REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.8 OF 2018

ABDI KEINAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgement of the Principal Magistrate, Hon. B.M. Ombewa in Criminal Case (SOA) 14 of 2017 at Marsabit Court)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act number 3 of 2006. The particulars of the offence are that the appellant, between the month of May 2016 and 31st December 2016 at [particulars withheld] in Marsabit south sub-county within Marsabit county intentionally caused his penis to penetrate the vagina of F.M. a child aged 15 years.

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

1. That the learned Magistrate erred in law and facts by not finding that the prosecution failed to avail vital witnesses.

2. That the learned Magistrate failed in law and facts by not finding that the conviction was not backed by the weight of evidence rendered.

3. That in law and facts the learned trial Magistrate erred by not finding that the trial was conducted partially and irregularly.

4. That the learned trial Magistrate failed by rejecting the appellant's own defence without giving cogent reason.

5. That the appellant was not accorded a fair trial. The record is clear the appellant was never supplied with the prosecution witness statements which was a clear contravention of Article 50(2) (1) of the Constitution (2010).

6. That the appellant was made to undergo trial while unwell and not conversant with the court process, this is the reason as to why the appellant failed to challenge the prosecution evidence.

7. That the lower court did not have my medical examination report to ascertain whether the appellant defiled the complainant as claimed kindly noting the appellant was never taken for medical examination despite the fact that evidence is clear the alleged offence was reported and arrest made after it was said to have been committed.

8. That the complainant deceived the appellant into believing that she was above the age of 18 years and the appellant believed that the complainant was of age.

Mr. Ondari appeared for the appellant. Counsel submit that it is the complainant who made the appellant believe that she was over 18 years old. Counsel relies on Section 8(5) of the Sexual Offences Act No.3 of 2006. Counsel maintain that the behavior, action and conduct of the complainant are in line with a mature person. Part of the conduct could be implied. **PW1** testified that she knew the appellant as her boyfriend. She knew when to say yes and when to say no. She was in class 6 in a boarding school. Even her parents approved her behavior. When the parents discovered she was pregnant they allowed her to go and live together with the appellant. The two have a child. PW1's mother confirmed that they allowed PW1 to live with the appellant.

Counsel submit that PW1's genitalia was examined by PW3, a doctor, and was found to be normal. PW1 was not complaining. She was

enjoying her relationship with the appellant. Counsel relies on the case of **MARTIN CHARO –V- REPUBLIC, Malindi Criminal Appeal No.32 of 2015**. It is submitted that the complainant used to sneak from school and go to the appellant's home on Fridays and go back to school on Mondays.

Mr. Chirchir Prosecution Counsel, opposed the appeal. Counsel maintain that the victim was 15 years old and in class 6. She could not have consented to sexual intercourse. The appellant knew that PW1 was a pupil. There is no evidence that he was deceived to believe that she was above 18 years. The appellant knew that PW1 was a student. The appellant took advantage of PW1.

This is a first appeal. The court has to evaluate the evidence afresh and draw its own conclusion. PW1 was the complainant. She testified under oath. Her verbatim evidence before the trial Court is as follows:

PW1

Child Female Sworn and states in Kiswahili

I **am F.M. I am just at home. I used to go to** [particulars withheld] **Primary School. I left class 6 last year. I am 15 years old. I have a birth certificate. It shows I was born in 2002.**

Court –birth certificate PMFI -1

B.M. Ombewa – PM

I know Abdi Keinan. I know him as my boyfriend. He became my boyfriend from January 2016. He used to seduce me. Initially I refused.

There was a time I went to wash clothes, he followed me to talk to me but I again refused. He used to follow me and I later gave in. I visited him in May 2016. From school I would go to his house on Friday evening and he would return me on Sunday. I was in boarding in [particulars withheld]**. I would leave school on Friday evening and the accused would return me to school on Sunday.**

When we closed school, my mother realized I was pregnant, she enquired from me and I told her that Abdi Keinan. My mother informed my father who told me to go and stay with the accused. I went to accused. I stayed there. We later differed. Accused left me in the house and went to play pool table. In the evening, I informed my father who went to accused at the pool table and told him that I wanted to see him. Accused said he would see me after he was done playing pool table. My father came and took me away. My mother came and took the luggage. My father took me to Chief who took us to Police station. I got pregnant with the accused. I have this child called A who is 06 months old.

I was taken to the hospital and p3 form filled up, it is here.

Court – P3 form PMFI -2

B.M. Ombewa – PM

I was also assessed for age. This is the report.

Court – Age assessment report PMFI -3

B.M.Ombewa –PM

We were engaging in sex with the accused during the time I was visiting him in his house and staying there.

I have never had sexual relationship with any other person except accused who is at the dock.

B.M. Ombewa – PM

Cross-Examination

Accused – what the witness has said is true. I would like to take care of my child.

PW2 P.M. is the mother to PW1. She testified that PW1 was 15 years old. PW1 was a student at [particulars withheld] boarding school. She later discovered that PW1 was pregnant when the school was closed. PW1 told her that it was the appellant who was responsible. Elders called the appellant. The appellant agreed to take care of the child. The elders decided that PW1 was to stay with the appellant. The two lived for 1 ½ months. They differed. PW1 complained that the appellant had abandoned her. The appellant wanted to be given time to play pool table first. PW1's father went there and took her back home. The matter was referred to the Police by the area chief PW1 gave birth.

PW3 Dr. MARK IMBUSI was based at Laisamis sub county hospital. PW1 was seen at the hospital on 18.1.2017. He examined PW1.

She was about 15 years old. She was 30 weeks pregnant. There were injuries on the genitalia.

PW4, PC SALVIN KAVITA was stationed at Laisamis Police station. He investigated the case. He referred PW1 to hospital. PW1 was between 14 to 16 years old. He established that from May 2016 the appellant seduced Pw1. They became friends. In July 2016 PW1 missed her periods. In November 2016 the appellant and an elder went to the complainant's parents with a view to asking for marriage to the complainant. They agreed and the appellant was given PW1. The two stayed as husband and wife for one month and one week. They differed. PW1 reported to her father who took her back. The matter was reported to the Police.

The appellant gave unsworn evidence. He is a boda boda operator. He loved the girl. He had sex with her once. Her parents are aware of their relationship. The parents had given her the girl. When he was told he was responsible for the pregnancy, he did not deny. He was staying with the girl as she was going to school. He normally remains behind to take care of their child as PW1 goes to school.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The charge is one of defilement. Under Section 8 of the Sexual Offences Act the offence of defilement involves Children under the age of 18 years. The prosecution evidence does prove that the complainant was 15 years old. Counsel for the appellant has dwelt mainly on the issue relating to the circumstances of the case. Mr. Ondari maintain that it is PW1 who made the appellant believe that she was over 18 years old. Counsel mainly based the appeal on this ground of appeal.

Sections 8 (5) and 8 (6) of the Sexual Offences Act provides as follows:-

> **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 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.**

The circumstances of the case are that the complainant was a class six pupil at a boarding School. She would leave the school on a Friday and the appellant would return her on a Sunday. According to the pre-bail report, the appellant was a boda boda rider. He was 32 years old in 2017.

The appeal raises the questions as to whether the appellant reasonably believed that PW1 was over the age of 18 years old. Such belief has to be determined in relation to the circumstances of the case. According to PW1, the appellant seduced her. She initially declined the appellant's move but she later gave in. The two became friends. She would visit him and they would engage in sex. In the process she became pregnant. When the parents were informed, the elders and PW1's parents resolved that PW1 was to go and live with the appellant. The two lived together for 1 ½ months as husband and wife until when they disagreed.

Did the appellant reasonably believe that PW1 was above 18 years old? According to the circumstances of the case I do not think so. The appellant knew that PW1 was still a class 6 pupil. He was the one dropping her at school on Sundays after spending the weekend with her. At the age of 32 years, the appellant was better placed to know that PW1 was still a child. The mere fact that one accepts to have sex does not make such a person to be an adult. The circumstances of this case does not lead to a conclusion that PW1 made the appellant to believe that she was over 18 years. This case can be distinguished from the MARTIN CHARO (Supra) Case: The fact that the two lived together for 1 ½ months does not imply that PW1 was behaving like an adult. PW1 was a child and the decision for the two to live together was that of her parents and the elders. It was not PW1 who on her own decided to get married to the appellant. PW1 was forced by circumstances to go and live with the appellant. Had the appellant behaved himself, he wouldn't have been charged in Court.

From the circumstances of the case, I do find that PW1 did not behave like an adult. PW1 was lured by the appellant into a sexual relationship. She gave in to the appellant's advances. The appellant knew very well that PW1 was a minor. The appellant had all the time to find out whether PW1 was an adult. He took advantage of the child. This was not a situation where PW1 was out for a Sexual relationship. The decision by her parents to live with the appellant was made on her behalf. PW1 did not make a personal decision to get married. The appellant should not turn around and allege that he was made to believe that PW1 was over 18 years. He took advantage of a young child who had not engaged in sex before as per her evidence before the trial Court.

The appellant admitted that he engaged in sex with PW1. There was no need for medical examination of the appellant. The appellant's defence did not raise any doubt on the prosecution case. The record of the trial court indicate that the appellant was always ready to proceed. The trial court reviewed the bond terms downwards. The appellant was given the opportunity to cross examine the witnesses. The trial was fairly conducted. There was no contravention of Article 50 (2) of the Constitution. The trial court directed that witness statements were to be issued to the appellant. The appellant never complained that he had not been supplied with the witness statements. All the other grounds of appeal must fail.

The circumstances of the case are quite clear. The appellant was a boda boda rider. At the age of 32 years he should have known whom to seduce. He opted to go for a primary school student. Had PW1 completed school and was just at home, then the circumstances would have been different. The appellant was aware that PW1 was still a primary school pupil. It cannot be held that he reasonably believed that PW1 was an adult. The appellant impregnated PW1, lived with her for 1 ½ months and was quite comfortable when the parents took PW1 back. His actions cannot go unpunished.

In the end, I do find that the appellant was properly convicted. The appeal lacks merit and is hereby disallowed.

Dated, Signed and Delivered at Marsabit this 29th Day of October 2018

S. CHITEMBWE

JUDGE