REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.17 OF 2018

LIBAN WAKO HALAKE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being and appeal from original conviction and sentence in criminal case no.716 of 2013 of HON. T.M. WAFULA Resident Magistrate at Marsabit)*

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 18th day of December 2013 at [Particulars withheld] village in Marsabit central district within Marsabit County, unlawfully and intentionally caused his penis to penetrate the vagina of MDG. a child aged 17 years.

The trial court convicted the appellant and sentenced him to serve 15 years imprisonment. The grounds of appeal are that:-

1. ***The appellant pleaded not guilty to the charge***

2. ***The trial court failed to notice that the appellant is suffering from ulcers.***

3. ***The appellant is the sole bread winner of his family of a wife and three children.***

4. ***That the sentence is excessive and should be reduced or should be put on probation.***

The appellant submitted that he was not accorded a fair trial. There was contradiction on the age of the complainant. The complainant was over eighteen years when the offence occurred. The complainant's father stated that the complainant was born in February 1996 while the birth certificate gave a date of 20th May 1996. In his defence he testified that the complainant's step mother informed the appellant that she was 20 years old. The complainant testified that she only saw her birth certificate after completing school. She saw her birth certificate in court. It was his evidence before the trial court that the complainant was unduly influenced by her father to implicate him as he had disagreed with him. He was meant to marry the complainant. The appellant also stated that it was not true that he ambushed the complainant in the bush and had sex with him. He was framed.

The state opposed the appeal. Mr. Mwangangi submitted that if the appellant was married to the complainant he could still have been charged with subjecting a minor to unlawful cultural practice. The birth certificate proved the complainant's age. It was legally obtained. The fact that the appellant had differences with the complainant's father is part of the evidence. The appellant did not cross examine the complainant's father on the alleged differences. It is only PW3 who referred to the differences. The nature of the differences was not explained. The sentence is proper and is the minimum. The appellant was not framed.

This is a first appeal and the court has to examine the evidence afresh and make its own conclusion. **PW1 MD** was the complainant. She told the court that she was seventeen years old and had completed standard eight. She knew the appellant as he was a casual labourer in the manyatta. On the 18.12.2013 she went out to the bushes with the appellant. The appellant forced her to the ground and they had sex. He did not use any protection. She screamed but her voice was not loud enough to attract attention. After the incident she did not go back home and at night they had more sex. They were later found in the bushes at about 1.00pm and they were escorted to Marsabit Police station where they were booked in the cells. On 20.12.2018 she was taken to hospital and examined. It is her evidence that it is the appellant who suggested that they go to the bushes and have sex. She had not previously differed with the appellant.

The record shows that PW1 was cross examined by the appellant and this is what she told the court

When we were arrested and taken to the Police station you said that we agreed to have sex.

When my father asked me I told him we are boyfriend and girlfriend.

You told me that when the results are released you will pay my fees for secondary and that I will not undergo any hardship.

I told my parents that even if they beat you up and sent you to the cells I will still continue as your wife.

Yes there is a bag you had which had Ksh.2,000/= and which we had agreed to use.

It is my parents who unduly influenced me to say that you forced me and raped me. We agreed to have sex.

The complainant was also examined by the trial court and this is what she told the court.

We have been boyfriend and girlfriend for one year.

On 18.12.2013 it was the first time for us to have sex.

We agreed to have sex. It is not the first time we have had sex. We frequently do it. I would wish that the accused be released.

PW2 DGJ is the complainant's father. He testified that the complainant was seventeen years old having been born on 20.2.1996. She had completed standard eight. She is the first born. The appellant was a casual labourer in the manyatta and had also worked for him. PW1 went out to fetch firewood on 18.12.2013 at 9.00am but did not return. On 19.12.2013 he called village elders and decided to comb the bush. They found PW1 with the appellant at about 1.00pm. The two were taken to his home and they called the chief. The appellant is married with three children. He was taken to the Police station and PW1 was referred to hospital. He had known the appellant for one month. PW1 did not state that she had agreed with the appellant to go where they were found.

PW3 Dida Dika is a farmer from Goru Rugesa. On 18.12.2013 PW2 who is his neighbour informed him that he had not seen PW1 since morning. The following day PW2 told him that he was not in good terms with the appellant who had worked for him. They went to the appellant's house to check if he was there but they were told that he had left home the previous morning and had not come back. They searched for PW1 and found them together in the bushes. **PW4 PC Hillary Rutto** was attached to the Marsabit Police station and investigated the case. The case was reported on 19.12.2013 at about 4.00pm. He went to the home of PW2 and arrested the appellant. From where the appellant and PW2 were found it was 500 metres from PW2's home. He also took the victim to the Police station on 20.12.2014 she was escorted to the hospital. A P3 form was filled and the doctor formed the opinion that there was penetration. He saw the birth certificate of PW1.

PW5 Doctor Mark Imbusi was stationed at Marsabit District hospital. On 24.12.2013 he attended to PW1. PW1 did not have any injuries. Her genitals had no bruises or tears but there was evidence of previous multiple sex with presence of spermatozoa like excretions from the vagina. There was evidence of repeated sexual act. He estimated PW1's age to be about seventeen years. He told the court that the sperms survive within a period of three days. The appellant was not examined.

The appellant gave unsworn testimony. It is his evidence that he was a resident of Goru Rugesa and he is a casual labourer. He had agreed with PW1 to get married. He was caught together with the complainant. They did not have any sexual intercourse. When they agreed PW1 told him that she was twenty years old. He confirmed from PW1's step mother who told him that PW1 was between 20 to 21 years because the child who follows PW1 was in form three.

The Court has to determine whether the prosecution proved its case against the appellant beyond reasonable doubt. The medical evidence established that PW1 was sexually active. She had had previous multiple sexual act. Its not clear how PW5, the medical doctor, came to that conclusion. I am satisfied that his professional experience is capable of enabling him to conclude that a complainant in a sexual offence could have had sex before the alleged date of the offence. In the current case, the doctor formed the opinion that PW5 had had previous multiple or repeated sexual contacts. PW1 informed the Court that she frequently had sex with the appellant. It is therefore established that PW1 was penetrated. Although the medical evidence does not prove that it is the appellant who penetrated PW1, the evidence does confirm that PW1 was penetrated. There was presence of spermatozoa in her vagina when PW5 examined her.

Section 8(1) of the Sexual Offences Act states as follows:-

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Section 8(5) and 8(6) of the Sexual offences Act further provides:

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.***

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.

Section 43 (4) of the Sexual Offences Act states as follows:-

> **43(*4) the circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such* act.**
>
> **(a) Asleep**
>
> **(b) Unconscious**
>
> **(c) In an altered state of consciousness**
>
> **(d) Under the influence of medicine, drug alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected.**
>
> **(e) Mentally impaired, or**
>
> **(f) A child**

The appellant informed the trial Court that PW1 was over eighteen years old. PW2 testified that his wife passed on in 2002. PW1 is his first born child. The appellant testified that he was informed by PW1's step mother that PW1 was between 20 to 21 years old because her immediate follower was in form three. The trial Court did not follow up that issue and his evidence, although unsworn, remained as part of the record. It may be taken that since the appellant's evidence being unsworn may not be of more evidential value, the law allows accused persons to tender unsworn evidence. Such evidence ought to be considered in line with the other evidence involving the case. The evidence, even if unsworn, raised the issue of the complainant's age. Was she seventeen, (17) years, or was she over eighteen (18) years. The mere fact that she had finished her standard eight cannot be conclusive proof that she was seventeen years. The birth certificate was issued on 21.3.2013. I took the effort of summoning the registrar of births and deaths to explain whether there were any supporting documents which did confirm that PW1 was born on 20.5.1996. **Mr. Peter Kimathi** who appeared before me on 13.2.2019 stated that it would be difficult to retrieve the documents from the archives. PW2, who is the father to PW1 testified that PW1 was born on 20th February, 1996. I have confirmed from the handwritten record of the trial Court that PW2 gave the date of birth as 20.2.1996. This is different from the date of 20th May 1996 indicated on the birth certificate. The year of birth remains the same. If we go by the 20.2.1996, by 21.2.2013 PW1 had turned 17. She had started her 18th year and was to be 18 by 21.2.2014. The incident occurred on 18.12.2013, about two months to the complainant turning 18 years.

Both dates indicated as PW1's date of birth makes PW1 to be under 18 years. The question is what informed the registrar of person to indicate the date of birth as 20.5.1996. The registration was done before the offence was committed. PW2 did not testify as to whether PW1's clinic documents were available. He could be right that PW1 was born on 20.2.1996. The appellant's evidence is that he was informed by PW1's step mother that pW1 was between 20 to 21 years and they had agreed to get married. This is what PW1 told the court. It is her evidence that the appellant is her boyfriend and she would like him to b released. She was influenced by her parents to claim that she was forcefully defiled.

Turning to the provisions of the Sexual Offences Act, Section 8(1) provides that defilement is any act which causes penetration with a child. This is complete or partial insertion of one's genital organs into the genital organs of another person. The evidence does prove that the appellant did penetrate PW1. PW1 initially told the Court that they were having sex for the first time but was quick to add that they used to have sex frequently. This raises doubt on her credibility.

The case therefore paints a picture of two people who used to frequently have sex. According to the complainant they had been friends for one year. The appellant's age is not indicated. According to PW2 the appellant is married with three children. I saw the appellant in Court and he is not an old man. He is equally not a young boy. In his mitigation, he told the Court that he is a first offender and has no family. There is no pre-bail or pre-sentencing report. Can it be said that the appellant took advantage of PW1 and lured her into sex. The evidence proves that the two have had a relationship for one year. PW1 was not pregnant when the two were found together on 18.12.2013. According to PW3, he was told by PW2, the complainant's father, that he was not in good terms with the appellant. The nature of their differences is not explained. The appellant did not raise this issue in his defence.

Given the evidence on record and the evidence of the complainant in particular, I do find that the prosecution did not prove its case beyond reasonable doubt. The mere fact that the prosecution proves penetration by the accused against the complainant is not *fait accompli*. There is the provisions Under Section 8(5) and (6) of the Sexual Offences Act. The section makes it a defence if the circumstances of the case made the accused to believe that the complainant was over eighteen (18) years. Section 8(5) and 8(6) of the Sexual Offences Act claws back the position that a child under the age of 18 years cannot give consent to sex. The circumstance of this case show that the complainant was about two months to turn eighteen. She had sexual relationship with the appellant for about one year. She did not tell he appellant that she was seventeen (17) years old. The appellant was informed by PW1's step mother that PW1 was between 20 to 21 years old. We cannot simply dismiss the appellant's contention to that effect. Further, there is the issue as to whether indeed PW1 was born on 20.2.1996. Apart from the date, there is no document to prove the exact date of birth. This was late registration that was done after PW1was seventeen (17) years.

I am satisfied that the defence provided under Section 8(5) and 8(6) of the Sexual Offences Act is available to the appellant. The complainant made the appellant believe that she was over eighteen years old. Even her own evidence in Court proves that she was fully conscious of her relationship with the appellant. She urged the trial Court to have the appellant released as she testified. It is her further evidence that it was her parents who told her to allege that she had been defiled. It is her position that even if the appellant is sent to the

cells, she would remain to be his wife. A child who does not know what she is doing cannot consider herself to be someone's wife. The complainant behaved like an adult. By the time she testified on 16.1.2014 she was about one month to turn eighteen if we are to go by her father's evidence. She was capable of expressing herself and independently stated that she used to frequently have sex with the appellant who will remain to be her husband. The circumstance of the case does not show that the appellant preyed on PW1 and lured her into sex. PW1 was having a relationship with the appellant while fully conscious of what she was doing. They had sex for one year but PW1 did not become pregnant. I can't say that PW1 was using contraceptives but I am convinced that PW1 knew what she was doing. She clearly behaved like an adult and repeatedly had sex with the appellant. The medical evidence does prove that there were repeated sexual acts. The law is meant to protect innocent children who are lured into sex by those who prey on them. This case proves that PW1 was not lured into sex. She knew what sex was and had it for over one year. She turned eighteen two months after the incident. She was not forced, lured or made to get confused. She knew what she was going. She behaved like an adult who had a one year relationship with her boyfriend. It does not help her by sending the appellant to fifteen (15) years in jail. She would like him to be released and I will not hesitate to fulfil her wish.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 21st day of February, 2019

S. CHITEMBWE

JUDGE