REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 32 OF 2016

OMUS KIRINGI CHIVATSI ……...……..…. APPELLANT

VERSUS

REPUBLIC ……..…….…….. RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 250 of 2012 of the Senior Principal Magistrate's Court at Kilifi – A.M. Obura, PM)

JUDGEMENT

The appellant was charged with 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 were that the appellant, on diverse dates between August 2011and December 2011 at [particulars withheld] of Kilifi County intentionally and unlawfully did an act which caused penetration with his organ namely penis into the organ namely vagina of K.O.D. a girl aged 16 years.

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

1) The evidence of pw1 was admitted without considering that she was not a reliable witness.

2) The prosecution did not prove its case beyond reasonable doubt.

3) The appellant's arrest had no link to the criminal case

4) The trial court failed to consider the appellant's defence that was reliable

5) The complainant's age was not proved.

The appellant submit that the burden of proof lies with the prosecution. The prosecution had to prove penetration, age and identification of the alleged culprit. Pw1 alleged that she became pregnant. However, she did not tell the appellant that she was pregnant. There was a photograph of another man shown to the complainant and she told the trial court that she had forgotten his name. PW1 delivered but the child and the appellant were not subjected to DNA test. The appellant relies on the case of **ARNOLD KILILO VS REPUBLIC**; Mombasa High Court Criminal Appeal No. 57 of 2011 where the court held that since the complainant was pregnant, DNA ought to have been conducted.

The appellant further submit that the complainant's age was not proved. Reference is made to the case of

KAINGU ELIAS KASOMO VS REPUBLIC; Malindi Court of Appeal Criminal Case No. 504 of 2010 where the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.

The State opposed the appeal. It is submitted that the age of the complainant was proved. Section 8 (4) establishes the punishment for defilement if the victim is between sixteen and eighteen years old. The appellant cross examined all the witnesses. The critical ingredients of defilement are age of the complainant, proof of penetration and positive identification of the assailant were proved.

This is a first appeal and the court is duty bound to evaluate the evidence afresh and make its own findings. Before the trial court pw1 was the complainant. She testified that she was 16-year-old. She was in class six (6). Between August 2011 and November 2011, she befriended the appellant. They met at a shopping Centre near the road. The appellant has a shop. They had sex several times and she became pregnant. She used to visit the appellant after school hours in the evening. They would have sex whenever she visited him. Her teachers suspected that she was pregnant. She became pregnant and delivered a baby girl on 1/7/2012. She did not tell anyone that she had sex with the appellant. She later informed her mother when she realized she was pregnant. She did not inform the appellant that she was pregnant.

PW2 is the mother of PW1 she testified that PW1 was about 16 years in 2011. Pw1 informed her that it was the appellant who had impregnated her. She decided to forgive the appellant but the assistant chief decided to have the matter reported to the police. PW2 is born again and that is why she decided to forgive the appellant. Pw1 delivered in July 2012. She learnt of pw1's pregnancy on 20/2/2012.

PW3 DR. MALIK was stationed at Kilifi district Hospital. He produced a P3 form filled by his colleague Dr. Hashim Suleiman on 1/3/2012. By that time pw1 was 7 months pregnant. PW4 corporal **Imbusi Reginald** was stationed at Kilifi police station. He investigated the case. The appellant was taken to the station by officers from Ganze on 27/2/2012 at 6.00pm. His investigations revealed that pw1 and the accused had sex several times. PW1 discovered that she was pregnant in December 2011.

In his Sworn defense, the appellant testified that he stopped going to school while in class five in 1997 due to economic hardship. He has been supporting his brother with school fees. The complainant's family wanted to take over his business. His business was burnt twice. He decided to flee the area. He was later arrested and charged with the offence. His business is located at a distance from pw1's home. He denied committing the offence.

The court is being called upon to determine whether the prosecution proved its case beyond reasonable doubt. The complainant testified that she used to visit the appellant after school and have sex. These sexual episodes lasted between August and November, 2011. By December 2011 pw1 realized that she was pregnant. It is not clear why the relationship stopped as pw1 did not inform the appellant that she was pregnant.

The evidence on the age of PW1 is that of pw1 herself and that of her mother PW2. None of them gave the year of pw1's birth. PW2 testified that her daughter PW1 was about sixteen years in 2011. The appellant submit that the age is quite important in a sexual offence case as the punishment is guided by the age of the victim. I do agree with that submission. My view is that the age indicated on the P3 form is what the complainant informs the police to be the complainant's age. That information has to be supported by the production of supporting documents or information. Such documents include birth certificate, immunization or baptismal card, school records such as school identity card indicating date of birth as per the school records or school leaving certificate, passport, age assessment or any relevant information such as the numbers of children the victim's family has and the complainant's position of birth in the family. This information enables the court to verify the victim's age. Where the victim appears to the court that she/he is a child, the court can make such observations and the apparent age can be considered. In the current case the trial court saw the complainant. The trial court did not conduct voire dire on PW1 as it presumed that she was old enough to understand the meaning of telling the truth. The mere fact that PW1 stated that she was sixteen years cannot be conclusive proof of age. Further, the fact that pw1 was in class six in 2011 does not prove that she was below eighteen years. There are many

mature students in primary schools in Kilifi county. This is part of public information which is revealed to the public whenever the standard eight (8) Kenya Certificate of Primary Education results are announced. There was need to have PW1's age assessed for the prosecution to have proved its case beyond reasonable doubt.

Apart from the issue of age, there is the conduct of pw1. She testified that she used to visit the appellant at his place and they would have sex. The investigation officer testified that his investigations revealed that PW1 and the appellant used to have sex several times. It is therefore clear that PW1 was having a stable relationship with the appellant. That relationship would have continued were it not for the pregnancy. They used to meet at the appellant's shop as per PW1's evidence. Section 8 (5) of the sexual offences Act provides that one accused of defilement can have a defence if it is proved that the child deceived the accused person into believing that she was over the age of eighteen years at the time the offence was committed, and the accused reasonably believed that the child was over eighteen years. The present case presents a picture of someone who went to the appellant's house to have sex and then go back home. According to the complainant's mother, the complainant stopped going to school in 2011. I believe that was after she realized that she was pregnant. PW1 did not testify that it was her first time to have sex when she did it with the appellant. There is no evidence that the appellant deceived the complainant or forcefully had sex with her. She enjoyed the relationship.

Although the offence of defilement is proved whenever penetration, age and identity of the defiler is established, there is need to analyze the circumstances of the case so as to exclude the presence of the conditions provided for under section 8(5) of the sexual offences Act. Where the alleged victim was not complaining, but enjoying the relationship, depending on the circumstances of the case, the accused should be accorded the benefit of doubt. Indeed, PW2 who is the mother of PW1 testified that she had talked to the appellant and had forgiven him only for the assistant chief to report the matter to the police. For the conditions under section 8 (5) of the Sexual Offences Act to be fulfilled, the accused is not required to have gone round asking people about the age of the complainant. What is crucial is the circumstances of each case. If the complainant used to frequently visit the accused as her friend and at times engage in sex, that relationship would be existing irrespective of the age of each one of them. The two would be conducting themselves as adults and it is not necessary under those circumstances for the accused to have belaboured into finding out his friend's age. In any case at that time the two would be engaging in sex and age would not be an issue. Who knows, maybe they even planned to have the child. Police investigations revealed that the two used to have sex several times.

The appellant's evidence does not raise doubt on the prosecution's case. Even if DNA tests were not conducted on the child, the fact remains that the appellant had sex with the complainant. Not all defilement cases result into pregnancy. A DNA test could have conclusively proved that the appellant is the father of the child. However, the absence of the DNA test doesn't strengthen the defense case. I am satisfied that the appellant had sex with pw1.

Given the circumstances of the case, I do find that the prosecution did not prove its case beyond reasonable doubt. The age of the complainant was not proved. The prosecution cited the case of NYAMAWI YAWA VS REPUBLIC, Mombasa High Court Criminal Appeal No. 172 of 201. In that case Justice Muya reduced the charge of defilement to sexual assault since the complainant's age was not proved. In the current case, I do find that PW1 behaved herself in a manner likely to suggest that she was an adult. There was no sexual assault. It could be possible that she was over eighteen (18) years old. Pw1 was part of the sexual relationship with the appellant and could not have been sexually assaulted.

In the end, I do find that this was not a case of defilement. PW1 engaged herself in sexual endeavors and was enjoying the exploration until when she became pregnant. She used to visit the appellant at his place and have sex. The appellant should not spend fifteen years in jail for his sexual engagement with PW1. I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered in Malindi this 22nd day of March, 2017.

S. J. CHITEMBWE

JUDGE