REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.6 OF 2016

(Being an appeal from the decision and sentence by Hon. J. Ndururi (PM) in Kericho CM Cr. No. 22 of 2012)

ROBERT KIPRONO TANUI.......APPELLANT

VERSUS

REPUBLIC.................................RESPONDENT

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Kericho with defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006, the particulars of the offence being that on 13th March 2012 at about 6.00 p.m in Kericho West District of the Rift Valley Province did cause his penis to penetrate the vagina of CC (name withheld) a child aged 12 years and 6 months in violation of the said Act.

2. In the alternative, he was charged with indecent act with a child contrary to section 11 (2) of the Sexual Offences Act. The particulars of the offence being that on the same day and place did intentionally and unlawfully cause his penis to come into contact with the vagina of CC (name withheld) a child aged 12 years and 6 months in violation of the said Act.

3. He denied both charges and the prosecution tendered evidence and closed their case on 19th May 2015. On the 27th May 2015 the appellant was put on his defence and he elected to tender a sworn defence and call two witnesses and defence was fixed for 15th June 2015, in which day the appellant asked for more time to prepare his defence and defence hearing was scheduled for 1st July 2015 but was adjourned a number of times. Thereafter and on 24/9/2015 a new magistrate took over the case, and the appellant asked for de novo trial which was rejected on 16/10/2015, and on 18th March 2016 the appellant said he was not ready with defence hearing, but the magistrate overruled him and gave a short unsworn defence and did not call any witness. He was subsequently convicted and sentenced to serve 20 years imprisonment.

4. He has now come to this court on appeal. He filed his initial appeal in person in April 2016. Later in November the same year 2016 he filed a supplementary petition of appeal through counsel Motanya & Company Advocates whose grounds are as follows:-

1. The magistrate erred both in law and fact in ignoring material evidence on the absence of spermatozoa when the complainant who alleged that the appellant defiled her severally was examined.

2. The judgment was bad in law as the magistrate never considered the appellants unsworn evidence at all, and was biased and never analysed evidence before court.

3. The learned magistrate erred in law and in fact in that he incorporated in his judgment matters not canvassed before him at all.

4. The learned magistrate erred in law and fact in convicting the appellant of the offence of defilement whereas there was no evidence of defilement and no evidence to support the charge and failed to consider the fact that the said offence took place on 13th March 2012 yet P3 form was filled on 16th March 2012 and this period was long enough for any other person to either have defiled the complainant or had sex with her and hence concluding that the appellant was the one who defiled the complainant was not proved beyond reasonable doubt and in any event the complainant's evidence was never corroborated and hence it was unsafe to convict on such evidence alone.

5. The trial magistrate erred in law and in fact in placing heavy reliance on the P3 form to convict the appellant yet the same does not indicate the age of the complainant to be 15 years and 7 months and hence the same is inconsistent with the age of the complainant as per the birth certificate hence the prosecution did not prove the actual age of the complainant beyond reasonable doubt.

6. The learned magistrate erred in law and fact in convicting the appellant of the offence of defilement whereas there was no evidence at all to prove that it was the appellant who may have defiled the complainant and not a third party.

7. That further to the foregoing, the learned magistrate erred in law and fact in that he convicted the appellant using evidence of witnesses which was contradictory and full of discrepancies that it should not have been relied on to convict the appellant.

8. The learned magistrate erred in failing to consider the mitigating circumstances of the case.

9. The sentence awarded was harsh and excessive in all the circumstances of the case.

5. At the hearing of the appeal, Mr. Motanya for the appellant submitted that there was no evidence tendered by PW5 the Clinical Officer with regard to presence of spermatozoa or injuries. Counsel submitted also that there was no evidence that the hymen was freshly broken.

6. Counsel emphasized that the totality of the evidence on record did not connect the appellant to the alleged offence since though the offence was alleged to have occurred on 13th March 2012, the P3 form was filled on 16/3/2012 which meant that in the intervening period the complainant might have had sexual activity with somebody else.

7. Counsel further argued that the age of the complainant was not established in that although P3 form puts the age at 15 years 7 months, PW1 the complainant put her age at 14 years, while PW2 her mother puts the age at 13 years. In any case, counsel argued, the birth certificate referred to by the prosecution was not produced in evidence, and the sentence of 20 years imprisonment thus had no basis.

8. Counsel lastly argued that the appellant was not supplied with prosecution witness statements and thus was not accorded a fair hearing as required under Article 50 of the Constitution. Mr. Migiro appearing with Mr. Motanya associated himself with Mr. Motanya's submissions and reiterated that the appellant was entitled to the prosecution witness statements to enable him effectively cross-examine witnesses – if the trail was to meet the requirements of Article 50 of the Constitution, which did not happen herein.

10. In response to appellant's counsel submissions, Mr. Ayodo opposed the appeal and said that the Clinical Officer clearly stated that the absence of spermatozoa was because it had taken one week before medical examination of the complainant was conducted. In any case, the hymen of the complainant was broken which was proof of sexual intercourse.

11. With regard to proof of age, counsel submitted that the birth certificate of the complainant was produced as exhibit 2 by the investigating officer PW4 and it was clear therefrom that the complainant was aged 12 years 6 months at the time. If the birth certificate is not traceable now, that was the mistake of the court and not the prosecution.

12. With regard to provision of witness statements, counsel submitted that at page 19 of the typed proceedings the appellant said that he had obtained all statements before PW1 testified-thus the appellant was given a fair hearing. Besides it was the appellant's defence that the complainant was now married and dowry paid which was considered by the trial court.

13. In response to Mr. Ayodo's submissions, Mr. Motanya stated that if the appellant actually stated at the defence stage that he was not given prosecution witness statements, then he should have been supplied with same.

14. This is a first appeal and I am required to re-evaluate the evidence on record and come to my own conclusions - see **Okeno -vs- Republic [1972] EA 32.** I have considered the appeal, and the submissions of counsel or both the appellant and the State. With regard to the complaint that the appellant was not supplied with witness statements, at page 12 of the typed proceedings, he stated as follows- ***"I am ready to proceed. I obtained all the witness statements."***

15. It follows that though he said in his defence that he did not want to say anything because he did not have the statements that must have been an afterthought. In any case if it was true he did not have statements at defence stage, maybe he forgot to bring the statements at defence stage, which did not deny him the opportunity to cross-examine witnesses as he had earlier been provided with the statements. There was also no record that he asked for time to go and get the statements. Therefore, it cannot be said that there was violation of the appellant's right to fair trial under Article 50 of the Constitution.

15. With regard to the age of the complainant, indeed age is a very crucial element of the offence of defilement under the Sexual Offences Act No.3 of 2006. It had to be proved that the complainant is below 18 years, and that the complainant falls under the age bracket indicated in the charge which would determine the severity for sentence.

16. In the charge sheet, it was alleged that the complainant was 12 years and 6 months on 13th March 2012 when the defilement occurred. The Clinical Officer PW5 Willy Kitur on the other hand said that she was 15 years 7 months, which was the age that was recorded by the police on the front page of the P3 form. Though the Assistant Director of Public Prosecution has talked of a birth certificate being produced as P exhibit 2, I do not see any copy of the same in the file. The Investigating Officer PW4, P.C Joseph Mogusu stated in evidence that he produced birth certificate S/No.384797 as PExhibit 2 but there is no trace of that certificate or a copy of the same in the file.

17. I note also that the birth certificate was marked in the list of exhibits as MF1-2. However, even that MFI 2 copy is not in the file, and nobody has given an explanation about its whereabouts. In those circumstances and knowing the high standards required for proof in criminal cases beyond any reasonable doubt, I give the benefit of the doubt to the appellant by finding that the P3 form was not produced in evidence at the trial. With the variance on the age and contradictions on age of the complainant in the prosecution evidence, I find that the prosecution did not prove the age of the complainant beyond any reasonable doubt.

18. I now go to penetration which is also an important ingredient of the offence of defilement. The evidence of sexual penetration is that of PW1 the complainant – that the appellant took her to his home, had sexual intercourse with her, then they went and took supper and slept together and had sexual intercourse till the next morning. She also said that she did not know that it was wrong for her to do so and only found out later that the appellant had been arrested.

19. In my view, the complainant was candid and honest that she engaged in sexual intercourse with the appellant not knowing that it was wrong. The opportunity for the appellant to do so was evident. He slept with her at least for one night. The prosecution thus proved beyond reasonable doubt that the appellant sexually penetrated the complainant, though the medical evidence on its own was not conclusive that the appellant had sexual intercourse with the complainant.

20. Since the age of the complainant was not proved beyond reasonable doubt, I find that the conviction of the appellant for the offence of defilement is not safe and cannot be sustained. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 11th December 2019.

George Dulu

JUDGE

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