



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCRA NO. 15 OF 2019**

**SK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being appeal from original conviction and sentence in the Senior Principal Magistrate's Court at Marimanti Law Courts in SOA No. 18 of 2018 delivered by P.N. Maina (Senior Principal Magistrate) on 27<sup>th</sup> February, 2019).**

**J U D G E M E N T**

1. SK, the Appellant herein was charged with the offence of defilement contrary to **Section 8(4) of Sexual Offences Act No.3 of 2006 vide Marimanti Senior Principal Magistrate's Court SOA Case No.11 of 2018**. The particulars as per the charge sheet in that count were that on 8<sup>th</sup> January 2017 in Tharaka South Sub County within Tharaka Nithi County defiled (name withheld) a child aged 17 years. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of Sexual Offences Act** but was convicted on the main charge.

**Brief background:**

2. The complainant at the material time was aged 17 years as per birth certificate tendered in evidence while the appellant was 18 years old because he testified that he was 18 years at the material time (8<sup>th</sup> January 2017). The Appellant and the complainant appears to have been in a relationship and had a consensual sexual intercourse a fact that the Appellant readily conceded in his defence. He however told this trial court in defence that he thought the girl was 19 years and older than him and that when he realized that she was still going to school after he met her with school books he stopped seeing her.

3. The complainant in her evidence told the trial court that she consented to sex after being taken for a picnic along Kathita River on a Sunday afternoon after the two had made prior arrangements to go on a date on that date. After the episode each went to their respective homes unknown to either of them that she had conceived from the engagement.

4. After around five months the girl realized that she had missed her periods and was pregnant. She left school and informed her parents who then took her to Marimanti Police Station to report and later to Tharaka District Hospital where it was confirmed that she was 6 months pregnant.

5. It is apparent from the evidence tendered that the police took no action immediately but waited until the complainant delivered which she did in September getting a baby boy named LB. Action was taken much later on 30<sup>th</sup> May 2018 by the police who arrested 2 suspects including the Appellant herein and subjected them to DNA test analysis which later revealed that the Appellant was the father. On 4<sup>th</sup> June 2018 the Appellant was charged with the offence of defilement. The DNA report authored by one H.S sang a Government Analyst was tendered as P. Exhibit 2 by Benard Chabari, a Clinical Officer working at Marimanti. I will come back to that anomaly later in this judgement.

6. The medical examination of the complainant was done on 5<sup>th</sup> June 2017 prior to the DNA test and the P3 report (P) was tendered by Benard Chabari, (PW2) as P. Exhibit 1 which indicated that penetration had been established by the fact that the complainant's hymen was broken and she was pregnant.

7. The trial court evaluated the evidence tendered and dismissed the Appellant's defence that the complainant tricked him into believing that she was 19 years old. The trial court found that all the ingredients of defilement had been established and that a child had been born out of the illicit sexual encounter. The Appellant then was convicted and sentenced to serve 15 years imprisonment.

### **The Petition of Appeal:**

8. The Appellant felt aggrieved by both the conviction and sentence and filed this appeal listing the following grounds namely:-

- i. That the trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was a lot of irregularities and malpractices.**
- ii. That the trial court erred by not noting the inconsistencies in the prosecution's case.**
- iii. That the trial magistrate did not take into account mitigating factors.**
- iv. That there were no independent witnesses called to testify.**
- v. That the trial court erred by rejecting defence without cogent reasons.**

9. In his written submissions the Appellant appears to have abandoned the above grounds and mainly concentrated on the fact that he was also a minor at the time and has attached a birth certificate to his submissions to back up his claims. He however did not seek leave of this court to adduce new or fresh evidence or seek leave to amend his petition or introduce new/further grounds as provided under **Section 350 of Criminal Procedure Code**.

10. The State/Respondent at the hearing of this appeal conceded to this appeal on the grounds that the Appellant at the time was also a minor and that the trial court erred by not adhering to the provisions of **Section 143 (1)** of the **Children's Act**, **Section 143** of the Children's Act provides *inter alia* that when a person is produced in court and it appears that the person is under 18 years of age, the court shall make due inquiry to ascertain the age.

11. The Respondent also faulted the trial magistrate for not adhering to the methods of dealing with child offenders under **Section 191** of the **Children's Act** and instead sentencing him to 15 years imprisonment.

12. This court has considered this appeal and the concession by the state which obviously is informed by the birth certificate attached to the Appellant's submissions. As I have observed above the Appellant never sought leave to tender and rely on new evidence in this appeal. Besides that when he appeared at the trial in his defence as I have observed above he told the trial court that he was 20 years at the time of his defence (1<sup>st</sup> February 2019) and 18 years old when he committed the offence. He was categorical on that fact and one can only conclude that the issue of age being brought up now is either an afterthought or a belated attempt to get off the hook.

13. This court has considered two aspects in the trial which appears to have been overlooked at the trial and though the Appellant has mentioned only one, this court will look at the two issues for the interest of justice

#### **(i) Whether the DNA report was properly tendered in evidence.**

14. The DNA analysis report dated 24<sup>th</sup> July 2018 authored by one H.K. Sang, a Government analyst was tendered by Benard Chabari (PW2) who told the trial court that he was a clinical officer working at Marimanti District Hospital. The witness did not work at the Government Chemist to know handwriting of the author and did not possess the requisite expertise to tender the DNA analyst report. The provisions of **Section 48** as read with **Section 33** of the **Evidence Act** is clear that only opinions of persons specially skilled in a given field are competent to tender expert opinions or evidence and the court can only admit such evidence otherwise such evidence is rendered hearsay.

15. This court finds that the DNA analysis report tendered by PW2 as P. Exhibit 2 was inadmissible because the author was not called to tender it and PW2 was not competent as provided under **Section 48** of the **Evidence Act** to tender it. The DNA analysis report was relied upon by the trial court to render a conviction because that is what established that the Appellant and not the other suspect he was arrested with was the father of boy child born after the illicit affair between him and the complainant. The trial court fell into error when it admitted the report in evidence and when it relied on it to render conviction.

#### **(ii) Whether the defence was considered:**

16. The Appellant has faulted the trial court for not considering his defence that the complainant told this court she was 19 years old at the time. I have gone through the judgment from the court below and for good measure the trial court actually analyzed the defence raised and clearly contextualized the provisions of **Section 8 (5)** of **Sexual Offences Act** in relation to the evidence tendered. The only point where the trial court fell into error is when he found that the defence was a sham or afterthought because of the evidence of P3. (P Exhibit 1). The P3 form indicates that the complainant was aged 14 years when she was examined (5<sup>th</sup> June 2017), a fact that was clearly misleading and inconsistent with the evidence tendered by PW4 (P Exhibit 3 birth certificate) which showed that the girl was aged 17 years old at the time.

17. The trial court also fell into error when it found that the complainant was examined "a few hours after the alleged act" when the truth of the matter is that she was examined on 5<sup>th</sup> June 2017 as per P. Exhibit 1 while the defilement took place on 8<sup>th</sup> January 2017 which was months rather hours after the event.

18. The Appellant's defence that he had a relationship with the complainant because he was led into believing that she was 19 years was not challenged by the prosecution during trial. The trial court finding that the Appellant did not challenge the complainant regarding her age was a misdirection in my considered view. **Section 8(5)(a)** of **Sexual Offences Act** provides:-

" 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 18 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 18 years .
- c. The brief referred to in subsection (5) (b) to be determined having regard to all the circumstances, including any steps the accused took to ascertain the age of the complainant."

19. I have considered what the Appellant told the trial court which can reveal the circumstances obtaining. This is what he said;

**"Complainant asked me to tell her my age. By then I was 18 years old. She started laughing at me telling me that I was a child compared to her since she was 19 years old. We then went ahead and agreed. We did everything"**

The Appellant appears to have been teased by the fact that the complainant appeared older than him and perhaps that might explain why he found it fit to make an impression upon the girl that he was old enough. In her evidence at the trial the complainant *inter alia* testified as follows:-

**" We agreed to meet the by the river. It was a Sunday..... we agreed to go for a walk at [particulars withheld] river..... Accused then persuaded me to have sex with him. .... he did not use any force..... I never told my parents ..... because I would have been beaten."**

20. Looking at the evidence presented before the trial court, there is no doubt that this was a sexual liaison between two teens and even if the appellant at the time never tendered his birth certificate to show that he was almost of the same age with complainant and therefore were teens who were more in need of parental counseling and guidance than a condemnation of one of them. In my view the legal defence under **Section 8(5) of Sexual Offences Act** by the Appellant was well taken by the Appellant and given the circumstances obtaining, that defence should have been upheld by the trial court.

In the end for the aforesaid reasons this court finds merit in this appeal. Both the conviction and the sentence are hereby set aside/or quashed. The Appellant shall be set free forthwith unless lawfully held.

**Dated, signed and delivered at Chuka this 26<sup>th</sup> day of February, 2020.**

**R. K. LIMO**

**JUDGE**

**26/2/2020**

Judgment signed, dated and delivered in presence of Momanyi for Respondent and Appellant in person.

**R.K. LIMO**

**JUDGE**

**26/2/2020**