



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 2 OF 2012

H. N. K.APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 1794 of 2010 of the Senior Resident Magistrate's Court at Kwale – Hon. Aminga - RM)

JUDGMENT

H. N. K. hereinafter referred to as the Appellant was Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual offences Act No. 3 of 2006.

The particulars are that on the 18th day of August, 2010 at [Particulars withheld] Village in Kwale County, the Accused intentionally caused his penis to penetrate the vagina of M.B. a girl aged 16 years.

The grounds of this appeal are that the trial magistrate solely relied on the evidence of a minor which was not corroborated in material particulars.

Secondly, that the trial magistrate did not seek or ascertain the exact date of the alleged offence.

Thirdly that much reliance was placed on the pregnancy, but there was no evidence to the effect that it was the appellant who was responsible as no D.N.A. tests were conducted to establish paternity.

The appeal is opposed and Counsel for the Respondent contends that under section 124 of the Evidence Act corroboration is not necessary in Sexual offences if the Court is convinced that the child was telling the truth.

This section provides,

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is

that of he alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

In the present case, the complainant did testify that on on the 18th day of August, 2010 in he evening, the Appellant invited her to his house where they talked till late and had sexual intercourse three times that night before the Appellant escorted her home.

Afterwards she stopped experiencing her menses. She informed the appellant who told her that she was pregnant and she should proceeded to inform her parents. Her mother later reported the matter to the area chief and the appellant was arrested and later charged .

She was referred to Kinango District Hospital where she was examined and the pregnancy was confirmed. She later gave birth on 21st March, 2011 but the child passed on. She denied to have had any other sexual affair with any other person at the time.

The Complainant's mother **B. H. (PW 2)** testified that her daughter was born on 24th April 1994 and that at the time of the incident she was aged sixteen (16) years old. A report had been made to her that she was no longer attending school as required and that her daughter was in the house of the appellant. She went and collected her from there. She had spent the night with the Appellant who was her cousin. Upon interrogating her daughter she informed her that it was the appellant who had impregnated her.

The Complainant was examined on 8th November, 2010 by Moses Kasyoki Muyuku (PW 4) a clinical officer attached at Kinango Hospital. He established that she was sixteen weeks pregnant. She had a broken hymen. He send her for age assessment. She was assessed to be aged sixteen (16) years. The witness produced the P3 form and age assessment report as exhibits in Court.

A careful evaluation of the evidence before the trial magistrate shows that though the appellant had denied it, he had befriended the complainant whose parents were estranged and had sexual intercourse with her at his rented house at [Particulars Withheld] on several occasions culminating to pregnancy.

It is this pregnancy which brought about truancy in school and caused suspicion from the school authorities. When the complainant went missing, the mother (PW 2) started seeking for her and acting on information, received, from the appellants mother, found her in the house of the appellant where she had apparently spent the whole night.

The trial Court was satisfied that the present case was one of the many that betride the landscape of the Coastal region. It had taken as a fact of Common notoriety the prevalent attitude of impregnation school girls and at most times marrying them off.

On the issue of corroboration, apart from the evidence of the complainant who at the time of the accident was aged sixteen (16) years and at class seven, there was the evidence of the clinical officer on the pregnancy and the missing hymen. There is also further corroboration by the mother of the Complainant who rescued her daughter from the appellants house.

As for the ascertainment of age of the complainant. The mother (PW 2) testified as to when she was born. (giving the date of birth as 24th April, 1994).

PW 4 the clinical officer also did cause complainant get to be assessed, which assessment showed that she was sixteen (16) years old. The assessment report was produced in Court as exhibit No.3.

As regards the exact date of the incident the charge sheets reads the 18th day of August, 2001. I have perused the original handwritten record and the date is clearly given at the bottom of page 17 as 18th August, 2010. The typed record does not show the date, this I believe it was through oversight. It was therefore not true to state that the trial magistrate did not ascertain the date when the incident took place.

I am satisfied that the Conviction was safe. As for the Sentence section 8(4) provides for a minimum of 15 years imprisonment.

The appellant has not put in a defence to the effect that the complainant deceived him that she was over the age of eighteen (18) years or that he reasonably believed that she was over the age of eighteen (18) years. The appeal has no merit and it is disallowed.

Judgment dated and delivered this **10th** day of **July, 2013**.

.....

M. MUYA

JUDGE

10TH JULY, 2013

In _____ **the** _____ **presence** _____ **of:-**

Learned State Counsel Mr. Mungai

For the Appellant (absent)

Court clerk Mr. Musundi