REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 6 OF 2018

PETER NGARE GATARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. Before the Resident Magistrate Siakago, the appellant was convicted of the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2) of the Sexual Offences Act No. 3 of 2006** and sentenced to serve 15 years imprisonment.

2. Being dissatisfied with the entire judgment, the appellant filed this petition of appeal dated 1st February 2018 with seven (7) grounds that may be summarized thus: that the learned trial magistrate convicted the appellant against the weight of evidence; and that the learned trial magistrate erred in law and fact in not allowing the appellant to fully prepare for his case.

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submission

4. The appellant submitted that his conviction was not based on the evidence adduced since there was no evidence to link him to the commission of the alleged offence. The appellant further submitted that he did not know the said L who was a minor and as such was protected under section 8 (5) as read with Section 8 (6) of the Sexual Offences Act.

5. The appellant further submitted that he did not force the complainant into any sexual act as it was the complainant who sought him. The appellant relied on the cases of **Joseph Omollo v Republic [2018] eKLR, Martin Charo v Republic [2016] eKLR and Duncan Mwai Gichuhi v Republic [2015] eKLR** where the court allowed the appeals on the ground that the defence under Section 8 (5) of the Sexual Offences Act was available to the appellants in those cases.

6. The respondent further submitted that the complainant misrepresented her age to him and that she came willingly to his home and that the two have borne a child out of their union. The respondent further submitted that the testimony of PW1 though meant to exonerate the appellant, there was no evidence on record to show that the appellant had exercised any due diligence to probe the age of PW1 and as such the defence provided in Section 8 (5) of the Sexual Offences Act.

7. It was further submitted that the trial of the appellant's case did not disclose any breach of his rights to a fair trial as alleged.

C. Analysis and Determination

8. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

9. The brief facts of this case are that on the 9/02/2014 at [Particulars Withheld] location of Embu County the accused intentionally and unlawfully caused his penis to penetrate the vagina of LN a child aged 16 years old.

10. The prosecution evidence was that PW1 the subject herein testified that she spent the night of 9/02/2014 with the appellant where she had intercourse with him and did the same for the next 4 days. PW4, the clinical officer who treated the subject upon examination concluded that the hymen had broken fragments which is evidence of penetration.

11. In his testimony, the appellant raised the defence under **Section 8 (5) of the Sexual Offences Act** that he was made to believe that the complainant was ready to get married and that he didn't know that the subject was 16 years.

12. The offence of defilement has three elemental ingredients which must be proved by the Prosecution beyond reasonable doubt:

a) The age of the Complainant;

b) Proof of penetration; and

c) Identification: proof that the Appellant caused the penetration.

13. On the age of the Complainant, PW2, the subject's mother testified that the subject was 16 years old and an acknowledgement of birth notification was produced in evidence. The oral evidence of the complainant was corroborated by the medical evidence as to what transpired at the material time. It is the appellant who caused the penetration which he does not deny. The complainant knew the appellant well and identified him as the person who caused the penetration.

14. The only issue in contention is whether the appellant knew that the subject was a minor and as such is protected under Section 8 (5) as read with Section 8 (6) of the Sexual Offences Act.

15. The evidence of the complainant and the appellant is that they were living as husband and wife. In a relationship that started in 2011 and on the material date she spent the night at the appellant's house where they slept together and had intercourse.

16. I now re-visit the provisions of **Section 8(5) & (6) of the Sexual Offence Act** apply.

Section 8 (5) *provides: -*

"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.

c)The belief referred to in Subsection (5) (b) is to be determined having regard to all the circumstances, including any steps that the accused person took to ascertain the age of the complainant."

Section 8 (6) provides: -

"the believe 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."

17. The question whether the accused raised sufficient evidence to raise the issue is left to the court to determine. Once the accused does this it is for the prosecution to prove beyond reasonable doubt, that the complainant did not consent and that the accused did not reasonably believe that the complainant consented.

18. At this point it's important to re-visit the proviso to Section **111 (1)** of the Evidence Act. The second proviso to the said section provides that the **"***person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of the offence."*

19. The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times.

20. The appellant went further to state that it is the complainant herself who told him that she was over eighteen (18) years of age. This allegation was denied during cross-examination. The appellant has now shifted his version of the story and claims that he honestly believed that the minor was over eighteen (18) years.

21. The defence under Section 8 (5) of the Sexual Offences Act would only be available if the complainant deceived the appellant that she was aged eighteen years or above. The denial by the complainant that she told the appellant that she was over 18 was not pursued during cross-examination and therefore remained unchallenged.

22. I have carefully perused the defence of the accused and noted that under Section 8 (5)(b) provides that the appellant must have "reasonably believed" that the minor was over 18. From the defence of the appellant, he has not even attempted to give a single reason as to why he reasonably believed, if at all, that the minor was of the age of majority. For this defence to succeed, it must be supported with reasons. In the absence of such reasons, the defence fails.

23. The appellant lived with the complainant for some time and therefore had the opportunity of knowing her as well as finding out what her age was even assuming he had been deceived which is not the case here. This defence under Section 8 (5) (a) also fails given the express denial of the minor that she even told him so.

24. The appellant relied on the case of **Joseph Omollo (supra)** and that of **Duncan Mwai Gichuhi (supra)** where the court allowed the appeals on grounds that the minor was deceived the appellant that she was over 18 years and ready for marriage. I do not agree with the findings of my colleague judges in those cases in that the complainant remained a minor and incapable of giving consent. Furthermore, the facts in this case are distinguishable from those two decisions.

25. I am of the considered view that the appellant has failed to establish that any of the defences under Section 8 (50 was available to him in the circumstances.

26. In this case, the complainant was under 18 years and incapable of giving consent to the act of intercourse or to marriage. It does not matter that she took herself to the home of the appellant whom she says was her intimate friend. Neither does it matter that she stayed with him for some time and conceived and gave birth to a child. What matters is that the appellant who was aged 27 years as per his confession was of sound mind and had the necessary intent to commit the offence. It would be contrary to the law to blame the minor that she voluntarily took herself to the appellant's house. The fact remains tht she was not possessed of the capacity to give consent.

27. The magistrate evaluated the evidence and found that the prosecution had proved the offence of defilement against the appellant. I am in agreement that the necessary ingredients were satisfied by the prosecution in regard to the age of the complainant and the medical evidence. PW4 confirmed there was penetration and PW7 produced the birth notification showing the minor was 16 years old.

28. Identification was positive in that the minor knew the appellant well and identified him in court.

29. The appellant's defence was considered by the Learned Trial Magistrate and dismissed as incapable of raising reasonable doubt in the prosecution case. In reaching that conclusion, the learned trial magistrate stated that even after knowing that the subject was a minor who was incapable of giving consent to having sexual intercourse, the appellant went ahead and lived with the minor as husband and wife and even sired a child which was an intentional act of the appellant in regard to the offence.

30. Although the appellant claimed that he was not given adequate time to prepare his defence, he did not substantiate or include his argument in his submissions. This court was left without any material to consider. The ground therefore fails.

31. It is my considered opinion that the trial magistrate judgment in which he convicted the appellant was based on cogent evidence.

32. As for the sentence, the appellant was sentenced to serve fifteen (15) years imprisonment which sentence was within the law. However, I am aware that the Sexual Offences Act sets minimum sentences. In the spirit of Supreme Court Petition in the **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR,** this court has discretion in passing sentence. Any law that seeks to restrict the court's discretion in sentencing offends the core principles of the Constitution and of criminal law principles.

33. For the foregoing reasons, I find the appeal is partly successful. The conviction is hereby upheld.

34. I take into consideration the mitigation of the appellant and the undisputed facts of the case and hereby set aside the sentence of fifteen (15) years imprisonment.

35. The accused is hereby sentenced to serve ten (10) years imprisonment.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Momanyi for Appellant

Ms. Mati for the State

Appellant present