



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 2 OF 2014.

FRED NYONGESA MUKHEBI ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of J.M. Nang'ea – SPM in Criminal Case No. 3125 of 2010 delivered on 12th March, 2013 at Kitale.)

J U D G M E N T.

The appellant, **Fred Nyongesa Mukhebi**, was charged before the Senior Principal Magistrate at Kitale with defilement, contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act, in that on the 31st October, 2010, in Trans Nzoia County he defiled M K, a child aged sixteen (16) years.

After trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment but being dissatisfied with the outcome he filed the present appeal on the basis of the grounds in the petition of appeal dated and filed herein on the 29th January, 2014, by the firm of **John Bororio & Co. advocates.**

At the hearing of the appeal, the appellant was represented by Learned Counsel, **Mr. Bororio**, who relied on the grounds of appeal specified in the petition and the lower court record and urged this court to allow the appeal.

Learned Prosecution Counsel, **M/s. Limo**, opposed the appeal on behalf of the state/respondent and submitted that the appellant's conviction and sentence was correct and with regard to ground three of the appeal, Learned Prosecution Counsel submitted that the issue pertaining to the complainant representing herself to the appellant as an adult was not raised during the trial. Learned Prosecution Counsel contended that the complainant was not an adult as she was seventeen (17) years old.

Having considered the grounds of appeal and the submissions by both sides, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the lower court had the opportunity to see and hear the witness.

Accordingly, the prosecution case was briefly that on the material date, the complainant **M K (PW1)**, aged seventeen (17) years at the time was at her home when the appellant went there at about 10.00 p.m. and lured her into his house which was about hundred (100) metres away. She spent the night in the appellant's house during which time the two engaged in sexual intercourse. She left the house at 5.00 a.m. and returned to her home where her mother questioned her as to where she had slept. Things became difficult for her and she returned to the appellant's house.

The appellant gave her Ksh. 200/= for her to escape to her sister's home in Bungoma. She returned to her home on 15th November, 2010, and thereafter went to school where she was forced to disclose where she had slept on the material date prior to sitting her exams. It was then that she disclosed that she had slept with the appellant in his house.

The matter was referred to the area chief and culminated in the appellant being arrested by the police.

The complainant's mother, **M N B (PW2)** indicated that the complainant was aged 16 years having been born on 6th December, 1993 and that she disappeared from home on the material date at 10.00 p.m and returned on the following morning at 5.00 a.m. She was rebuked upon her return as a result of which she ran away to Bungoma where she stayed for two weeks. She later returned home and went to school before disclosing that she had slept at the appellant's house.

Linus Ligale (PW3), a clinical officer at Kitale District Hospital examined the complainant after he was informed that she engaged in sexual intercourse with a married man. He filled and signed the necessary P3 form which was produced in evidence.

Dr. Ken Ndege (PW4), of Kitale District Hospital produced an age assessment report indicating that the complainant was aged approximately sixteen (16) years.

Sgt. Justin Wabwire (PW5), took over the investigations of this case from one P.C. Nyaduke who went on transfer. He did so when the matter was already in court where he produced the complainant's baptismal certificate.

In his defence, the appellant denied the charge and termed it false. He indicated that the complainant did not go to his house as alleged and that on the material date he was in his house together with his wife and children. He said that he could not have gone to the complainant's house as they kept fierce dogs which would have mauled him. He contended that the complainant's mother told lies in court.

From the evidence, it is the opinion of this court that at the material time the complainant was a minor aged below eighteen (18) years. Therefore, any person engaging in sexual intercourse with her whether or not consensual, was criminally liable for the offence of defilement.

The evidence by the complainant's mother (PW2) and the doctor (PW4) established the complainant's age to be sixteen (16) years.

She (complainant) readily admitted in her evidence that she engaged in sexual intercourse with the appellant in his house. The appellant however denied the fact but his defence was disbelieved by the trial court in favour of the complainant's evidence. It therefore followed that the appellant's conviction was based on findings of credibility made by the trial court.

In the circumstances, this court would not fault the trial court as it was in a better position to determine the credibility of witnesses whom it saw and heard.

The appellant's conviction by the trial court was therefore safe and proper thereby rendering this appeal lacking in merit.

The sentence imposed was also proper and lawful.

In sum, this appeal must and is hereby dismissed.

[Delivered and signed this 1st day of October, 2014.]

[In the presence of M/s. Kigi for state and Mr. Bororio for appellant.]

J.R. KARANJA.

JUDGE.