



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL 59 OF 2018

GEOFFREY WANJALA WANGILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in original criminal case No. 2113/2014 delivered on 8.9.2014 by Hon S.O. MOGUTE,SPM]

JUDGMENT

The appellant GEOFFREY WANJALA WANGILA was charged with the offence of defilement of a child(girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 23rd and 24th day of August 2015 in Bumula District within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of MNM a child aged 16 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No.3 of 2006 based the same facts. The particulars of the alternative charge were that on the 23rd and 24th day of August 2014 in Bumula District within Bungoma County the appellant intentionally and unlawfully touched the vagina of MNM a child aged 16 years.

The evidence on record is that during hearing the appellant herein decided to plead guilty to the charges, in which he was convicted and sentenced to serve twenty (15) years imprisonment.

That facts relied upon by the prosecution were that on the 23/08/2014 the complainant was at her home when appellant approached her and requested they have sex and complainant agreed and followed appellant to his home where they had sex and complainant did not go back home next day and they continued to have sex at the home of the accused. That on the 25/8/2014 went and looked for the complainant at home of appellant and found her. He arrested both of them and took them to Bumula police station and P3 form was issued to the complainant and complainant was taken to Bumula Health Centre for treatment and thereafter the appellant was charged with the offence. She produced treatment notes, P3 form and age assessment report as exhibit 3. From the record the appellant admitted these facts as presented by the prosecution counsel. In convicting the appellant the learned trial magistrate relied on these facts and admission by the appellant. She also relied on the medical evidence as indicated in the p3 form and the age assessment report.

The appellant been dissatisfied filed appeal to this court against conviction and sentence on the grounds set out in the appeal that the case was not proved to the required standard of proof beyond reasonable doubt and that age assessment was not established.

While this appeal was pending the complainant herein filed an affidavit sworn on the 17th September 2018 briefly stating that she was 18 years old when they had sex and prayed that the appellant be released. She annexed a current age assessment form and baptism card in support of her affidavit.

The prosecution through a letter dated 11th October 2018 wrote this court briefly stating that the complainant in this case has sworn an affidavit alleging that when she was defiled she was an adult aged 18 years old and appellant was her boyfriend and that basing on current age assessment complainant is 23 years old and was approximately 19 years old in 2014 per annexed baptism card and prayed that the accused be acquitted.

The appellant filed further submissions on 8th November 2018 and submitted that the complainant showed him his latest age assessment result which indicate she was 22 years and that the complainant was never taken for medical age assessment in 2014 and if there was such then was a false document.

Also the prosecution filed on the 20th December 2018 an application dated 3rd December 2018 seeking this court to take additional evidence

pursuant to provisions of section 358(1) of the CPC but later withdrew the same on the 18.2.2019.

During the appeal hearing the appellant submitted that the complainant was not 18 years old when he committed the offence. The prosecution state counsel submitted that he opposed the appeal and that the appellant was convicted and sentenced on his own plea.

I have considered the proceedings before trial court, the appeal as filed and submissions by both the appellant and prosecution and I have also considering all the annexed documents and it is my finding the appeal revolves around the age assessment of the complainant at the time of the commission of the offence by the appellant which is therefore the main issue for determination in this appeal.

To establish the age of the complainant I will draw to the Children Act of 2011 that defines a child ***as any human being under the age of eighteen years***. The age of the complainant in a defilement case can be proved by birth certificate, baptism card or age assessment report and in this case the prosecution filed an age assessment form as exhibit 3 dated 29.08.2014 for the complainant and the form indicated that the complainant was age was assessed to be 16 years old at time the offence was committed. Also on the 24.8.2015 a P3 form was filed as exhibit 2 indicate that the complainant was 16 years old.

I have also considered the affidavit sworn by the complainant on the 17th September 2018 stating that she was age 18 when she had sex. The complainant also annexed a current age assessment report indicating she is 22 years old and also annexed a baptism card from Christ the King Church indicating she was born on 3.09.1996.

Even if this court were to accept the baptism card a simple calculation basing on her baptism card annexed on the affidavit it leads to conclusion that on the 23rd August 2014 when the offence was committed she was still under 18 years old since she was born on 3rd September 1996 and she was to turn 17 years 11 days.

Upon considering the record, I am satisfied that the plea of guilt was unequivocal; the facts demonstrated an offence of defilement and that the complainant was under the age of 18 years, which was supported by age assessment report dated 28.08.2014, P3 form and further reinforced by the complainant's exhibit of baptism card annexed to her affidavit.

In the circumstance I find the appeal has no merit and same is dismissed.

Dated and Delivered at **BUNGOMA** this **18th** day of **June**, 2019.

S.N.RIECHI

JUDGE