



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 478 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 269/2009 of the Principal Magistrate's Court at Mariakani: W. F. Andayi – PM)

SAFARI HAMISI KITSUNYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **SAFARI HAMISI KITSUNYU** has filed this appeal challenging his conviction and sentence on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were as follows:

“On the [sic] diverse dates between the month of February, 2009 and March, 2009 at Samburu Trading Centre Samburu South Location in Kinango District within Coast Province intentionally and unlawfully committed an act which caused the penetration of genital organ namely penis into the genital female organ namely vagina of U N a girl child aged 17 years thereby causing her to conceive.”

The appellant did also face an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The appellant entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced on 11th February, 2010. The prosecution led by **CHIEF INSPECTOR MOHAMED** called a total of four (4) witnesses in support of their case.

The complainant **U N** was a 17 year old girl. She told the court that she and the appellant were in the same class at [Particulars withheld] primary school in Samburu. The two became friends whilst in class 6 and then the appellant began to seduce her. The complainant eventually gave in to his demands and the two engaged in sexual intercourse on two occasions i.e. on 12th and 13th March, 2009 at [Particulars withheld] area in the bushes. Thereafter the complainant failed to get her menses and realized that she was pregnant. **PW2 J M N**, the complainant’s mother told the court that in August, 2009 she discovered that her daughter was pregnant. Upon questioning the complainant told her that it was the accused who was responsible. The matter was reported to the police and the complainant was taken for a medical examination. **PW4 JOHN KIRUI** a clinical officer at Samburu Health Centre stated that he examined the complainant on 23rd September, 2009 and established that she was 32 weeks (8 months) pregnant. He filled and signed her P3 form which is produced in court as an exhibit. The complainant did subsequently deliver a baby boy. The police arrested the appellant who denied ever having had sexual relations with

the complainant. He was later charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied ever defiling the complainant. On 28th October, 2010 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve ten (10) years imprisonment. Being dissatisfied with both his conviction and sentence the appellant filed this appeal. **MR. LEWA** Advocate argued the appeal on behalf of the appellant whilst **MR. AYODO** learned state counsel acting for the respondent state opposed the appeal.

I have carefully perused the record of the trial and I have also given careful consideration to the submissions made by both counsel. As a court of first appeal it is my duty to re-examine and re-evaluate the evidence adduced at the trial and to draw my own conclusions thereon.

There was no eyewitness to the offence. As with most sexual acts this was a private act between two persons. The only eyewitness so to speak was the complainant herself. She told the court that it was the appellant who seduced and later defiled her. She states that they engaged in sexual intercourse on two occasions on 12th and 13th March, 2009. Although the complainant was categorical that it was the appellant who defiled her she also admits under cross-examination that she wrote a letter in which she identified a boy known as 'S' from a different school i.e. [Particulars withheld] primary school as the one who made her pregnant. This admission casts doubt on the evidence of the complainant. If she was certain it was the appellant who defiled her then why did she write a letter naming a different boy as the culprit? Although the complainant states that she did this under pressure from the appellant, her veracity as a witness is certainly questionable. The mere fact that the complainant fell pregnant and delivered a baby boy does not implicate the appellant. There is no evidence that it was the appellant who fathered her son. No DNA test was ever done to establish scientifically that the appellant was the father of the child. The complainant was specific on the dates when she and the appellant engaged in sexual intercourse. She states it occurred on 12th and 13th March, 2009. She states at page 5 line 6

“It was twice, 12th and 13th March, 2009. It was at the same place.....”

Pw4 who examined the complainant on 23rd September, 2009 opined that she was 8 months pregnant. The court was told that the complainant delivered her child in November, 2009. Assuming that she delivered at full term i.e. 9 months then the dates do not quite add up. If the complainant conceived in March, 2009, then by September, 2009 she would have been six months pregnant and not **8 months** as testified by the doctor. If the complainant conceived in March, 2009 then she would ordinarily have delivered in December, 2009 and **not** in early November, 2009. Even given the fact that conception dates cannot be precisely determined, there is a variation of at least one month or 4 weeks which has not been explained. This places a doubt in the evidence of the complainant and raises a real possibility that she actually conceived **earlier** than March, 2009 when she claims to have been defiled by the complainant. No samples of semen were taken from the complainant due to time lapse thus no matching was done to prove that the appellant did actually penetrate her. On the whole I find the evidence adduced in this case to have been weak. It does not meet the legal threshold of beyond reasonable doubt. As such I do allow this appeal. The appellant's conviction is hereby quashed and his sentence is set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 13th day of June, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Kiprop for State

Appellant in person

Court Clerk Mutisya