REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 56 OF 2016

(Being an appeal arising from Kitale Chief Magistrate's court criminal case No. 1543 OF 2014 delivered by C.N. Mugo – Resident Magistrate on 2/7/2015)

BENSON ONGARO BARASA …....................................APPELLANT

VERSUS

REPUBLIC …..RESPONDENT

J U D G M E N T

1. **Benson ongaro Barasa** " the appellant" was charged with the offence of **defilement of a child contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.** The particulars were that on the **23rd day of April 2014 at [Particulars withheld] village within Trans -Nzoia County intentionally caused his penis to penetrate into the vagina of S N a child aged 17 years.**

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the same Act. The matter proceeded to full hearing and he was found guilty , convicted and sentenced to 15 years imprisonment on the principal count. He has appealed against the judgement citing the following grounds of appeal:

(i) That the learned trial magistrate erred in law and in facts to convict the appellant without the results of DNA analysis which could have exonerated the appellant from the offence.

ii) That the trial magistrate erred in law and facts to convict the appellant yet the evidence of the clinical officer and the treatment notes findings indicate there was no penetration occasioned by the appellant to the complainant.

iii) That the learned trial magistrate erred in law and facts to convict the appellant without documentary prove of the age of PW1 in which the evidence of PW2 indicate of that the age of PW1 was above 18 years old.

iv) That the learned trial magistrate erred in law and facts to convict the appellant in the absence of crucial witnesses like D and P.

v) That the learned trial magistrate erred in law and facts to convict the appellant without recognizing that PW1 was mentally challenged and her evidence was a mis representative of the

alleged offence.

vi) That the learned trial magistrate erred in law and facts to convict the appellant by regarding a fatally defective charge sheet in view of the evidence adduced in court by the clinical officer, PW2 and PW3.

3. When the appeal came for hearing the appellant relied on his written submissions. He submits that failure by the court to wait for a DNA report prejudiced him. Further he submits that PW1 was examined on the same day but no spermatozoa were found yet she had claimed to have been defiled. He faulted the clinical officer for not explaining details of his report to the court.

4. He submitted that the age of PW1 was required as by law.

He stated that D who was alleged to have witnessed these happenings was never called as a witness. All in all he submitted that had his defence been considered he would have been acquitted.

5. Mr Kakoi for the state submitted that PW1 had said she was 15 years of age while the age assessment showed she was 17 years though this was an estimate. The age of 17 years was therefore not proved. He relied on the evidence of PW1 and PW5 to prove penetration. The medical evidence showed she had injuries. **PW3 Kenya Police Reservist (KPR)** rescued the appellant from the crowd that wanted to lynch him.

6. The evidence shows that **PW1** who has some mental challenges was at home playing with other children on 23rd April 2014 when their neighbour (appellant) called her to go and sweep his house. She went in and he closed the door. She was unable to scream as he closed her mouth with his hand. Its then he placed her on the mattress, removed his trousers, penis, her pant and skirt and had sexual intercourse with her.

7. One child called D saw and called people who came. They knocked down the door and snatched the knife from the appellant. He dressed up but was thoroughly beaten by the crowd that came to PW1's rescue. She was rushed to hospital and treated.

8. **PW2 M O** who is PW1's sister did not witness the incident but was among those who took her to hospital. She knew the appellant who was their neighbour.

PW3 Martin Kwemoi the Kenya Police Reservist (KPR) stated that he got wind of a problem at Mama Maua's. He rushed there and found the appellant being beaten. He was informed that the appellant had defiled PW1. He took the appellant to Maili Saba police station.

9. **PW4 Pharis Silali** examined PW1 for age assessment. He found her to be approximately 17 years of age (Exhibit 3)

PW5 John Kipkorir Koina is the clinical officer who examined PW1. He found her to be mentally challenged but could talk, and express herself. He found injuries on her private parts, a whitish discharge on labia but other tests were negative. And she was treated. He produced the P3 Form (Exhibit 2) and treatment notes. (Exhibit 1) From Exhibit 1 its indicted that her hymen was torn and pant was blood stained.

10. In his unsworn statement of defence the appellant denied the charge. He explained how he had done work for the complainant's uncle but was never paid. That his woes started when he demanded for

payment from these people. This charge according to him is fabricated because of his unpaid dues.

11. This is a first appeal and this court has a duty to re-evaluate the evidence and arrive at its own conclusion.

See Okeno V Republic 1972 EA 32 Mwangi V Republic [2004] 2 KLR 28.

12. Upon considering the evidence, the grounds of appeal and submissions by both parties I find the following to be the issues for determination.

I) Whether there was penetration

ii) Whether the appellant was involved

iii) The age of PW1

Issue No. 1 Whether there was penetration

13. PW1 was said to be mentally challenged but could speak very well, and express herself.

She explained in detail how she was sexually assaulted, by the appellant. The organ used was a male one which was inserted in her vagina. Upon being rescued she was immediately taken to hospital and the documents from hospital were produced as Exhibit 1.

She was examined and a P3 form filled based on the examination and Exhibit 1.

14. The examination confirmed that the girl had been defiled.

Of significant in these two documents is the following finding:

- she had white wet/soiled pants – blood stained.

- whitish discharge at the labia majora

- hymen torn

- bruises around the labia

- Epithelial cells seen

There is no doubt that there was penetration of her vagina.

Issue No. ii Whether the appellant was involved

15. The appellant mentioned a DNA that was never produced. It is not clear what the DNA was all about, and so I would not want to speculate anything about it. Had it been so significant the prosecution would not have closed its case without it. He also raised issue with the failure to call D and other witnesses.

On the issue of witnesses, the prosecution has the discretion to call witnesses to prove its case. An issue only arises when known witnesses are not called to prove any fact before the court. Once a fact

has been proved to the sanctification of the court there is no need to call all the witnesses to come and repeat the same thing.

Section 143 of the Evidence Act supports this. It provides ;

" No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

There is therefore no set number of witnesses to prove a case.

16. It is true that there may be need for more than one witness to testify to confirm a fact. This is however not true for all cases.

<u>Section 124 of the Evidence Act</u> 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 the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, no reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

17. The proviso to Section 124 of the Evidence Act covers the cases of victims of sexual offences. The present case is one of such cases. What is important is for the trial court to be satisfied with the credibility of the victim of the said sexual offence.

18. Contrary to the submissions by the appellant on the clinical examination it is nowhere indicated that no spermatozoa were seen. There was no test done to confirm its presence.

Exhibit 1 shows that there was a whitish discharge seen at the labia majora.

19. This incident occurred during the day. The complainant was rescued from the appellant's house and the angry crowd throughly beat the appellant. The appellant has submitted that because of her mental condition PW1 could just make noise for no reason at all. That could be true but what was she doing with him in his house that was locked from inside" He has not explained.

20. **PW3** a Kenya Police Reservist (KPR) who rescued the appellant said he found him being beaten by a mob and on inquiry he was told it was because he had defiled the complainant. He also confirmed that the appellant had a house near PW1's grandmother's house and that is where he was being beaten from. The appellant had raised issues about grudges with PW1's family. There is no evidence that he raised any such issues with any office. He did not also raise it in cross-examination of PW1 and PW2. Even if such a matter exists it has no bearing on PW1's complainant. The evidence against him is overwhelming. He is the one that sexually penetrated the complainant.

<u>Issue No. iii) - The age of PW1</u>

21. The complainant said she was 15 years but the age assessment showed she was 17 years. The assessment reports are usually not conclusive as they have a margin of error of + 1 of -1. The appellant also submitted that the complainant was above 18 years. Due to that want of clarity and conclusiveness on the complainant's age I will go by the + 1 error and conclude that she was 18 years.

22. Her consent was therefore required before anyone indulged her in sex. From the evidence of what transpired and the medical evidence (exhibit 1 and 2) it is clear that the sexual activity was without her consent. It amounted to rape. The appellant was not charged with rape but that is the offence that has been proved.

Section 179 (1) of Criminal Procedure Code provides ;

" When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved by the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with."

The above section allows this court to convict an individual for proved minor offence though he was not charged with it.

23. The upshot is that the appeal is allowed and the conviction and sentence set aside.

24. I invoke Section 179 (1) of Criminal Procedure Code and substitute the conviction for defilement under Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 with a conviction for rape contrary to Section 3(1) as read with Section 3(4) of Sexual Offences Act No. 3 of 2006.

He is sentenced to ten (10) years imprisonment from the date of conviction.

Orders accordingly.

Delivered, signed and dated on 29th day of August 2017 at Kitale.

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H. ONG'UDI

JUDGE

In the presence of;

Ms Kagai fro Mr Kakoi for the State

Appellant present

Kirong Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

29/8/2017

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