REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 33 OF 2015

(Formerly Nakuru HC.CR.A. No. 216 of 2014)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 497 of 2013 of the Chief Magistrate's Court at Naivasha – S. Muchungi, RM)

STEPHEN GITWA KIMANI……..……..……...APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In that on the 1st day of March 2014 at [particulars withheld] in Gilgil District within Nakuru County he intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ namely vagina of **J. N. M.** aged 15 years. He was sentenced to 20 years imprisonment.

2. I find it necessary, before setting out the amended grounds filed on 14/6/2016, to observe that prior to the filing of these grounds three applications had been filed as follows:

a) on 10th May 2016 by the Appellant seeking leave to adduce new evidence, namely that out of his relationship with the complainant, a child named **P.W.G.** had been born to the victim and that the respective families on both sides had given blessings for the victim and the Appellant to get married. All for the welfare of the minor child.

b) on 12th May 2016, by the mother of the Appellant – alleging the birth of a grandchild to the victim and pleading on behalf of the welfare minor.

c) on 12th May 2016 by the victim asserting that she lured the Appellant and lied to him about her age and that raising the minor child born out of the incident had become difficult for her.

3. The latter two applications which appear in the form of affidavits were struck out by the court. However, I will make reference thereto in the course of considering the substantive appeal. Suffice to say that the applications/cum affidavits appear tailored to assist in the "release" of the Appellant, ostensibly to enable him take care of his "family". The Appellant's application of 10th May, 2016 was not prosecuted.

4. However, the matters raised in three applications are incorporated in the amended grounds of appeal with are as follows:

"1. That the learned trial magistrate erred in law and in facts by not finding that prosecution did not prove beyond all the reasonable doubt that PW1 was a child.

2) That the learned trial magistrate erred in law and fact in not considering PW1 chose her will to visit the Appellant and freedom to make such choice and to have her own family.

3) That the learned trial magistrate erred in law and facts in not holding that state had to recognize and protect the young family notwithstanding the complaint made by the parent.

4) That the trial learned magistrate erred in law and facts in not finding that PW1 consented to the sex engaged on protection with the Appellant and only meant to Appellant.

5) That I have additional evidence to adduce that PW1 is still at my house/home and have my child (daughter) and 20 years waiting for me would be harsh, unconstitutional and excessive following the circumstances of this case may be illegal." (sic)

5. The Appellant's home-made submissions in support of the appeal are to the following effect. That the complainant's age was not proved and that, by her conduct she was capable of consensual sex. Further that, the parents of the complainant pressed charges with the sole aim of bringing to an end the love relationship between the complainant and the Appellant; that the latter had no warning that the complainant was a minor. In the Appellant's view, circumstances of the case required strict proof of the Appellant's age to rule out consent (or deception) the part of the complainant. He dismissed the birth certificate tendered in court, being a photo copy, as inadequate evidence of age.

6. The appeal was opposed by the Director of Public Prosecutions through Mr. Koima. He submitted that penetration by the Appellant was proved, and that the birth certificate tendered proved the age of the victim.

7. The duty of the first appellate court as stated in **Pandya -Vs- Republic [1957] EA 336** is that:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The prosecution case was that the complainant **J. N. M. (PW1)** was a girl aged 15 years in 2013. She was a student in Secondary School. She came home to [particulars withheld] estate in the material period on school break. However, on 27th February, 2013 she left home to visit the Appellant, her boyfriend of one (1) year. She spent the night with him and remained there until 1st March 2013. They had sexual intercourse.

9. In the meantime, her mother, **N.W.M. (PW2)** searched for her in vain and eventually reported to the police. On 29th February 2013 the Appellant went to **PW2's** home and informed her that **PW1** was in his house and had refused to leave. Police accompanied by **PW2** visited the Appellant's house and found **PW1** in the home. She was taken to the police station, along with Appellant. Both were examined by the doctor, who found that the complainant's hymen was breached. The Appellant was charged.

10. In his defence, the Appellant elected to give an unsworn defence. To the effect that he was 24 years

old but did not know the age of the complainant. He admitted that he had a love relationship with her and had sex with her when the complainant visited him in the material period. That she had refused to leave his house. He reported the matter to the mother of the complainant. Later he was arrested while at his place of work.

11. There is no dispute in relation to the question of penetration: the Appellant had sexual intercourse with the complainant during the time she was in his house. The Appellant in his appeal has challenged evidence in respect of the complainant's age, and as well, reiterated the defence that he did not know the victim's age.

12. This is what the trial court stated in its judgment on these matters:

> **"There is sufficient evidence to prove that the minor at the time of the offence was committed was 15 years. The copy of her Birth Certificate indicates that she was born on 13/06/1997……. The accused person defended himself stating that he does not know the complainant's age and did not know that she was school going. This cannot afford him a defence because apart from refusing to leave the accused person's house, the complainant did not deceive him into believing that she was over 18 years. The accused too did not take any steps to first ascertain her age before engaging in sex."**

13. Regarding the issue of age, the court relied on a photocopy birth certificate tendered by the investigating officer. The said copy though identified by **PW1** was not shown to **PW2** in the course of her testimony. And neither did **PW2** assert the complainant's age, beyond the testimony that at the material time, **PW1** was a High School student. The explanation given by the investigating officer, **PC Gitare (PW4)** for only availing the copy was that the original was misplaced. The court then proceeded to mark the copy of birth certificate as an exhibit, without asking whether the Appellant, who was unrepresented had any objection. I agree with the Appellant's challenge with regard to the said copy of birth certificate on this appeal.

14. The circumstances in which secondary evidence may be used in a trial are set out in Section 68 (1) of the Evidence Act, which states in part:-

> **(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases-**
>
> **(a) when the original is shown or appears to be in the possession or power of-**
>
> **(i) the person against whom the document is sought to be proved; or**
>
> **(ii) a person out of reach of, or not subject to, the process of the court; or**
>
> **(iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**
>
> **(b) ……;**
>
> **(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;**
>
> **(d) ……;**
>
> **(e) ……;**
>
> **(f) ……;**

(g) ……"

15. Statements by **PW4** explaining the absence of the original document were hearsay, as **PW2** did not state in her evidence that the same was misplaced, or mention it at all. Therefore the evidence in respect of the photocopy of birth certificate was improperly admitted. However, apart from the birth certificate there was the evidence of the complainant herself that she was born on 12th June 1997, which means, that she was aged between 15 and 16 years at the time of the offence.The Appellant opted not to cross-examine **PW1**. The doctor who examined the complainant estimated her age at 15 years as noted in the P3 form (**Exhibit 2b**).

16. Thus it matters not that no formal age assessment form was tendered, contrary to the Appellant's submissions. The court could well have relied on the oral and medical evidence on record in respect of the age of the complainant.

17. Considering the question of proof of age in defilement cases, the Court of Appeal sitting in Malindi stated in **Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR)**

> **"……the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See** Denis Kinywa -Vs- Republic, Criminal Appeal No.19 of 2014 **and** Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015**. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in** Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000**. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"**

There is therefore no merit in the Appellant's submissions that the complainant's age was not proved.

18. It remains therefore to consider whether the defence offered by the Appellant to the effect that he did not know the complainant's age and or that he was deceived, was viable. The defence appears to have been based on Section 8 (5) and (6) of the Sexual Offences Act which state:-

> **"8(1) ……...**
>
> **(2) ……...**
>
> **(3) ……...**
>
> **(4) ……...**
>
> **(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 the alleged commission of the offence; and**
>
> **(b) the accused reasonably believed that the child was over the age of eighteen years.**
>
> **(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.**

(7) ……...

(8) ……..."

19. The Appellant stated in his defence that while **PW1** was his girlfriend, he neither knew her age, nor that she was a student, until the complainant's parents informed him later. This defence has been given great emphasis in the Appellant's submissions. The application struck out by the court and which had been brought by the complainant also brought out the element of deception of the Appellant by the complainant.

20. During the trial, the complainant did not raise these matters in her evidence, nor did the Appellant cross-examine her in that regard, or at all. He did not cross-examine the mother of the complainant **PW2** either. There was no dispute however that the Appellant and complainant were boyfriend and girlfriend respectively, prior to the material date, although it seems that they had sex for the first time during the material period when **PW1** visited the Appellant. She remained there even after the Appellant notified her mother, **PW2** about her presence, and that she had refused to return home.

21. This is what **PW2** stated *interalia*:-

> **"I was asked (by police) where I suspected she (PW1) could be and I told them I had seen a boy who was her friend and I suspected him. I had seen her with him – accused on another occasion. I had also told someone to warn accused that the girl was a student, before this day. On 29/2/2013 accused called me on phone and told me he wanted us to talk. He came near the plot where I was staying. He said he wanted to seek for my forgiveness as he had the girl in the house and she had refused to come back……. There is no other day she had disappeared from home……There is no day accused came and told me he wanted to stay with her. I have never seen her with another boy or man…..… I later on spoke to her (PW1). She said accused was her boyfriend. She did not want to tell me what they did that night……."**

22. Notably, the third party sent by **PW1** to warn the Appellant concerning his relationship with **PW1** was not called as witness. In dismissing the Appellant's defence, the court accepted evidence that the complainant remained put in the Appellant's home, despite the Appellant's entreaties to go home, but observed no evidence was tendered that:

a. PW1 deceived him, and

b. that he took steps to ascertain her age before engaging in sex with her.

23. Could it be that despite the fact that the complainant was school going, the Appellant openly related with her as a lover believing her to be an adult? The Appellant did not explain what reason **PW1** gave for refusing to leave his home, but he also openly went forward to inform **PW2** that **PW1** was at his home, and to ask for forgiveness of **PW2**.

24. Evidently he had been carrying on with the **PW1** for a while, and when he says he did not know her age, he was probably suggesting that he did not ask her. This however is not the only consideration in respect of belief under Section 8(5) and (6) of the Sexual Offences Act. The court was obligated to consider "**all the circumstances**" in satisfying itself whether **"the Appellant reasonably believed the child was over the age of eighteen years"** as provided in Section 8 (5) (b) of the Sexual Offence Act.

25. I think the trial court ought to have considered "**all the circumstances**" including other conduct by the Appellant; such as his open relationship and dealings with **PW1's** mother when **PW1** refused to return home. Deception can be by conduct or through words. That is why all the circumstances must be considered, bearing in mind that deception is by nature a subjective matter that may vary from person to person. It must be borne in mind too, that the Appellant himself was also a youth, aged between 22 – 23 years at the time of the offence.

26. As a court of justice dealing with a case of this nature and reviewing all the circumstances obtaining herein, I cannot help but wonder if the mandatory nature of sentences provided under the Sexual Offences Act should not also be tied to the age of the offender, and the special circumstances of each case. An adult paedophile who preys on a young girl by use of force and/or guile should certainly be treated differently from a young male adult who engages in open relations with a girl close to his age. Here was a young man, confronted with the spectre of a young girl, his girlfriend, who out of folly or youth, had decided to ensconce herself in his house, refusing to go away. And literally forcing herself on him.

27. The Appellant, and this was confirmed by **PW1**, did not have sex with her on the first night. It happened on the second night - the 28th February, 2013. Again out of youthful folly or inexperience, the Appellant did the "decent thing" by visiting the girl's mother on 29th February and attempting in his awkward way, to apologise and report that the girl was in his home. He did not even run away after that, but continued to carry out his welding job, where police found him.

28. Ignorance of the law is not a defence, but some young people, and I think the Appellant could be one of them, are naive and fall easily to deception. Besides, the Appellant and the complainant were on the face of it "in love" with each other, and from their actions, possibly indifferent to details touching on their respective status, their parents or consequences of their actions.

29. In her consideration of the Appellant's defence, the learned magistrate erred, in my opinion, by the failure to make an appraisal of "all the circumstances" of the case, and seemingly confined herself to the concept of a verbal deception on the part of the complainant, and the failure by the Appellant to ascertain the age of the complainant. Important as these aspects are, the trial court was duty bound, especially in the peculiar facts of this case to consider "all the circumstances" before dismissing the Appellant's defence.

30. While I would not go as far as laying down a general rule in this regard, I believe that in order to do justice where two young people are involved the trial court should carefully weigh the evidence. The nature of sentences under the Sexual Offences Act call for an assurance on the part of the convicting court that the conviction is based on solid evidence.

31. The burden of proving the guilt of an Accused person always lies with the prosecution, and does not shift, barring a few exceptions stipulated in the law. Section 111 (1) of the Evidence Act states as follows:

> **"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."**

32. Under the second proviso, an Accused person is entitled to an acquittal where a reasonable doubt is created by the defence (or prosecution) evidence as to his guilt. The reference to *reasonable doubt* alludes to the fact that the burden of proof of guilt beyond reasonable doubt in a criminal trial does not shift, and remains with the prosecution. And whereas the Accused may assume the evidentiary burden to establish a statutory defence or exception provided for in the law, the standard of proof required of him must necessarily be lower – sufficient to create reasonable doubt.

33. In the case of **Republic -Vs- David Ruo Nyambura & 4 others [2001] eKLR** , **Etyang J** (as he then was) though considering an alibi defence offered by the Accused persons in that case, made some useful comments on statutory defences. He stated *interalia*:

> **"Quite clearly therefore all the accused persons have raised the defence of alibi. The law as regards this defence is now settled and was restated in *Leonard Aniseth -Vs- R* 1963 EA 206 at page 208 letters F, G, thus:-**
>
> **Since the well-known decision of *Woolmington -Vs- Director of Public Prosecutions* (1935) AC 462, it is well settled that, subject to the defence of insanity and to certain statutory exceptions which are not relevant to the present case, no burden rests upon an accused person to establish any defence. In the recent case of *R v Johnson* 46 CR APP R 55 the Court of Criminal Appeal dealt specifically with the burden of proof when a defence of an alibi is raised. The headnote of that case reads:-**
>
> > ***Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer…….".***

34. **Etyang J.** continued to observe**:**

> **In this case, therefore, the accused persons have raised the defence of alibi. <u>This defence is to be given the same consideration as all other defences raised by an accused in a criminal trial. That consideration is on a balance of probabilities.</u> The prosecution still remains with the duty to prove the guilt of the accused beyond reasonable doubt. That burden of proof (legal burden) never shifts to the accused, who assumes no burden to prove his innocence……..."** (See also **Gikonyo J. in Peter Wafula Juma & 2 Others -Vs- Republic [2014] eKLR**).

35. The foregoing lies at the heart of Section 111 (1) of the Evidence Act. And Section 8 (5) and (6) of the Sexual Offences Act must be read with the provisions of Sections 111 (1) of the Evidence Act in mind. In my own view, the trial court in this case/erred by peremptorily dismissing the Appellant's defence without a thorough consideration of <u>all the circumstances</u> of the case. It was not enough, in the circumstances of this case, to pick one or two aspects – namely the continued presence of the complainant in the Appellant's house, and the Appellant's failure to ask the complainant her age – and to conclude that he was not deceived.

36. Indeed, **PW1** had stated in her evidence-in-chief that she did not know if the Appellant knew her age. As a minimum the court could have, as it was entitled to do, make its own observations regarding the apparent age of **PW1** when she testified. It is my considered view that the trial court gave short shrift to the defence offered by the Appellant. And that, had it considered all the relevant and proven circumstances of this case, it would have come to the conclusion that the Appellant's defence was not totally worthless, but on a balance, tended to introduce reasonable doubt as to the culpability of the Appellant.

37. The exhortation by appellate courts that every case must be considered in the uniqueness of its circumstances is prudent and worth repetition in this case. In view of all the foregoing, I find that the Appellant is deserving of the benefit of doubt that he was entitled to in the lower court. I do hereby quash his conviction and will order that unless otherwise lawfully held, the Appellant be set at liberty forthwith.

Delivered and signed at Naivasha, this **13th** day of **April, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Appellant – Present

C/C - Barasa

C. MEOLI

JUDGE