REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 5 OF 2019

BIDAN GICHOBI KABURUCHO alias SIRIO.....APPELLANT

– VS –

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant Bidan Gichobi Kaburucho alias Sirio was charged before Resident Magistrate court at Gichugu, with the offence of defilement contrary to **Section 8(1)(4) of the Sexual Offences Act.** He was also charged with an alternative charge of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act.**

2. The particulars of the offence of defilement are that on diverse dates between 1st & 31st May 2017 in Kirinyaga East Sub-County within Kirinyaga County unlawfully and intentionally did cause his penis to penetrate into the vigina of HWM a child aged 16 ½ years.

3. The appellant pleaded not guilty on the two counts. After a full trial, the appellant was convicted on the offence of defilement and was sentenced to fifteen years imprisonment.

4. The appellant was aggrieved by both the conviction and sentence and filed this appeal which raises the following grounds:-

a) The learned trial Magistrate erred in law and fact by rejecting the appellant's evidence in defence.

b) The learned trial Magistrate erred in law and fact by failing to make a finding that the complainant (minor) deceived the appellant to believe that she was of the age of majority.

c) The learned trial Magistrate erred in law and fact by making a finding that Section 8(5) and Section 8(6) were not applicable in the appellant's case.

5. The appellant prays that the appeal be allowed, the conviction be quashed and the sentence be set aside.

6. The facts of the case are that the complainant HWN was a student in class Six (6) in the year 2017. She was then living with her father PW and her brother PM. Sometimes in May 2017 at around 6.00 Pm the complainant had gone to the shamba to pick vegetables. The appellant had bought a piece of land near her home. As the complainant was picking the vegetables, the appellant who was in his farm went to where she was and held her waist with one and covered her mouth with the other. He then pulled down her trouser. The appellant removed his trouser and under pant. He then opened her legs, removed his penis and penetrated her vagina. The appellant lay on her and defiled her. The complainant tried to scream but the appellant would block her mouth using his hand. The appellant gave the complainant Kshs 100/- and warned her not to tell anyone or he would kill her. The complainant realized that her trouser was torn and the button and the zip came off. The complainant went home and took a bath. Later she started experiencing pain and nausea. She would vomit after eating food. She went to Karumandi Dispensary where she was examined and she was told that she was pregnant. She informed her mother who in turn informed her father. The matter was reported to the police. The complainant was issued with a P.3 form. She was examined at Kianyaga Hospital and a P.3 form was filled. She was told to wait and give birth. After giving birth on 26/2/2018 she was summoned by the OCS so that a DNA test could be conducted. The complainant went to Kenyatta Hospital with the child and the appellant. Saliva samples were taken from the child, the complainant and the appellant. The DNA test confirmed that the appellant was the father of the child born by the complainant.

7. The complainant was born on 26/10/2000 as per the birth certificate issued on 23/3/01 which was produced in court as exhibit. The appellant was arrested and charged with this offence.

8. In the appellant's submission dated and filed on 9th March 2020, the appellant submitted that in his defence he did not deny having sexual relations with the complainant, he however reasonably believed she was above 18 years, since at the time she could seek employment at his

farm. He also submitted that the complainant was big bodied at the time as admitted during her cross examination testimony.

9. He submitted that since the complainant was a casual laborer at his farm and he had never seen her in school uniform, he reasonably believed she was an adult as she behaved like one. Further that the prosecution failed to adduce evidence of the complainant's school attendance. He submitted that the only reason the matter was reported was because the complainant was impregnated.

10. He submitted that the complainant's theory of being attacked was fictitious as she never told anyone of the ordeal until after she discovered she was pregnant a month later.

11. The appellant relied on the case of *Martin Charo vs Republic 2016 Eklr* and the Court of Appeal decision in *Eliud Waweru Wambui vs Republic.*

12. Lastly he submitted that his defences under **Section 8(5) and (6)** were complete defences, and that the trial magistrate ought to have given him the benefit of doubt, as was held in the case of *Omus Kiringi Chratsi vs Republic 2017 eKLR* where the complainant was found to have enjoyed the relationship.

13. The prosecution in their submissions dated 4th March 2020 and filed on 5th March 2020, submitted that that the key ingredients for the offence of defilement were proved, they include proof of age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. They submitted that both charges were proved beyond reasonable doubt.

14. The state submitted that the appellant failed to submit evidence that the complainant behaved like an adult, thus **Section 8(5)** could not be applicable. Further the appellant was accorded the minimum sentence of 15 years as per **Section 8 (4).** The prosecution prayed for the dismissal of the appeal.

15. This is a first appeal and this court has a duty to re-evaluate the evidence and come up with its own independent finding. The court only leaves room for the fact that unlike the trial Magistrate it had no chance, to see the witnesses and assess their demeanor. In **Okeno –v-R(1972) E. A** it was held:

> ***"An appellant on a 1st appeal, is entitled to expect that evidence as a whole will be subjected to a fresh exhaustive examination (Padya –v-R(1957)E.A 336 and to the appellate court's own decision on the evidence. The 1st appellate court must itself we conflicting evidence did draw its own conclusions (shantilal-v-R(1957)E.A 570). It is not the junction of a 1st appellate court merely to scrutinize the evidence to support the lower courts findings, it must make its own findings and draw its own conclusion."***

3. ISSUE FOR DETERMINATION:

In view of the submissions by the appellant, the only issue for determination is whether the defence under **Section 8(5) of the sexual Offences Act** was available to the appellant.

4.ANALYSIS

The appellant does not deny that he had penetrative sexual relations with the complainant. **Section 8(1)(4) of the Sexual Offences Act** provides:-

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(4) A person who commits an offence of defilement with a child between age of sixteen and eighteen years is liable upto conviction to imprisonment for a term of not less than fifteen years.***

16. A review of the proceedings, the witness testimonies and evidence including the birth certificate of the complainant and the DNA test of the child born out of the incident they indicate that the complainant who was a child aged 16 ½ years had penetrative sex. She could not consent to sexual intercourse owing to her age. The act was defilement as defined under the **Sexual Offences Act**. **Section 8(1)(4) of the Act**

17. The sexual offences avails a defence to a person who is charged with defilement.

> ***Under Section 8(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.*
>
> ***Section 8 (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.*

In **Irene Atieno Ochieng v Republic [2017] eKLR the High Court at Migori** it was held that '*whenever the accused opts to rely on the defence under* **Section 8 (5) of the Sexual Offences Act**, *the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate: -*

'(a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;

(b) That the accused person reasonably believed that the child was over the age of eighteen years; and

(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.'

18. An accused person will first have to prove deception by the child in respect of the child's age.' The accused will then have to prove that he reasonably believed she was of majority age and as per sub-section 6 and that he took the necessary steps to ascertain her age. The appellant claimed that his defence was not considered by the trial court, that the complainant enticed herself to him, and that due to her big body size at the time he reasonably believed she was of majority age.

19. During his testimony the appellant stated that the complainant had worked for him for about three times to plough his farm. He also claimed that he had inquired if she goes to school, in which she denied. He however did not raise all of these issues during cross examination of the complainant, with the exception of the aspect of her being big bodied. The appellant submits that the complainant's conduct was consistent with an adult, as she took herself to the hospital where she was confirmed to be pregnant. He also did not raise this issue in his defence.

20. The evidence of the complainant on the manner in which she was defiled remains uncontroverted. The prosecution availed evidence in form of a biker whose elastic was damaged and a trouser whose button came off and the zip came off. They were produced as exhibit 5 & 6. This is indicative of use of force. Uncontroverted evidence bears a lot of weight and the court would have no reason not to rely on it. The evidence by the complainant on how the appellant pounced on her and defiled her is uncontroverted.

21. The trial Magistrate found that the appellant did not show that a relationship existed between him and the complainant. He also found that the issue of accused being hugged by PW-1- and PW-1- being a casual worker in his farm was not raised during cross-examination of PW-1-. He concluded that this fact makes him to believe that this was an afterthought on the part of the defence. I find that having considered the evidence on record, this finding was based on the evidence on record by the complainant. I find that the trial Magistrate properly addressed his mind to the evidence and the law in rejecting the defence of the appellant. The defence was not plausible.

22. The appellant failed to prove deception on the part of the complainant as to her age or that he took the necessary steps to ascertain her age. Therefore, his defence did not meet the necessary threshold to accord him the benefit of doubt.

5. FINDING

I find that the appeal is without merits.

23. On sentencing, the minimum sentence provided under **Section 8 (4) of the Sexual Offences Act** is years 15 years. The appellant was sentence to the bare minimum sentence is provided. I have no reason to interfere with the sentence. I dismiss the appeal.

Dated at Kerugoya this 15th day of September 2020.

L. W. GITARI

JUDGE