



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 224 OF 2017.

B M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the Chief Magistrate's Court at Kwale in Criminal Case No. 1282 of 2015 dated 13th October 2017 in at Kwale by Hon P.K. Mutai RM)

JUDGMENT

1. **B M** the Appellant herein was charged and convicted of the offence of defilement contrary to section 8(1) as read with subsection 3 of the Sexual Offences Act No. 3 of 2006. The particulars were that he had caused his penis to penetrate the vagina of D.K a child of 15 years of age.

2. The Appellant pleaded not guilty to the charges and the matter proceeded to full hearing. He was found guilty and convicted and sentenced to 15 years imprisonment. He was aggrieved by the whole judgment and filed this Appeal on the following grounds:

(i) That the learned Hon trial court magistrate erred in law and fact in convicting and sentencing him without proper finding that 15 years sentence meted out ought to be varied.

(ii) That the learned Hon trial court magistrate erred in law and fact by failing to see that he was a first offender and a student therefore punishing him alone would be unfair.

3. A summary of the prosecution case is that the Appellant and PW1 (D.K) were boyfriend and girlfriend who were intimate. PW1 who was in 2014 aged 15 years and in std 8 would sneak and go and stay with the Appellant at his home. The Appellant was also a student in Form 2 and would go to school leaving PW1 behind. They all along engaged in sex which to them was consensual.

4. As a result of their conduct PW1 conceived and that is when problems started. In spite of his denials, the product (a baby boy) of their so called love was found to have been fathered by the Appellant. A DNA had been conducted by PW6 George Lawrence Osuda a government analyst. His report was produced as (EXB7).

5. The Appellant in his unsworn defence denied the charge saying he had never engaged in sex with the complainant. He disagreed with the DNA results. His witness DW2 only knew PW1 as a neighbour and that the Appellant used to go to school.

6. During the hearing of the Appeal the appellant relied on his written submissions, which basically raises the issue of his age. He claimed that both of them were minors and were incapable of giving consent for sex.

7. Mr Isaboke for the Respondent submitted that the Appellant's age was never assessed. The girl was in std 8 while the appellant was in Form Two. It was his submissions that both were young people, who lived together and engaged in sex. It is PW1's mother who was aggressive in the matter.

8. Counsel submitted that there had been several meetings between the families following PW1's pregnancy. That the issue here should have been resolved in the appellant's favour. Learned counsel therefore conceded the appeal.

9. This is a first appeal and this court has a duty to re- evaluate and reconsider the evidence and come to its own conclusion. It also has to bear in mind that it did not see or hear the witnesses and give an allowance of that. See **Okeno v R 1972 EA 32; Muthoko & Anor V R [2008] KLR 297.**

10. Following the submissions made herein and having seen the Appellant in court and having read the evidence, I ordered for an assessment

of the appellants' age by a medical doctor.

11. The report on the age assessment was filed on 27th September 2018. The said report has confirmed my fears and even those of the learned counsel for the State Mr. Isaboke.

12. The report shows that the Appellant as at 20th September 2018 was approximately 19 years of age. It follows that as at 29th September 2014 when the alleged offence was committed he was 14 years old or thereabout. When he was convicted on 13th October 2017 he was 17 years old.

13. It is therefore clear that both PW1 and the Appellant were minors at the time of the alleged offence. PW1 was also candid in her evidence that they were in a relationship. She was in std 8 while the appellant was in Form 2. All these were clear indications to the trial magistrate to take extra precaution to reassure himself/herself of the age of the Appellant.

14. This is not a small and negligible issue because as a result of the careless action of the trial court a minor was tried as an adult, convicted and sent to prison for 15 years. He has already served one (1) year of the 15 years. This is contrary to the provisions of the Children's Act.

15. The State graciously conceded this Appeal after satisfying itself of all the circumstances. I therefore allow the Appeal, quash the conviction and set aside the sentence.

16. The Appellant shall be released forthwith unless lawfully held under a separate warrant. The Deputy Registrar to ensure that the learned trial magistrate gets a copy of this judgment.

Signed and dated this 26th day of October 2018 at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE