REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 117 OF 2019

BETWEEN

HAMISI MATAI CHIGUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence passed by Hon. B. Koech PM on 17.05.2019 in Kwale CMC S.O No. 112 of 2016)

JUDGMENT

Introduction.

1. Hamisi Matai Chigumba was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. He was also charged with alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The Appellant pleaded not guilty and the matter went to full trial. After trial, the trial Court found the Appellant guilty of the main charge and he was convicted and sentenced to serve 15 years' imprisonment.

3. Being aggrieved by the conviction and sentence, the Appellant filed his appeal vide a petition of appeal filed on 5th December, 2019 on the following grounds;

> **1. That the learned Magistrate erred in law and fact by not considering that the offence of defilement was not proved beyond any reasonable doubt.**
>
> **2. That the learned Magistrate erred in law and fact by not considering that the evidence adduced in Court by the prosecution does not link me with the offence.**
>
> **3. That the learned Magistrate erred in law and fact by not considering that the prosecution witnesses were incredible once hence the conviction was unsafe.**
>
> **4. That the learned Magistrate erred in law and fact by not considering my reasonable defence.**

4. In amended grounds of appeal the Appellant's grounds were stated as:

> **1. That the learned Trial Court Magistrate erred in law and in fact in convicting me the appellant without considering that the sentence.**
>
> **2. That the learned Trial Court Magistrate erred in law and in fact in convicting me the appellant without considering that the child born out of the consensual sexual intercourse is my biological child and needs father's care pursuant to Article 53 of the Constitution.**
>
> **3. That the learned Trial Court Magistrate erred in law and in fact in convicting me the appellant without considering that the sentence meted on me the appellant was harsh, excessive, unjust, unfair and unconstitutional basing on the circumstances of the case.**

5. The prosecution case was that the complainant was defiled by the Appellant. The complainant stated that she started having a relationship with the Appellant in December, 2015 and the Appellant ran away when she got pregnant. She testified that she used to go to the Appellant's house who in turn would take her to a neighbor's house every evening. It was the complainant's testimony that she was having sexual intercourse with the Appellant. PW3 stated that the Appellant left her at a neighbor's house and she decided to go back home. She had not told her parents where she was and when she got home she was assisted to give birth. She also testified that there has not been any marriage agreement between her parents and the Appellant's parents.

6. PW1 testified that the complainant is 16 years and in class 5 at [Particulars withheld] Academy. That on 7th March, 2016 together with his wife, they found the Appellant in his house together with the complainant and they reported the matter to the chief and at the police station. That when they came back accompanied by the administration police they found the complainant alone in the house. That the Appellant resurfaced six months later and he continued to have sexual intercourse with the complainant which led to the complainant disappearing from home, when she came back, she was taken to the dispensary and was found to be pregnant. On cross examination, PW1 denied to have given the complainant to the Appellant for marriage.

7. PW2 stated that in March, 2016, the complainant had disappeared for a long time but was later found at his sister's place at Tiwi. He took the complained home and she left again after three days, eight months later she came back pregnant claiming she was carrying the Appellant's child. On cross examination, he denied agreeing to the Appellant marrying the complainant.

8. PW4 Nora Mwemba who works at Diani Health Center testified that on 27th September, 2016, the complainant went to their station with a history of being defiled by a person known to her and the complainant said she had a relationship with that person. On examination, her hymen was absent and she was 26 weeks pregnant. A P3 form was filled and the same was produced as prosecution exhibit 1.

9. PW5 George Lawrence Ogunda who works with the government chemist Mombasa stated that he examined the DNA and found that the Appellant was 99.9% the father of the complainant' child. An exhibit memo and a DNA report were produced as prosecution exhibit 5 (a) & (b) respectively.

10. Police Constable Asha Kassim testified as PW6 that on 14th December, 2016 the Appellant was brought to her office with officers from the Children Department and the complainant. The Appellant was alleged to be in a love relationship with the complainant who was 16 years at the time of the offence.

11. The Appellant gave an unsworn statement in his defence where he stated that he was 26 years. He stated that he was arrested at Diani police station where they were to record agreement for maintenance. He said that he had married the complainant, lived with her for four months prior to his arrest and they have a child together. He further testified that he did not know the complainant was a child when he married her, in fact he thought that they were age mates. That the complainant was not going to school she deceived him that she was an adult. It was his testimony that he was ready to take care of the child if he is released.

SUBMISSION

12. The Appeal was canvassed by way of written submissions. He submitted that the use of the words is 'liable upon conviction to imprisonment' gives room for the exercise of judicial discretion. Reliance was placed on the case of Opoya v Uganda [1976] EA 752 at page 754. He also submitted that the 15-year sentence imposed on him is the mandatory minimum sentence that does not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived the opportunity to exercise its discretion when sentencing, this being the position in the Supreme Court case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR.

13. The appellant also submitted that in consideration of the fact that he is the father to the complainant's child who is in need of fatherly love, the 15 years' sentence is excessive, he relied on the case of Hamisi Musudi Gambere v Republic HCCR APP. NO. 121 OF 2016 at Mombasa. He urged the Court to take Judicial notice of the circumstances of the case holistically and find that the time served since arrest is sufficient and allow the appeal.

14. The Respondent in its submissions submitted that it does not object the appeal on sentence. It submitted that even though the Appellant does not give mitigating factors, he acknowledged the child he sired with the complainant and he is a fairly young man. The Respondent further submitted that the Court may opt to call for a pre-sentence report for guidance.

DETERMINATION.

15. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Okeno v Republic [1972] EA 32** where the Court of Appeal on the duty of the Court on a first appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."***

16. I have gone through the record of appeal and the submission on record and in my view the issue that arises for this Court to determine is

whether the sentence imposed by the trial Court was manifestly harsh and excessive.

17. The Appellant seeks to challenge his sentence for the offence of defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act which provides as follows;

> ***Defilement***
>
> ***1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***2. ….....***
>
> ***3.....***
>
> ***4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

18. In the present case, the Trial Magistrate at page 7 of her judgment noted she had considered the Appellant's mitigation and had treated him as a first offender and sentenced the Appellant to 15 years' imprisonment which is the minimum sentence provided for under Section 8 (4) of the Sexual Offences Act for the offence that the Appellant was charged with.

19. It is not in dispute that the complainant was a minor aged 16 years and therefore had no capacity to consensual sex. However, the Complainant and the Appellant knew each other and had even cohabited for a period of four months as stated by the Appellant in his defence prior to the complainant having a child. The Appellant testified in his defence that when he met the complainant she was not going to school and she deceived him that she was an adult. The complainant indeed testified that she was in a relationship with the Appellant. He also stated that if released, he is ready to take care of his child. The Appellant denied defiling the complainant instead testified that they were in a relationship and engaged in consensual sex. On cross examination, PW6 stated that the complainant was defiled she was a child.

20. Section 8 (5) and (6) of the Sexual Offences Act provides as follows

> ***"(5) It is a defence to a charge under this section if-***
>
> ***(a)it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b)the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."***

21. The Court of appeal in **Eliud Waweru Wambui v Republic** [2019] eKLR held that;

> ***"We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years. We find merit in the Appellant's contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the Appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the Appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. We would give the term deceive the ordinary dictionary meaning which is to;***
>
> ***"Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to."***
>
> ***(Per the Concise Oxford English Dictionary, 12th Edn. 2011). So understood, we would think that had the two courts below properly directed their minds to the Appellant's defense and the totality of the circumstances of this case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.***

22. 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 they met and the complainant conceived. In view of the above, I find that the trial Court's conviction is unsafe, the sentence, clearly imposed on the basis of a mandatory minimum was harsh and excessive.

23. The upshot is that the appeal succeeds, the conviction is quashed, and sentence set aside. The Appellant is set at liberty forthwith unless lawfully detained.

It is so ordered.

Dated, signed and delivered in open Court, this 19th day of March, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE