REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.7 OF 2019

REPUBLIC .....APPELLANT

VERSUS

AJK.....RESPONDENT

(Being an appeal from the original judgment in the Senior resident Court at Moyale by the Hon. S.M. Kimani SRM in Criminal case No.10 of 2016)

J U D G M E N T

The respondent was charged with the offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act. The particulars of the offence are that the appellant on the 23rd day of December, 2015 at around 2100 hours at [particulars withheld] location in Sololo Division within Marsabit County, intentionally caused his penis to penetrate the vagina of HAD a child aged 16 years.

The trial Court convicted the appellant and sentenced him to serve three (3) years on probation. Being dissatisfied with the sentence imposed by the trial court, the state preferred this appeal. There is only one ground of appeal namely:-

> **1. That the Hon. trial Magistrate erred in law in sentencing the appellant to non custodial sentence of 3 years whereas the law under which the conviction was founded provides for a minimum sentence of 15 years.**

Mr. Ochieng learned prosecution Counsel, Submitted that the appeal is only on sentence. Counsel maintain that the state appreciates the consideration of the trial Court but the sentence is quite lenient. Counsel urged the Court to give a proper sentence.

Mr. Biwott, Counsel for the respondent, opposed the appeal and submitted that the sentence is based on the evidence and all factors of the case. Both parties were minors. Mitigation factors were considered. There was a pre-sentence report which favoured the respondent.

This is a first appeal. The Court has to assess and evaluate the evidence afresh before drawing its own conclusion. PW1 was the complainant. She had turned 18 years by the time she testified. On 23.12.2015 she left her home in [particulars withheld] and went to Sololo. She was to sleep at her friend's place. While there the respondent entered the house at around 9.00pm. Her friend excused herself and left. The respondent started caressing her and forcefully defiled her. He lifted her long dress and wrestled her to the floor of the living room and defiled her. She felt pain and blood started oozing from her vagina. The respondent then left. Later her friend appeared from the bedroom. PW1 told her not to tell anyone. After one month she missed her monthly periods. She decided to keep quire. In May 2016 pupils at school began noticing her pregnancy. On 14.6.2016 she was summoned by one of her teachers and she told her that she was pregnant. The teacher informed pW1's sister. Elders were summoned and the respondent denied impregnating her. The matter was reported at the Sololo Police Station. She gave birth on 11.9.2016. It is her evidence that she was 17 years old when she was defiled. DNA test was done and the respondent was found to be the child's father. PW1 was born on 3.2.1999. PW1 and the respondent used to attend the same school. While she was in class six the respondent was in class seven. The two had no relationship.

PW2 SAD is a clerical officer at the Sololo [particulars withheld] office. She is PW1's sister. On 14.6.2016 PW1's teacher by the name **A** notified her that PW1 was pregnant. On 18.6.2016 elders met including the area chief. PW1 informed them that it was the respondent who was responsible for the pregnancy. The respondent who was also in the meeting denied responsibility. The matter was reported to the Police.

PW3 AAD is PW1's brother. He attended the elders meeting. DNA test was conducted at **KEMRI** and the respondent was found to be the father of the baby. **PW4 Somo Galma** is a clinical officer. On 21.6.2016 he examined PW1 and found that she was 28 weeks pregnant. He filled a P3 form for PW1.

PW5 PC Hillary Omondi Arianda was attached to the Sololo Police station. The case was reported on 19.6.2016. He investigated the

case. The respondent was arrested on 21.6.2016 and charged with the offence. PW3 produced PW1's birth certificate. He escorted pW1 and the respondent to KEMRI in Nairobi where their blood samples were taken for DNA purposes. The report indicate that the possibility of the respondent being the father was 99.99%.

The respondent tendered unsworn statement. He stated that he knows PW1. They went to the same school. He was a class ahead of her. In 2010 they developed friendship. In 2011 he did his KCPE examination and joined form one in 2012 at [particulars withheld] Boys High school. In 2012 PW1 did her KCPE. She joined [particulars withheld] girls secondary school in 2013. Distance separated them. In August, 2014 he met PW1. She told him that she had dropped out of school. He finished form 4 in 2015 and went back to the village. He found PW1 who proposed that the two should get married. In December 2015 PW1 asked him to go to BM's home. BM is PW1's friend. As they were there PW1 asked B to excuse herself. PW1 told him that she loved him so much. He also loved her but was not ready for marriage. The two spent the night together and had sex. PW1 asked him not to tell anyone that the two had had sex. The two kept on seeing each other and PW1 did not disclose anything unusual to him. He later heard rumours that PW1 was pregnant. He was summoned and asked about the matter but denied being responsible unless a DNA test was conducted. He was arrested and charged with the offence.

The appeal is on sentence. The respondent was convicted of the offence. He was born on 20.7.1997. The incident occurred on 23.12.2015. The respondent had turned 18 by 23.12.2015. He admitted having sex with the complainant. The DNA test does confirm that he is the father of the child born out of their sexual intercourse.

I have read the sentence of the trial Court. The trial Court went a long way to explain how it arrived at that sentence. The trial Court was guided by several authorities from both the high Court and Court of Appeal. The court referred to the cafe of **DPP –V- Joseph Waihenya Gitau (20180 eKLR,** in that case Justice H.P.G. Waweru held that a probation sentence is not illegal in a case where the offender is convicted for the offence of defilement in contravening of section (1) as read with section 8(3) of the Sexual Offences Act.

The trial Court also referred to the case of **Eliud Waweru Wambui –V- Republic (2019) eKLR** where the Court of Appeal observed as follows:

> **We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *GILLICK VS WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY [1985] 3 ALL ER 402,* do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjoined leaps. As Lord Scarman put it in that case (at p421);**
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> > **"if the law should impose on the process of growing up fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At P.422**
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> **The law also referred to the judgement of Chief Justice Lord Parker in *R VS Howard [1965] 3 ALL ER 684 at 685;***
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> > **"……. where he ruled that in the case of prosecution charging rape of a girl under 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that, there are many girls who know full well what it is all about and can properly consent.?"**
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> **Where to draw the line for what is elsewhere referred to as *statutory rape* is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Arch bold criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having and sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfurling tragedy calls for serious interrogation.**

The trial Court called for a pre-sentencing report. The report notes that although pW1 and the respondent had a relationship from 2010, they first engaged in sex on 23.12.2015, the very day PW1 became pregnant. By 2010 both PW1 and the respondent were minors. PW1's family was of the view that the respondent be imprisoned so that he can learn a lesson from what he did.

In its judgement the trial Court observed as follows: -

> **I must say that i was not particularly impressed by the demeanor of the complainant the entire time she was in the witness box. She did appear to me to have been reticent about the state of affairs upon which this case is founded. She was out rightly economical with the truth.**
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> **During the various examination of the complainant, that is to say, right from her examination-in-chief through to cross examination and finally through to re-examination it became grossly apparent that the accused and the complainant had started off a romantic relationship when the both of them were below the age of eighteen. The impugned sexual intercourse that the duo had on 23rd December, 2015 was predicated on this relationship. Given the circumstances of this case, I found it to be quite incredible for the complainant to assert that she was forcibly defiled. If that be so it is not reasonable or even possible that she kept mum until she was discovered to have been about twenty-eight weeks pregnant. I find that – if it is**

indeed true the accused forced himself on the complainant – the far-reaching effects of pregnancy would have constrained her to disclose to her parents or her teachers what had happened on the material date.

This Court sought a probation officer's report. The report dated 10/3/2020 indicates that the respondent is 22 years old. The victim and the respondent had known each other from their primary school days. The respondent is now in the boda boda business. The child born out of the relationship is in nursery school and lives with the victim's mother as the victim is a college student in Meru. The victim informed the probation officer that the respondent has never sent her any money for the child's upkeep. The report has left the issue of sentence to the Court.

The respondent in his defence confirmed that he had a relationship with the Complainant. The two spent the night together on the material day when the Complainant presumably became pregnant. He wanted DNA test to be conducted to confirm that the child is his. This was done and the report from the Government chemist does confirm that the respondent is the child's father. It is not clear why the respondent has decided not to support the child yet he is the father. He does not need to go to the victim's home to pay any financial support. The victim is definitely on phone and he can send the money through mobile money transfer services. At the age of 22 years, the respondent should learn to be responsible. He is already a father and is economically engaged. By being sentenced to a non-custodial sentence, the respondent may have an erroneous conclusion that although he made the victim pregnant, he can easily walk away with it. The respondent seems not to be sympathizing with the victim who is meant to take care of the child at her tender age of 20 years now. The victim was only 16 years when the incident occurred.

The appeal is on sentence only. Mr Ochieng was of the view that the Court ought to have imposed a 15 years' imprisonment sentence which is the minimum sentence. From the evidence on record, I am satisfied that fifteen (15) years imprisonment is not the ideal sentence for the respondent. The two were in a love relationship at their tender age. The respondent was already over18 years. He has decided not to be responsible to his own child. He seems not to have learnt any lesson from his mistake.

I do find that a custodial sentence will sober him up. I do set aside the three years' probation sentence and replace it with nine (9) months imprisonment.

In the end, the appeal is hereby allowed. The respondent to serve nine (9) months imprisonment from the date hereof.

Dated, Signed and Delivered at Marsabit this 24th day of March, 2020

S. CHITEMBWE

JUDGE