REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO.10 OF 2015

ERASTUS WANYONYI WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

ERASTUS WANYONYI WANYAMA, the appellant herein was convicted by the lower court in Kapenguria for an offence of defilement, contrary to section 8(1), (4) of the Sexual Offences Act No.3 of 2006.

The particulars of the said offence as carried in the charge sheet are that on the 5th day of April 2011 at [particulars withheld] sub-location in Seker location, within West Pokot County, the accused did cause his penis to penetrate the vagina of D K, a child aged 13 years.

Upon conviction on 21/3/2014, he was sentenced to serve 20 years imprisonment. Dissatisfied with the said conviction and sentence, he appealed to this court on 27/3/2014 on the following grounds;-

(1) That he had pleaded not guilty to the charge.

(2) That trial Magistrate erred in law and facts by convicting him on contradictory and inconsistent evidence of the prosecution witnesses.

(3) That the trial Magistrate erred in law and facts when he failed to consider the evidence of penetration in this case.

(4) The evidence of the Clinical Officer proved that the girl was not found with any signs on her genital organs.

(5) The trial Magistrate erred in law and facts when he did not note that the prosecution failed to conduct DNA test to confirm if the accused was responsible for the complainant's pregnancy.

(6) The trial Magistrate erred in law and facts when he failed to consider his defence.

(7) The prosecution side did not prove the case beyond any reasonable doubt.

(8) The prosecution failed to call essential witnesses to second the matter.

(9) He would raise more grounds during the appeal hearing.

The prosecution case as was presented in the lower court shows that the complainant at the time of the offence, that is on 5/4/2011, was a pupil in [particulars withheld] Primary School in class 5. The complainant and the appellant had met for 2 days prior to 5/4/2011. They had developed friendship. On 5/4/2011 they went to Katakit Forest at about 7pm. They removed their pants and had sex. In the words of the complainant, the accused laid on her and put his thing into her private part two times. She conceived out of that engagement.

Later on 24/6/2011 they met and went to Mwisho farm, the appellant's home. They stayed together for a week, sleeping together and having sex. She had consented to all that.

PW2, the complainant's father stated that he was told by his wife that the complainant disappeared and was not going to school. She was 13 years then, having been born on 4/8/1998. He reported at Marich police station. He also asked about her in the area and was informed about her friend called E W. A village elder also disclosed of a girl who was at Mwisho farm trying to ask where Makutano was. It was alleged the girl was being locked during the day. The said elder told police at Kwanza police post about it. On 1/7/2011 the two were arrested. The complainant was taken to Sigor sub-district hospital. She was examined and her P3 form filled on 4/7/2011 by PW3. He confirmed that she was pregnant and was 13 years old. He was of the opinion that there was a sexual contact. PW4, the investigating officer received the complainant's Birth Certificate from her parents and some letters from the school where she was a pupil. He produced them in court as exhibits.

The appellant, who gave unsworn testimony in his defence, alleged he was fixed by William who's the complainant's father, as he rented a house in which William used to. He denied that he was with the complainant in his house.

Mr. Thuo who appeared for the State, stated that the age of the girl was well established by the evidence of the Birth Certificate and was not challenged in the lower court. On the issue of DNA test, he averred that it was not necessary in the case. He further argued that there was evidence of penetration of which was corroborated by the Clinical Officer. Lastly, he disagreed with the appellant in the allegation that his defence was not weighed by the trial Magistrate. Page 25 of the judgment reflects that it was weighed against the prosecution case and rejected. He urged the court to dismiss the appeal and uphold the conviction and sentence.

As a court of first appeal, I have evaluated the entire evidence afresh.

The evidence of the complainant shows that her and the appellant were lovers. On 5/4/2011 they had sex at Katakit Forest of which led to her pregnancy. Thereafter on 24/6/2011 she went with him to Mwisho farm, where they lived together in his house having sex. The fact that PW3 confirmed she was pregnant, corroborates her evidence that she was penetrated in her genital organ by the appellant, with his genital organ, as that is the most possible way on how she got pregnant. She herself averred so. Penetration was therefore proved by the prosecution to the required standard. On the issue of DNA, I wish to echo the words of court of Appeal in Nyeri, in the case of **Geoffrey Kioji-VS- Republic Criminal App. No.270/2010** where the court stated:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it's satisfied that there's evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the provisions of section 124 of the Evidence Act, Cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a Sexual Offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

This makes it clear that DNA evidence, of which would link an accused person to the offence or otherwise, more so in a case where it's claimed the victim got pregnant out of defilement or rape, is not mandatory. If obtained it's highly welcome for consideration, but if not other evidence need be weighed

and a decision made.

PW1 and PW2 did not express any hatred for the appellant in their evidence, even during cross-examination. PW1 was even sincere and honest that they were lovers and had consented to it. The accused did not cross-examine on the issue of grudge between him and complainant's father in that he occupied a house complainant was evicted from. Such defence was therefore an afterthought.

In the case of ***Lazarus Ocharo Kieya -Vs- Republic, Criminal App. No.252/2011,*** the High Court of Kenya at Kisii in regarding the age of the complainant stated that a birth certificate is conclusive proof. It's therefore possible for the complainant, especially if a minor not to be certain of her age, but in presence of a Birth Certificate the issue is settled. Such was the case with PW1. However her Birth Certificate established that she was 13 years old. She was a child at the time of offence, lacking capacity in law to consent to sex.

The foregoing grounds confirms that the trial Magistrate rightly evaluated the evidence in the case and arrived at the right decision, that the offence against the accused was proved by the prosecution beyond reasonable doubt.

The sentence passed is legal and I have no cause to interfere. I accordingly dismiss the appeal and uphold both the conviction and the sentence.

STEPHEN GITHINJI J

Judgment read, delivered and signed in open court in presence of the Appellant, the State Counsel and Court clerk this 5th day of November 2015.

STEPHEN GITHINJI J

5/11/2015