REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 44 OF 2014

NOAH BIWOT …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(An appeal from the original conviction and sentence of J. M. Nang'ea Senior Principal Magistrate in Criminal Case No. 3188 of 2010 delivered on 1st April 2010 at Kitale.)

J U D G E M E N T

1. The appellant, ***Noah Biwott,*** appeared before the Senior Principal Magistrate at Kitale charged with defilement, contrary to s. 8(1) read with S.8(3) of the Sexual offences Act. It was alleged that in the morning of August, 2010, at [Particulars withheld] village Trans-Nzoia County, the appellant defiled ***P T***, a girl aged fourteen (14) years and in the alternative, committed an indecent act with the girl contrary to s.11(1) of the Sexual Offences Act.
2. After a full trial, the appellant was convicted and sentenced to twenty (20) years imprisonment on the main count. He was dissatisfied with that outcome and preferred this appeal on the basis of the grounds in the petition of appeal dated 14th April, 2014. He appeared in person at the hearing of the appeal and relied on his written submissions in support of the appeal. He urged this court to allow the appeal and set him free.

3. The learned prosecution counsel, ***M/s Limo***, opposed the appeal on behalf of the respondent by submitting that there was sufficient evidence against the appellant. That, the evidence of the complainant (PW1) was unshaken and was confirmed by that of the doctor (PW5). That, the appellant was found to have defiled the complainant on several occasions and that his grounds of appeal are unsustainable as there were no contradictions as alleged herein. That, the evidence against the appellant was uncontroverted and the sentence imposed on him was lawful.

The Learned Prosecution Counsel, urged this court to dismiss the appeal.

4. Having considered the grounds of appeal in the light of the submissions by both sides, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

5. Briefly, the case for the prosecution was that the complainant ***F T N*** (PW1). Was at the material time a primary school girl and the appellant was her neighbour at [Particulars withheld] village. She indicated that she was aged fifteen (15) years at the time and that on the 13th day of August, 2010, she was called by the appellant into his maize plantation where he seduced her and she agreed to engage in sexual inter-course with him. He used a rubber sheath (condom) in the first instance but not the second instance. She thereafter went home .

6. In the month of September 2010, her mother ***C N N (PW2),*** suspected that, she was pregnant and took her to Kapchibora dispensary for examination. Her father, ***P N S (PW3)***, was notified accordingly. At the dispensary, it was revealed that she (complaint) was pregnant. She identified the appellant as the person responsible for her pregnancy.

7. Her parents (PW2 and PW3) indicated that she was born on 9th February 1996 and was aged fourteen (14) years. They reported the matter to the children's officers who referred the matter to

the police. ***PC Paul Kamau*** (PW4), received the necessary report when the complainant and the appellant were taken to him at the Kitale Police Station. He interviewed the complainant and thereafter escorted them to Sibanga Police Base which fell under Cherangany Police Station in whose jurisdiction the matter fell.

8. ***PC George Mandu*** (PW6), took over the investigations of the case from a colleague who had been transferred. He went through statements obtained from witnesses and caused the appellant to be charged with the present offence.

In his defence, the appellant contended that the charge was strange to him. He implied that he was framed by the complainants since they owed him money for maize. He said that the village elder apprehended him and alleged that he had defiled the complainant a fact which was not true.

9. After considering the evidence, the learned trial magistrate concluded that the complainant was defiled and that the appellant was responsible for the offence as alleged by the complainant who was found to be a credible witness. The learned trial magistrate also found that since the complainant was born on 9th February 1996, she could have been a minor aged 14 years or thereabout at the time of offence and more so, because her age was never challenged or disputed by the appellant.

10. This court on its part would find that there was sufficient evidence from the complainant and her parents showing that she voluntarily engaged in sexual inter-course with a man in the month of August 2010, as a result of which she became pregnant. Her age was not established by necessary evidence. It was therefore difficult to say with certainty that she was a minor at the material time.

Indeed, the learned trial magistrate appreciated that no records were produced to prove the complainant's alleged or suspected age but went ahead to hold that she was a minor since the fact was not disputed by the appellant.

11. With respect to the learned trial magistrate, it was not for the appellant to establish his innocence or prove the complainant's age. The burden to do so lay squarely with the prosecution. Suffice for this court to hold that the prosecution did not discharge the burden to prove that the complainant was a minor at the material time of the offence.

12. Be that as it may, the evidence implicating the appellant was that of the complainant alone. Such evidence could be relied upon on its own provided that the court was satisfied that the complainant spoke the truth. Herein, the learned trial magistrate found that she spoke the truth as her evidence and that of her parents was not discredited by the appellant whose defence was treated as an after thought.

13. Here again, the learned trial magistrate shifted the burden of proof to the appellant yet it was for the prosecution through the complainant and others to prove that the appellant was responsible for having carnal knowledge with the complainant and impregnating her.

The appellant denied the offence. It was the responsibility of the prosecution to prove otherwise. This court does not think that the prosecution discharged its burden of proof in that regard.

14. The complainant from the very beginning was not certain as to the date of her involvement in sexual intercourse. She talked of the 13th day of August 2010, yet she informed PC Mwangi (PW4) that she could not remember the date. She also stated that she was at a ladies camp from 15th to 22nd August 2010 and that it was in September 2010, that her mother suspected her of being pregnant. She said that she was taken for a pregnancy test in October 2015, and the results were positive. Her mother (PW2) said that she gave birth to a baby boy named ***John Kiprop*** on the 28th August, 2011.

15. The complainant also stated that the appellant was her ex-boyfriend and that they often engaged in sexual intercourse even prior to the month of August 2010.

From all the foregoing statements by the complainant, it could not be said that she was a credible and reliable witness for a finding that the appellant was responsible for defiling and impregnating her and more so, when there was no DNA test to confirm the paternity of her child, the product of the alleged illicit affair.

16. It is the finding of this court that there was insufficient evidence to establish that the appellant was responsible for the alleged offence. His conviction by the learned trial magistrate was therefore neither sound nor safe.

Consequently, this appeal is allowed to the extent that the conviction is quashed and the sentence of twenty (20) years imprisonment set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

J. R. KARANJA

JUDGE

[Delivered and signed this 2nd day of July 2015**]**