REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 88 OF 2011

(An appeal against both conviction and sentence of the Senior Resident Magistrate's court at Butali in Criminal Case No. 1293 of 2010 [S. N. ABUYA, SRM] dated 27th May, 2011)

JACKSON EBOSO MOYOTI ..... APPELLANT

VERSUS

REPUBLIC …….……..……. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with a main count of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual offences Act No. 3 of 2006. The particulars of the charge were that on 26th December, 2010 [particulars withheld], Kakamega North District within Western Province unlawfully inserted his genital organ namely penis into the genital organ namely vagina of one J S aged 16 years. In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the same Act. The particulars were that on the same day and place, unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of J S a girl aged 16 years. He denied both charges. After a full trial, he was convicted on the main count. He was sentenced to serve 15 years imprisonment.

Being dissatisfied with the decision of the trial court, he appealed to this court through his counsel M. Kiveu advocate. His advocate filed written submissions to the appeal. At the hearing of the appeal, Mr. Kiveu added that the age of the complainant was not proved, as no age assessment was done.

The learned Prosecuting Counsel Ms Opiyo, opposed the appeal. Counsel stated that the trial court relied on the evidence of PW4 who was a Medical practitioner. Counsel also argued that the charge sheet was proper, as it disclosed the offence of defilement. In counsel's view, the evidence supported the charge. Counsel lastly submitted that the sentence was the minimum sentence provided by the law.

In response to the submissions of the Prosecuting Counsel, learned counsel for the appellant Mr. Kiveu, stated that the age of the complainant was not proved by documentary evidence. The Clinical Officer merely gave a personal opinion on the age of the complainant. Counsel also argued that mitigation of the appellant was not taken into account in determining the sentence.

The prosecution case is in brief that PW1, the complainant aged 16 years, was walking on the road when the appellant called her to his house. He locked the house both from outside and inside. He had carnal knowledge of her three times until 10.00 p.m., when the father of the complainant, PW3, came to that house with the Assistant Chief. Initially, the appellant refused to open the door. However, later when the door was opened with the assistance of the police, the appellant was found inside with the complainant. The appellant was then apprehended and taken to the police station. The complainant was taken for medical attention, and PW4 a Clinical Officer examined her. He found that she was not a virgin. Some traces of spermatozoa were found in her private parts. The appellant was consequently charged with the offence.

When the appellant was put on his defence, he chose to keep quiet and asked that judgment be given on the basis of the evidence tendered by the prosecution.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The magistrate convicted the appellant and sentenced him. Therefrom arose this appeal.

This being a first appeal, I am duty bound to re-evaluate the evidence on record afresh and come to my own conclusions and inferences, taking into account however 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 evaluated the evidence on record afresh. The first complainant of the appellant was that no test was conducted by the magistrate to determine whether the complainant should tender evidence either on Oath or without taking an Oath. The record shows that the learned trial magistrate asked questions to the complainant PW1 J S, in an effort to determine whether she was intelligent and knew the importance of an Oath. The magistrate thereafter found that she was capable of giving evidence on oath. She was sworn, tendered evidence and was cross-examined. In my view, the requirements for testing a minor witness before giving evidence, set out in the case of **Michael Murithi Kinywa -vs- Republic – Cr. Appeal No. 38 of 2002** at Nyeri were satisfied. Besides, the child was not a child of tender years. She was above 10 years of age. I dismiss this complaint by the appellant.

In cases of defilement, the age of the complainant is an ingredient of the offence. Like other ingredients of the offence, it has to be proved beyond reasonable doubt. There is no doubt in my mind that the appellant had sexual intercourse with the complainant after locking themselves in the house for a whole day after church. The medical evidence established the presence of spermatozoa in the private parts of the complainant. The appellant was found by witnesses in the locked house with the complainant. Assuming that the complainant was below the age of 18 years, even if she consented to the sexual intercourse, that consent would not be valid as she would have no capacity to give such consent being a minor.

However, was the age of the complainant proved beyond any reasonable doubt? The only evidence of age of the complainant was that tendered by the complainant herself. She said she was 16 years of age. She did not mention the year of her birth. The father PW3 J S S did not tender any evidence on the age or year of birth of the complainant. The Clinical Officer PW4 Sylvanus Osida only took the age indicated by the police in the P3 form to be the actual age of the complainant. In my view the prosecution fell short of proving the age of the complainant to the standards required in law. With the evidence on record, the complainant could as well have been above 18 years. The conviction cannot therefore stand, as the benefit of this serious doubt on the age of the complainant has to be given to the appellant.

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 6th day of March, 2014

George Dulu

J U D G E