REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 44 OF 2015

DENNIS KIMEU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Being an appeal from the Sentence of Principal Magistrate's Court at Mavoko Law Courts delivered by **Honourable T. A. ODERA (Principal Magistrate)** on **25th November, 2014** in **MAVOKO P.M.CR. CASE NO. 1370 of 2013)***

JUDGMENT OF THE COURT

1. The Appeal arises from the judgment of Hon T. A. Odera Principal Magistrate in **Mavoko Principal Magistrate's Court Criminal case Number 1370 of 2013** dated the 25th November, 2014.

2. The Appellant had been charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars' being that on the 15th day of August, 2011 at [particulars withheld] area in Athi River District within Machakos County intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one MM (name withheld) a child aged fifteen and half (15½) years. The Appellant also faced an alternative charge of committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The Appellant also faced a second count of Assault causing actual bodily harm contrary to Section 250 as read with Section 251 of the Penal Code but which offence he duly pleaded guilty and was subsequently sentenced to a fine of Kshs.5,000/= or three (3)months imprisonment in default.

3. The Appellant was found guilty of the offence convicted and sentence to serve Twenty (20) years imprisonment.

4. Aggrieved by the said conviction and sentence the Appellant has filed this Appeal and raised the following grounds of Appeal:-

> ***(a) That the learned trial Magistrate erred in matters of law and fact by not finding that the test for operation of the statutory defence under Section 8 (5) for the Sexual Offences Act No. 3 of 2006 was satisfied and therefore the guilt of the accused persons was effectively defeated.***
>
> ***(b) That the learned trial Magistrate erred in matters of law and fact by not fully considering all the mitigating factors fob the matter including the state of the mind of the offender to the obvious conclusion that the 20 years minimum statutory sentence was harsh and inappropriate under the individual circumstances of the case.***

5. This being the first Appellate Court, it is obligated to re-evaluate and re-examine the evidence tendered before the trial Court and to come to its own independent conclusion bearing in mind that it did not have the opportunity to see or hear the witnesses testify and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32, PANDYA =VS= REPUBLIC [1957] EA 336, PETER =VS= SUNDAY POST [1958] EA 424).**

6. **Summary of the Prosecution's Case:-**

PW.1 testified that he received the Complainant first on an entail complaint of assault and further learnt from the Complainant that the assailant had earlier defiled her as a result of which she conceived a baby girl. He examined the Complainant and filled the P.3 form in which he confirmed that indeed the Complainant had been assaulted on the head and had been defiled.

PW.2 testified that the Appellant had been her boyfriend and that on the 15/08/2011 the Appellant had overpowered her and defiled her. She later conceived and gave birth to a baby girl. A DNA test conducted on the baby, The Appellant and Complainant and which revealed the Appellant was 99.99% the father of the infant.

PW.3 testified that she conducted the DNA test upon receiving buccal swabs from Complainant, Appellant and the infant and that the analysis revealed that the Appellant was 99.99% the father of the infant.

PW.4 testified that he was the Investigating Officer and upon receipt of an assault report from the Complainant, he learnt that the Appellant had visited the Complainant demanding to pick a child he had sired with her following a previous sexual intercourse. He thereafter preferred a charge of defilement and assault after confirming the same from the doctors.

7. **Appellant's Defence Case**:-

The Appellant was put on his defence and he tendered a sworn testimony. He stated that he and the Complainant had been lovers. He stated he was then aged about 22 years while the Complainant was about 16 years old. He admitted siring a child with the Complainant. He stated he later went to visit the Complainant and his child only to discover that another man had taken her and he got annoyed and assaulted her. He admitted committing the offences and sought forgiveness and wanted to be reunited with his family. He finally stated that he did not know that the Complainant was a student. The Appellant called his mother Jane Mueni Musyoka as a witness. She confirmed that the Appellant had impregnated the Complainant who was then a School girl and that she and the girl's parents held a discussion in which it was resolved that the girl should proceed with her schooling.

Submissions:

8. Parties filed submissions which I have carefully considered. I have also considered the evidence adduced before the trial court. It is not in dispute that the Appellant and the Complainant engaged in sexual intercourse as a result of which a baby girl was born. The Appellant does not dispute this fact. The Appellant's real concern is that the trial Court should have considered the statutory defence in his favour in terms of the Provisions of Section 8(5) of the Sexual Offences Act. His other concern is that the sentence of Twenty (20) years meted out on him was inappropriate in view of the circumstances of his case. Hence the issues for determination are as follows:-

(1) Whether the trial court failed to consider the statutory defence in favour of the Appellant during the trial.

(2) Whether the sentence meted out upon the Appellant was inappropriate.

9. As regards the first issue, the critical component of the charge revolves around the age of the Complainant. The charge sheet indicated her as fifteen and half (15½) years at the time of the alleged

defilement. Indeed a copy of the Birth Certificate was produced as an exhibit which confirmed that the Complainant was born on the 28th July, 1996 and therefore was aged about 15 years and a few months at the time of the alleged defilement namely 15th August, 2011. Hence the Complainant was still a minor when the incident took place. The Appellant has raised that the trial Court ought to have given him the benefit of a statutory defence in line with Section 8(5) of the Sexual Offences Act. Indeed it is a defence if the victim deceived the accused in believing that she was over 18 years and it must be proved that the Appellant reasonably believed that the Complainant was indeed over the age of 18 years. However, the defence is not absolute because under Section 8(6) of the said Act an accused has to demonstrate the steps he took to ascertain the Complainant's age. The relevant provisions provide as follows:-

Section 8 (5):

"It is a defence to a charge under this Section if:-

> ***(a) It is proved that the child deceived the accused person into believing that he or she was over the age of eighteen (18) 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 (18) years.***
>
> ***(6) The belief referred to in sub-Section 5((6) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the Complainant."***

10. From the above, it is quite clear that even if the Complainant had presented herself to the Appellant to have been over eighteen (18) years of age, the onus was on the Appellant to ascertain that the said age was correct. This is mandatory in that the said Section was introduced so as to protect victims from sexual molestation and it raised the bar on the perpetrator to ensure that they were indeed dealing with adults and not minors. The appellant in his defence did not give evidence on any steps that he took to establish the age of the Complainant nor did he give evidence to invoke the statutory defence under Section 8 (5) of the Sexual Offences Act No.3 of 2006. In fact the responses for both the Appellant and his witness upon being cross-examined by the trial court Prosecutor completely weakened any attempt on the part of the defence that the Complainant was over 18 years of age. The Appellant admitted on cross-examination that the Complainant looked young like a child. Likewise the Appellant's mother admitted on cross-examination that the Complainant looked like a child. The record of the lower court proceedings and more specifically the evidence of the Complainant reveals that during the alleged defilement at the Appellant's room on the 15/08/2011 the Complainant kept pleading with him not to force her into sex as she was still attending school. Hence the Appellant had enough evidence that the Complainant was a school girl but nevertheless went ahead to forcefully have sex with her. Indeed after the sexual intercourse the Appellant appears to feel remorseful at his conduct in having forced himself onto the Complainant and hence the Appellant's claim that they were lovers and had enjoyed consensual sex is not believable. In any case the Complainant was still a minor and had no capacity to consent to the sexual intercourse. It therefore follows that the Appellant did not qualify to come within the ambit of the defence provided under Section 8(5) of the Sexual Offences Act. It is obvious that the Appellant was not made to believe that the Complainant was over 18 years and that he never took any steps to establish her age. Hence the Appellant's first ground of Appeal lacks merit and is dismissed.

11. As regards the second issue, the Appellant was indeed sentenced to 20 years imprisonment, the trial court did receive a pre-sentence report which it considered and thereafter indicated that its hands were tied by the law which provided a minimum sentence for the offence under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006. Indeed the said Provisions of the law did not give the trial court a discretion in the matter as it regards sentencing the same provided for minimum sentence for not less than 20 years imprisonment. However from the Birth Certificate of the Complainant, it is shown that as at 15/08/2011 she was 15 years and twenty days to be exact. Hence she was over 15 years old and therefore between 15 years and 16 years old. The Section for which Appellant had been charged was Section 8(1) and 8(3) which provides as follows:-

"***Any person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty (20) years."***

12. Since the Complainant was born on the 26/07/1996 then she turned 15 years old on the 26/07/2011 and therefore by the time of the incident on the 15/08/2011 she was only twenty days older than 15 years and her expected next birthday would have been the 26/07/2012. Hence I find the Complainant was still within the age of 15 years and was within the bracket contemplated by Section 8(3) for the Act. The sentence imposed by the trial court was therefore not illegal nor was it inappropriate. The second ground of Appeal therefore fails.

13. In the result it is the finding of this court that the trial Prosecutor had proved his case before the lower Court beyond reasonable doubt. The conviction and sentence arrived by the trial Court was based on sound evidence which was credible, consistent and corroborated. The Appeal herein lacks merit and is hereby ordered dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24TH** day of **JULY** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Machogu for Respondent

Appellant: In person

C/A: Kituva