



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 66 OF 2012

(An appeal against both conviction and sentence of the Senior Resident

Magistrate’s court at Hamisi in Criminal Case No. 425of 2010

[J. K. NG’ARNGA’R, PM] dated 6th August, 2012)

BONFACE JUMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was convicted of defilement contrary to **Section 8 (1) of the Sexual Offences Act No. 3 of 2006** in that on 19th July, 2010 at [particulars withheld] in Vihiga District within Western Province unlawfully and intentionally had carnal knowledge of N M, a girl aged 7 years. He was sentenced to life imprisonment. Being dissatisfied with the decision of the trial court, he has come to this court on appeal challenging both the conviction and sentence. In addition to his petition of appeal, he filed written submissions, which I have perused.

The learned Prosecuting Counsel Mr. Oroni, conceded to the appeal on the grounds that the age of the complainant was not established through evidence.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my conclusions and inferences. I have to take into mind that I did not have the opportunity to see the witnesses testify and determine their demeanour. See the case of **Okeno -vs- Republic [1972] EA 32**.

I have re-evaluated the evidence of record. The mother of the complainant testified as PW1. She was E M. She did not give any evidence regarding the date or year of birth of the complainant. She did not give the age of the complainant. The complainant testified as PW2 and stated that she was 7½ years old. The Clinical Officer PW6 Simon Manu did not medically assess the age of the complainant. He relied on the apparent age indicated in the P3 form by the police. The school teacher PW3 H B stated that the complainant was in Std. 2.

The totality of the above evidence therefore is that the age of the complainant was not established. I have no doubt that she might have appeared to be a young girl. That must be the reason why she testified without taking an Oath. However, it is not for this court to speculate on the age of the complainant. The ingredients of the charge had to be proved by the prosecution beyond any reasonable doubt. The prosecution did not do so with regard to age. The benefit of the doubt has to be given to the appellant, and I do so.

The main reason why this appeal will be allowed however, is with regard to the credibility of witnesses. The complainant stated that she was defiled on 19/7/10. The school teacher, PW3 took her to hospital on 20/7/10. By that time, the complainant had neither mentioned the defilement to her mother or to the school teacher. It was PW6, the Clinical Officer who actually detected the inflammation in the vagina. There is no record in the evidence that the complainant even told the Clinical Officer about the person who had defiled her. It is apparent that she told her mother about the defilement after coming from the hospital.

In addition to the above, the police did not say when and how they got to know that the appellant was the culprit. Instead, their evidence was that he was handed over to them on 10/8/10. This was the evidence of PW4, PC Galgalo and PW7 PC Tuwei. This evidence is also at variance with the date of arrest as given by PW5 Kepha Mulinya who stated that the arrest occurred on 19/7/10. It is also apparent that three people were initially arrested.

No explanation was given in evidence on the variance of the dates between the date of arrest and the date of hand over to the police. No explanation was given on what happened to the other two people who had been arrested.

In my view, the circumstances of arrest and number of people who were initially arrested as well as the lack of evidence to show that it was the appellant who was being sought after as the culprit, gives the inference that the complainant did not give specific information that it was the appellant who was the culprit herein. It appears that the appellant was singled out because he was a former lover of the mother of the complainant. It is possible that due to the now strained relationship between the two, the mother of the complainant and the complainant decided to implicate the appellant. The circumstances and the evidence on record do not point to the involvement of the appellant in the commission of the offence. It is also possible that the inflammation on the private parts of the complainant was not necessarily caused by the defilement. Inflammation can be caused by many various causes.

The learned Prosecuting Counsel has conceded to the appeal, and I agree with him.

In the result, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered this 13th day of March, 2014

George Dulu

J U D G E