



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.7 OF 2018

MOHAMED ABUBAKAR..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 29 of 2017 of the Principal Magistrate B.M Ombewa at Marsabit)

JUDGMENT

The Appellant was charged with the offence of defilement Contrary to Section 8 (1) as read with sub section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the 8th day of January 2017 at about 1600 hours at in Marsabit central sub county within Marsabit county, intentionally and unlawfully caused his penis to penetrate the vagina of DBG. a girl aged 15 years.

The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. He was also charged with a second count of trafficking narcotic drugs contrary to section 4(A) of the Narcotic and Psychotropic substances Control Act 1994. The particulars of the offence are that the appellant on the 8th day of January 2017 at about 1600 hours in Marsabit central sub county within Marsabit county, was found trafficking bhang to wit 850grammes of street value of Ksh.4500/= by storing in contravention of the said Act.

The trial court convicted the appellant on the main count of defilement and acquitted him on the count of trafficking narcotic drugs. He was sentenced to serve 15 years imprisonment. The grounds of appeal are:

- 1. That the learned magistrate erred in convicting the appellant after admitting that there was a marriage relationship that existed.**
- 2. That the learned magistrate erred in law and fact by admitting the evidence of the complainant after already establishing that there existed a marriage arrangement that broke done.**
- 3. That the learned magistrate erred in law and fact by concluding the presence of the spermatozoa found on the complainant was that of the appellant even without a medical report supporting such findings.**
- 4. The learned magistrate failed to appreciate the fact that the complainant had informed her parents that she was in the appellant's house since the start of the alleged marriage.**
- 5. That the learned magistrate clearly did not appreciate the genesis of the case in reaching his decision.**
- 6. That the learned magistrate erred in law and fact in failing to make a finding that the prosecution witness tendered uncorroborated and contradictory evidence.**
- 7. That despite being a first offender before any court the trial magistrate passed a sentence that was harsh and excessive.**
- 8. That the trial suffered some procedural irregularities**
- 9. That the trial court did not consider the appellant's mitigations.**

Mr. Halake appeared for the appellant. Counsel submit that the evidence established that there was an arranged marriage between the appellant and the complainant. Witnesses testified that the complainant had gone missing. There is no report to the Police. This shows that they knew her whereabouts. PW2 is the complainant's auntie. There may have been differences between the complainant and the appellant. In her evidence the complainant testified that she had lived with the appellant as a man and wife. That shows she was ready to live with a man. The trial Court even rejected her testimony that she was detained in the appellant's house. She had free entry and exit from the house. At one time she went out to her auntie and complained of her issues with the appellant and then went back to the appellant's house. There was no force or coercion.

The complainant was found to be seven weeks pregnant. The medical evidence does not establish whether it was the appellant who defiled the complainant. No DNA test was done. The complainant stated that she lived with the appellant for four weeks. The pregnancy was seven weeks old. The evidence indicate that the complainant went missing from 8.12.2016 to 1.1.2017 which is a period of four weeks. The ultra sound shows that she was seven weeks pregnant giving a discrepancy of three weeks. Medical evidence indicate that there was spermatozoa in the complainant's private organs. That does not prove that the same were those of the appellant. It is possible that she had sex with other people whenever she went out of the appellant's house. Mr. Halake also submit that PW8 produced the age assessment report yet he was not the maker of the report. The report did not have an official stamp. The appellant's mitigation was not considered. The appellant was twenty one years old in 2016. The sentence is excessive. Mr. Halake relies on the cases of **Dominic Kibet Mwareng, Kitale Criminal Appeal No.155 of 2011,(2013)eKLR, Martin Chalho V Republic Malindi Criminal Appeal No.32 of 2015(2016)eKLR** and that of **Omus Kiringi Chivatsi V Republic Malindi Criminal Appeal No.32 of 2016(2017) eKLR**

The state opposed the appeal. Mr. Chirchir, prosecution counsel, submitted that the complainant was between sixteen and seventeen years old. She was under age and could not consent to sex. There is no evidence of an arranged marriage. The complainant testified that she did not know the appellant before. She was taken to the appellant by one Fayima and left there. She was then locked inside. At one time she had disappeared but it was established that she had gone to look for employment. The complainant went out of the appellant's house but she realized that she was pregnant. That is why she went back to the appellant as she did not want the appellant to deny that she was with him. Mr. Halake appeared before the trial court and did not object to the production of age assessment report by PW8. The main ingredients in a defilement case is penetration and not spermatozoa. Penetration was proved. The complainant was removed from the appellant's house and taken to the Police station and then to hospital. The spermatozoa was found within 12 hours. The appellant was evasive in his defence.

This is a first appeal and the court has to evaluate the evidence afresh and makes its own conclusion. The record of the trial court indicate that eight witnesses testified for the prosecution. PW1 to PW5 were recalled for further examination. **PW1 D.B.** was the complainant she testified under oath. She told the court that she left school when she was in class five. One Fayima whom she knew took her to the appellant's house at manyatta Shauri Yako. She could not recall the date. But it was 4.00pm. They stayed in that house and the appellant and Fayima were chewing miraa. At about 9.00pm Fayima excused herself to go to the toilet but did not come back. At about 1.00am the appellant closed the door and restrained her from leaving the house. She stayed in the house for several days and the appellant had sex with her. The appellant slept with her like his wife. She later left the house and went to inform her auntie. She went back to the appellant's house. Her parents were informed and her mother went to the appellant's house. The appellant pleaded for forgiveness and asked for two days. Later her mother, chief and the Police went to the appellant's house and they were arrested. The appellant was resisting arrest but was forcefully arrested. She was later taken to hospital and a P3 form was issued. She was found to be pregnant. It is her evidence that when she was in the appellant's house he would occasionally leave her in the house but lock the door. She had not known the appellant before. She could not leave the appellant's place because she feared that she could be pregnant. The appellant used to take food to her. The toilet was outside the house and at times she would relieve herself in the house. She left school in 2013 when she was in class 7. She had not seen Fayima ever since. Even the Police found her faeces inside the house when they went to arrest them.

PW2 Guyatu Boru is a neighbour to PW1. On 6.1. 2017 at about 5.00pm she was with her husband when PW1 went there crying. She took PW1 out. PW1 told her that a certain lady had taken her to a house and she was suffering. She went with PW1 upto the house and met the appellant. PW1 told her that she did not want to leave the house as she had the appellant's pregnancy. The following morning she went and informed PW1's mother. She went back to the appellant's house with PW1's mother and found the appellant. The appellant refused to talk to them. The complainant's mother went to inform the chief. The following day PW2 found the appellant assaulting PW1 and pulling her outside. She went and informed the area chief. The complainant's mother and brother went there. The appellant was causing chaos and the Police also went there. Police officers removed bhang and urine from the house. It is her further evidence that the accused when asked why he was living with the complainant by the complainant's mother, he requested for two days to give an answer.

PW3 JG is PW1's mother. She testified that PW1 left home on 1.12. 2016. She started looking for her but did not report to the Police. Previously PW1 escaped from home and got employed then went back home. She was looking for the complainant. On the 6.1.2017 PW2 went to inform her that PW1 had gone to her place. She then went to the appellant's house and asked the appellant why he was living with PW1. PW1 told her that a certain woman took her to the appellant's house and left her there and the appellant restrained her from leaving. She went and informed the chief. The following day PW2 told her that the appellant was assaulting PW1 and that she had informed the chief who had gone to the scene. She went there and the Police were called. It is her evidence that PW1 was sixteen years old. According to her, PW2 met the complainant on 6.1.2017 and reported to her the following day on 7.1.2017. It is her evidence that the complainant also told her that she had reported the matter to the chief.

PW4 Hussein Galgalo Halake is the Assistant Chief of Wabera Sub-location. On the 8.1.2017 a woman went to her shop and informed him that there was a girl being assaulted in a certain house. He closed his shop and went to the house. He saw the appellant whom he knew cooking while there was a girl on a sofa set. He also knew PW1. At one time PW1 had approached him in town and told him that she was staying with the appellant who wanted to chase her away. He did not take any action. He asked the appellant about the girl in the house but the appellant told him that he did not know her. He asked PW1 how old she was and she said she was sixteen. He tried to arrest the appellant but he resisted. He called his fellow assistant chief (PW5) who went to the scene. The Police were called and the appellant was arrested and escorted to the Police station. They recovered a paper bag which contained bhang and Ksh25,000. There was also femiplan drugs that had not been used. **PW5 Ali Dominic Fernandes** is the Assistant chief of Marsabit town. On 8.12017, a Sunday, he was at home. At about 4.00pm PW4 called him on phone and informed him that the appellant had locked up a girl in his house for about two months. PW4 asked him to go to the appellant's house as the appellant had refused to cooperate with him. He went to the scene and found PW1 who informed them that the appellant had locked her up in the house and had been using her as his wife. PW1 also told them that she was being assaulted by the appellant. They found urine and faeces in the house. They also recovered a black paper bag which had bhang.

While at the Police station they found Ksh.25,000 inside the paper bag. It is his evidence that the appellant was insulting PW4 and told them that they could proceed and kill him. He asked PW1 about the faeces and the urine and she told them that the appellant had not been allowing her to go out for a call of nature.

PW6 GB is a primary school teacher and an elder brother to PW1. He testified that PW1 went missing on 8.12.2016. They looked for her but all in vain. On 7th January 2017 they got information from PW2 that she had known where PW1 was. On 8.1.2017 PW2 told them to go to the appellant's house as the appellant was dragging her out of his house. He rushed there and found the chief at the scene who told them that he had called the Police officers. Police officers went to the scene and arrested the appellant. PW1 was also taken to the Police station and was later taken to hospital. **PW7 Corporal George Jillo** was stationed at the Marsabit Police Station. He investigated the case. On 8.1.2017 he received a call from PW4 who informed him that there was a minor who was confined in a house. He went to the scene at Shauri Yako village and found PW4 and PW5 at the scene. The two were interrogating the appellant. He arrested the appellant and PW1 and took them to the Police station. He then referred PW1 to hospital where a P3 form was filled and her age was assessed. **PW8 Dr. Adano Koche** was the Director of Medical Services in Marsabit county. He examined PW1 and filled a P3 form. PW1 had offensive smell from her vagina. There was no evidence of virginity or its recent breakage. Tests were done and spermatozoa was found to be present. She was found to be pregnant. Ultra sound indicated that she was about seven weeks pregnant. It was clear that she had had sex for the last twelve hours. He also examined the appellant and his genitalia was normal. PW8 also produced an age assessment report that had been filled by Dr. Francis Mutua. PW1's age was estimated to be between 16 and 17 years. Her molars were yet to erupt. There was therefore penetration. He is the one who referred PW1 to Dr. Mutua for age assessment. The ultra sound was done on the 1.10.2017. There were no genital injuries on both PW1 and the appellant.

The appellant gave sworn evidence. He testified that on the 8.1.2017 at about 4.00pm he was at home at Shauri Yako village. Chief Hussein (PW4) went there and told him that there was a girl in his house. The girl was not in his house but was in Fatuma's house. He told the chief that somebody had brought the girl to his house. The girl slept in his house but he did not sleep there. The girl was taken to his house by one Fatuma who told him that she had only one room and she could not stay with the girl since she has a husband and children. The girl was taken to his house on 1.12.2016. She stayed for one month and eight days. He did not lock her up and was going out for her activities and coming back. During that time he did not sleep in his house. He would occasionally visit his house and find her there. The girl would always inform him that she had talked to Fatuma on phone. He works as a fundi making culvert. When the chief went to his house the girl was seated outside Fatuma's house. PW4 told him that the girl was lost and her family was looking for her. He was arrested, handcuffed and escorted to the Police station. He does not know if PW1 was pregnant. He did not have sex with her. Fatuma is his neighbour. Where he was staying there are twelve rental rooms and neighbours used to see the girl enter and leave the house.

DW2 Fatuma Shuna is a sister to the appellant. She told the court that in December 2016 the appellant used to go to work in the morning and go to sleep in her house. The appellant told her that his neighbour had requested him to allow a girl to sleep in his house. The appellant stayed in her house for about one and half months. The appellant is a casual labourer. She had never met PW.1 She later heard that the appellant had been arrested.

The appeal raises the following issues.

1. Whether PW1 was defiled
2. Whether it is the appellant who defiled PW1.
3. Whether PW1 behaved like an adult and the defence provided under Section 8(5) and 8(6) of the Sexual Offences Act is available to the appellant.

It is the evidence of PW1 that she was taken to the appellant's house by one Fayima. According to PW3 the complainant went missing from 8.12.2016. Medical examination indicates that PW1 was seven weeks pregnant. According to PW8 spermatozoa were noted in her birth canal and it was clear that she had had sex for the last twelve hours. It is the complainant's evidence that when she was in the appellant's house they had sex and they lived like a husband and wife. It is therefore clear that PW1 was defiled.

According to PW1 it is the appellant who defiled her. PW4 testified that at one time the complainant approached him in town and told him that she was living with the appellant and wanted to chase her away. PW2 went to the appellant's house and saw the complainant. This was after the complainant had gone to PW2's house and informed her of her problems with the appellant. PW3 who is the complainant's mother went to the appellant's house on 7.1.2017 and the complainant told her that she had been taken to that house by one Fayima and had been detained. According to PW4 and PW5 who are the local administrators (Assistant Chiefs), they went to the appellant's house and found PW1 there. PW5 testified that they found urine and faeces in a basin and PW1 told them that the appellant was not allowing her to go out for a call of nature. On his part the appellant alleges that indeed PW1 was taken to his house by one Fatuma alias Fayima and she stayed in his house for about one month and eight days. It is his evidence that during that time he never used to sleep in his house but was sleeping at his sister's place. He denied ever having sex with PW1. Mr. Halake, Counsel for the appellant informed this court that it appears that there was an arranged marriage between the appellant and the complainant. Although PW1 was missing from home no report was made to the Police. Mr. Halake appeared for the accused before the trial Court. He led the accused in his defence. The accused totally denied that he had sex with the complainant.

The first ground of appeal is that the trial Court erred in convicting the appellant yet the Court found that there was a marriage relationship that existed. If there was such a marriage then why were the complainant's parents not visiting the appellant's house. The evidence shows that at one time the complainant went to PW2's home and complained about the appellant. This enabled PW2 to go and inform the complainant's parents since they were looking for the complainant. Assuming such a marriage did exist, it is clear to me that PW1 was not an active participant to the alleged marriage arrangements. Why was it that it was a stranger by the name Fayima/Fatuma who took PW1 to the appellant's house. If there was marriage arrangement then the parents of both parties ought to have been involved or at least their relatives. It is the evidence of the complainant that she used to be locked in at times whenever the appellant left his house. This is confirmed by the prosecution evidence that they found urine and faeces in the house. It is true that at times the complainant was free to leave the

appellant's house. This is proved by the evidence of PW4 to the effect that the complainant at one time met him in town and told him that she was living with the appellant. Also the complainant left the appellant's house on 6.1.2017 and went to PW2's house. The complainant's explanation is that she feared that she could be pregnant and she wanted people to know that she had been living with the appellant. From the evidence on record, it is established that the appellant and the complainant lived together for over one month. It is also established that the two used to have sex. Whether the pregnancy was as a result of their relationship is immaterial. The requirement of the law on the offence of defilement is that any act which causes penetration with a child constitutes the offence of defilement. The presence of spermatozoa or pregnancy is immaterial. The evidence on record does prove that the appellant did penetrate the complainant and defiled her.

The offence of defilement involves victims who are under the age of eighteen years. Section 8 of the Sexual Offences Act categorized the punishment to be met out on the offenders depending on the age of the victim. Mr. Halake contends that when ultra sound were done it was found that PW1 was seven weeks pregnant. I have noted that PW8 indicated that the ultra sound was done on the 1.10.2017. The handwritten record of the trial court also gives the same date. I do find that that is an error apparent on the record because PW8, Dr. Adano testified on the 4.9.2017. By then the doctor had already examined PW1. Unfortunately the P3 form for the appellant has no date. According to the P3 form the complainant was referred to Marsabit General Hospital on the 8.1.2017. PW8 testified that he referred the complainant to his colleague for age assessment. The age assessment done by Dr. Francis Mutua is dated 9.1.2017. According to the assessment PW1 was in the age bracket of 15-16 years. Her molars were yet to erupt. It can therefore be concluded that PW1 was examined by PW8 in January 2017. Since the appellant and the complainant had been living together from early December 2016 and the ultra sound was done in around 8th January 2017 it is clear that the pregnancy could have been seven weeks old. The estimate is not exact. The appellant himself testified that PW1 was taken to his house on 1.12.2016. Apart from that, I am satisfied that the appellant did have sex with the complainant. Even if it is shown that the complainant might have had sex with other people as alleged by Mr. Halake still that does not exonerate the appellant from the offence. The prosecution evidence clearly proved that the appellant had sex with PW1 on several occasions.

The last issue is whether it can be concluded that the complainant's conduct and the circumstances of this case enabled the appellant to consider PW1 as an adult. Section 8 (5) and (6) of the Sexual Offence Act states as follows:-

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.

Mr. Halake relies on my above two cases of **Martin Charo V Republic (Supra)** and that of **Omus Kiringi Chivatsi V Republic (Supra)**. In those cases I did acquit the appellants as I held that it was the children who behaved like adults and went to have sex with the appellants. The defence under section 8(5) is quite unique and should be applied in deserving cases. The court has to evaluate the circumstances of the case as required under Section 8(6) of the Sexual Offences Act. The circumstances of this case are that the complainant was taken to the appellant's house by one Fatuma. At about 9.00pm Fatuma excused herself to go to the toilet and left the complainant in the house. When PW1 was recalled she told the court that they were neighbours around but the appellant told her that if she screamed he would kill her. Can it be said that PW1 took herself to the appellant's place only for purposes of engaging in sex. Can it also be concluded that the parents of PW1 were well aware that their child was cohabiting with the appellant. The evidence on record shows that when the complainant's mother went to the appellant's house and enquired why the complainant was there the appellant told her to ask PW1. It is also on record that the appellant asked for two days to give an answer.

Although it is established that the complainant lived with the appellant for over one month as a husband and wife, I do find that the circumstances of the case do not meet the requirements of Section 8(5) and (6) of the Sexual Offences Act. It is clear to me that Fatuma and the appellant took advantage of PW1. The evidence also proves that PW1 was a minor. Her age was assessed at between 15-16 years. PW1 herself and her mother testified that she was 16 years old. Mr. Halake was in court when the age assessment report was produced by PW8 and there was no objection. He cannot now complain that the age assessment report was not produced by the maker. Had he objected to its production then the prosecution would have called the maker. PW8 testified that he is the one who referred the complainant for age assessment. From the evidence on record I am satisfied that PW1 did not behave herself like an adult. It is not proved that she went out to the appellant's house for purposes of having sex. The appellant took advantage of the complainant and did not bother to find out where her parents were. It is also clear to me that the appellant's attitude aggravated the situation. He was evasive and rudely responded to enquiries made by the complainant's mother, PW2 and the area assistant chief. Even the defence is evasive. He does not explain as to why the alleged Fatuma who was his neighbour took the complainant to him. Further, why did he allow a person whom he did not know to stay in his house for one month and eight days without finding out where this person came from. His defence that during all that time he slept at his sister's place is just an afterthought. His sister, DW2 tried to come to his rescue but her evidence does not help the appellant. I am entirely in agreement with the findings of the trial court. The prosecution proved its case beyond reasonable doubt. The circumstances of the case can be distinguished from those in the cases cited by counsel for the appellant.

Although PW1 was at times free to move out of the appellant's house, it is clear that when she was taken to that house, she did not expect what she got. Her evidence that it is one Fayima who took her to the appellant's house is in line with the defence evidence. Why did Fayima take PW1 to the appellant's house? The appellant totally denied that he had sex with the complainant. It is clear to me that at times PW1 used to be locked inside the house. Although she could leave the premises, that does not disprove her evidence that the appellant had sex with her.

In the end, I do find that the appeal lacks merit and is hereby disallowed. The charge sheet brought the offence of defilement under Section

8(1) and 8(3) of Sexual Offences Act which provides for a sentence of not less than twenty years. The trial court found that the prosecution had proved its case as per the charge sheet but sentenced the appellant to serve fifteen years imprisonment which sentence is provided for under Section 8(4) of the Sexual Offences Act. I do not wish to disturb the sentence since the evidence shows that the complainant was 16 years old. The age assessment gave the age of the complainant to be between 15-16 years old. The appellant is entitled to have the benefit of the upper age limit and escape a further five years in jail. The appellant will therefore continue to serve his fifteen years imprisonment.

Dated, Signed And Delivered At Marsabit This 20th Day Of February, 2019

S. CHITEMBWE

JUDGE