



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 8 OF 2020

BETWEEN

BEJA ZUWA.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. P. Wambugu PM on 3.01.2020 in Kwale CMC S.O No. 2 of 2018)

JUDGMENT

Introduction.

1. Beja Zuwa was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. He was also charged with offence of alternative count of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. After trial the trial court found the Appellant guilty of the offence of defilement and he was convicted and sentenced to serve 20 years imprisonment.
3. Being aggrieved by the conviction and sentence, the Appellant filed his Appeal on the following grounds.
 1. That the trial court erred in law and facts by convicting the Appellant to 20 years imprisonment without considering that the age of the complainant was not proved thus rendering the conviction unsafe.
 2. That the trial magistrate erred in law and facts by convicting the Appellant without considering the case was full of massive contradictions and discrepancies and thus conviction could not have been arrived at.
 3. That the trial magistrate erred in law and facts by convicting the Appellant without considering that the prosecution case was not proved beyond reasonable doubt.
 4. That the trial magistrate erred in law and facts by convicting the Appellant without considering his reasonable mitigation.
4. In amended grounds of Appeal the Appellant contended that:
 1. The trial magistrate failed to avail him the defence under section 8(5) of the Sexual Offences Act No. 3 of 2006.
 2. The trial court failed to appreciate that there was consent of the complainant though it was considered immaterial.
 3. The learned trial magistrate erred in both the law and fact imposing a sentence that is excessive in light of the current jurisprudence in regard to sentencing of offenders.

SUBMISSION

5. The Appeal was canvassed by way of written submissions. The Appellant in his submissions stated that the Complainant fully appreciated and consented to what was going on between them. He argued that the complainant presented herself to him as an adult who was ready for marriage and that the said arrangement was okayed by PW 1 who was living with her. He said that circumstances under which he met the complainant and engaged her for marriage could not enable him to know that she was below the age of 18 years.

6. The Appellant also argued that the complainant conducted herself in a manner that suggested that she was a mature person, the fact that she was school going notwithstanding. That at some point the Complainant returned to his house after her aunt had taken her away.

DETERMINATION.

7. This being a first appeal this court as held in the case of **Okeno vs Republic** has an obligation to re-evaluate and re-look at the evidence in the trial court afresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.

8. The prosecution case was that the Complainant's guardians gave her away for marriage to the accused who is aged 20 years. That PW 1 Umazi Beja an aunt to the complainant learnt that the complainant had left, she inquired and learnt that she had been married to the appellant herein.

9. That PW 1 went and informed the complainant's teacher and also reported to police. She said that the complainant informed her that her guardian told her that she would be happy if she gets married. That the child disappeared again and went to Shimoni to stay with the Appellant.

10. That the Appellant and the Complainant were both arrested and taken to Lunga Lunga police station. PW 1 said that the complainant's guardian who gave her away for marriage had run away. She said the Complainant was a pupil at [Particulars withheld] primary school in standard 2. PW 1 said that the Complainant and the Appellant were examined and treated for the same infection at the hospital.

11. The complainant PW 2 testified that she was a standard 2 pupil at [Particulars withheld] primary school and she was living with her aunt and other children. She said the Appellant's aunt came to her aunt's place and told her that her nephew wanted a wife. That after 2 days the Appellant's aunt had called the Appellant and when she went to the Appellant's aunt's house she told her to go with the Appellant to their home in Kanana.

12. That she accompanied the Appellant to his home and they cohabited for 3 months as husband and wife. She said the Appellant used to work at Kisco and could occasionally come home and they had sex. That he was later arrested by police and taken to Jago police station and then to Shimoni.

13. The Complainant said she didn't have parents and was told to get married to accused whom she had not seen before. She said that her aunt declined when the Appellant wanted to go and introduce himself as complainant's husband.

14. PW 3 HBL testified that his late brother's daughter the Complainant was living with her aunt when on 14th October, 2017 they learned she had disappeared from home. That they reported to police and they got information from the Appellant's aunt that the Complainant was married to her nephew and they should not look for her. That when they reported to police, they found the Complainant had come back but then disappeared again. That she was traced in January, 2018 and arrested together with the Complainant.

15. That the Complainant and Appellant were both taken to Lunga Lunga hospital where they were treated. Age assessment report-Plaintiff exhibit 1, P3 form-Plaintiff Exhibit 2(a), treatment notes-Plaintiff exhibit 2(b) and P3 for Appellant- Plaintiff Exhibit 3(a) and treatment notes-Plaintiff exhibit 3(b) were identified and produced. PW 4 Dr. Hassan Juma of Msambweni hospital testified that he attended to the Complainant and Appellant at Lunga Lunga hospital. He produced the P3 form and treatment notes for the Complainant as ExP 2(a) & (b) as well as P3 and treatment notes for the Appellant as ExP 3(a) & (b).

16. Dr. Hassan Juma testified that the Complainant's hymen was absent and had been living with the Appellant and the Appellant also confirmed that he lived with the Complainant. He said that both the Complainant and the Appellant had similar infection from the urine test that was done.

17. When the Complainant was re-called for cross-examination, she said that the Appellant's parents had taken her back to her home and the Appellant took her back. She said that her aunt wanted her to go to school and not to get married. She said the Appellant went for her at night when her aunt had slept.

18. PW5 PC Joseph Kiprotich testified on behalf of the initial investigating officer PC Isaac Nguru. At the close of the prosecution's case, the Appellant was placed on defence and he opted to give unworn statement and to call one witness and defence hearing was set for 29th day of August, 2019. However on the due date it is recorded that Appellant said he was not ready to proceed with his defence and he closed his defence. The trial magistrate then rendered a judgment in which the Appellant was found guilty and was convicted and sentenced to serve 20 years imprisonment.

19. I have considered the record in the trial court and realized that the trial was conducted by a total of 3 magistrates whereof the evidence was taken by Hon. Koech (Mrs) PM and Hon. Wambugu (Mr.) PM took over after the Appellant had been placed on his defence. On 15th August, 2019 when the Appellant said he was not ready to proceed with his defence, it is not clear whether he was not ready to testify on that particular day or he was going to remain silent and let the trial magistrate determine the matter based on the prosecution evidence.

20. The appellant had also indicated that he was going to call one witness in his defence but there is no indication if the court inquired about the said witness. The judgment of the trial magistrate leaves a lot to be desired. The heading judgment and introductory part of the alleged

judgment is handwritten above the proceedings of the court's evidence of witnesses and ruling of a case to answer.

21. I am of the view that the same falls short of content of judgment provided for under Section 169 of the Criminal Procedure Code. In consideration of the grounds of Appeal and submissions by the Appellant that circumstances under which he met and married the Complainant did not give him an opportunity to know whether the complainant was a minor and whether she was still going to school.

22. It is not in dispute that the complainant was a minor whose age was assessed at 15 years and a standard 2 pupil at [Particulars withheld] primary school and therefore had no capacity to consensual sex but the Complainant and the Appellant didn't know each other prior to being made to marry each other. The 20 years old Appellant was introduced to the Complainant by his aunt Maria who was a neighbor to the Complainant's aunt and the Complainant's aunt told her that she would be happy if she got married.

23. I do believe that the Appellant defence under Section 8(5) of the Sexual Offences Act should have been resolved in his favour considering the circumstances under which he was made to marry the Complainant. These are two young people who were misled by people who stood in *loco parentis* to them into entering into an unlawful union which infringed onto the right of the Complainant. This coupled with the manner the proceedings were conducted particularly after the Appellant was placed on defence, the manner the judgment was written, I find that the Appellant was not accorded fair trial as envisaged under Article 50(2) of the Constitution of Kenya 2010.

24. The Appeal therefore succeeds, the conviction is quashed, and sentence set aside and the Appellant set at liberty forthwith unless lawfully detained.

It is so ordered.

Dated, signed and delivered online by MS TEAMS, this 29th day of January, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE