012 he had a confrontation with their Assistant Chief in a bar. The Assistant Chief had demeaned his (appellant's) father and then accused him (appellant) of disrespecting and embarrassing him. He promised to "show him" one day and that he would regret it. On 17th January 2013 he went fishing for a week and when he returned he found a school girl pregnant. On 2nd February 2013 one Manase summoned him to his office and then called the police who took him to Usenge police station where he stayed for 3 days. On 3rd February 2013 he was charged with this offence which he knew nothing about. He however admitted that he knew the complainant.

As the first appellate Court I have considered and evaluated this evidence by both sides carefully all the while bearing in mind that I did not have the benefit of seeing the witnesses give evidence. I have also paid heed to the submissions made by both sides at the hearing of this appeal.

The complainant reported this matter close to eight months after the offence had occurred. This report was made to the Assistant chief who had gone in search of her.

M A O (PW3) her elder sister told the Court that she had mentioned the pregnancy to her on 22nd December 2012 and that she (the complainant) had given her the name of the man responsible and even given her his phone number but she could not reach him. She did not however refer directly to that man as the appellant since it had taken so long for this matter to come to light and as the complainant was pregnant and had in fact given birth. The prosecution requested that a DNA be carried out and this request was granted on 19th April 2013. The record shows that by 5th June 2013 the DNA report was ready. It was however not produced in evidence. The appellant has dwelt on this in his submissions. Much as Section 124 of the Evidence Act provides that the evidence of the victim of a sexual offence is sufficient provided the Court believes she is telling the truth. I find that in this case we cannot ignore the omission to produce this DNA report. This is because it would go directly to the credibility of this witness.

The omission to produce it can only mean one thing and that is that the appellant was not the father of the child. That is what giving the benefit of doubt to an accused person entails. If he was not the father of her child, was the complainant credible when she said that she had never and did not afterwards have sexual relations with any other man. It can only mean that she was not truthful and in the circumstances she was not a credible witness.

The trial magistrate seemed to have been impressed by her knowing the exact date of her birth and also

her knowledge menstrual cycle. She also impressed me as a very intelligent witness. I am not however convinced that she was a truthful witness. Accordingly I would give the appellant the benefit of doubt, allow his appeal, quash the conviction and set aside the sentence and order that he be released forthwith unless otherwise lawfully held.

Signed, dated and delivered at Kisumu this 11th day of June 2015

E. N. MAINA

JUDGE

In the presence of:-

Ruto for the state

Appellant in person

CC: Moses Okumu/Rose Abondo