



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 27 OF 2017

K K M..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered on 16th May 2017 in CR Case no.459 of 2011 (Kilifi), by Hon. A.O. Obura – PM)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on diverse dates between 23rd March 2011 and 2nd April 2011 at [particulars withheld] area in Kilifi County within the Coast Province intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ namely vagina of R C , a girl aged 16 years old.

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

- 1. The age of the complainant was not properly proved**
- 2. The conviction was based on an age assessment report but no birth certificate was produced**
- 3. The prosecution evidence did not prove the case beyond reasonable doubt.**
- 4. The appellant's defence was not considered.**

The appellant submit that the complainant, PW1, testified that she was 17 years when she had sex with the appellant. At the police station she said she was sixteen (16) years. The investigating officer testified that PW1 was 17 years at the time of the offence. The complainant informed the investigating officer that she was born in 1993. PW5 testified that the girl's age was assessed at 18 years old. The appellant submit that the trial court selectively believed that PW1 was under the age of 18 years old. The investigating officer's allegation that he saw the birth notification indicating that PW1 was born in 1993 cannot be true. The birth notification was not produced.

The appellant relies on the case of *ALFAYO GOMBE OKELO -V- REPUBLIC [2010]eKLR* where the court of appeal states as follows;

“In its wisdom, parliament chose to categorize the gravity of that offence on the basis of the victim, and consequently, the age of the victim is necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1). In this case the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother M A when she testified on 16th October 2007 that “This child in court is mine aged 14 years born in 1992 The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find”.

The appellant further submit that no DNA test was conducted to confirm that the appellant was the father of the child born by PW1. This breached section 36(1) of the Sexual Offences Act. The appellant maintains that the prosecution did not prove its case beyond reasonable doubt.

The state opposed the appeal. **Mr. Fedha**, prosecution counsel, submit that the evidence of PW1 to PW6 proved the case beyond reasonable

doubt. The trial court was convinced that the evidence proved the case. The P3 form proved that there was penetration. PW1's hymen was broken and she was pregnant. PW1 knew the appellant. All the ingredients of defilement were proved.

This is a first appeal and the court is required to evaluate the evidence adduced before the trial court afresh and make its own conclusion. Before the trial court **PW1 R C** was the complainant. For purposes of clarity I do reproduce her evidence which went as follows:-

“I am R C . I reside at xxxxx. I am not studying. I used to go school. I went for 4 years. I dropped out in class 6 at xxxxxPrimary School in 2012.

On 20/3/2012 at about 12 noon I do not recall what happened. I do recall I had been sent to xxxx to grid maize at the posho mill. The accused was my boyfriend. I went to his house. He is the one who stopped me on my way from the shop at xxxxx. He said he loves me. I accepted. I went and spent the night at his place. I was school going. I was 17 years old. I went to his house severally. I would spend time there and then return home. He is my husband. He was arrested and brought to court. We had sex when I visited him. I went for medical examination and it was established I was one month and over some days expectant. I had fainted and my parents took me to hospital. It was in May 2011. I was one month and 2 weeks pregnant. The sub chief came and arrested us and took us to the police. He picked me from home and took me to xxxx where my mother lived. My father lived with me at home.

My mother sells “mnazi” at xxxx. I was taken to hospital. Accused was not taken to hospital. We went to xxxx police station. We were in custody for 3 days before being brought to Kilifi. I left school after I was impregnated. I was examined at the hospital. I was not issued with this document (P3 form). It bears my name. Police did not give me the form – “MFI P1”. My mother came for me at the police station. I was taken home. I delivered on 3/12/2012. This is my baby girl. She is 1 year 7 months. The accused K K is the father (she has a toddler).

PW1 cross-examined by accused in Kiswahili

My mother did not tell me what to say in court. It was in 2011 that you befriended me. I forgot the date. I was impregnated in April 2011. I delivered in December 2011. I forget the exact dates. It was a long time ago hence I forgot the details and not that I am not the complainant. You were the one who befriended me in 2011.

PW1 re-examined

I was impregnated in 2012 and not 2011. I was confused. I do not recall when I recorded my statement with police. I do not recall if it was on 25/5/2011 that I recorded my statement and if I was pregnant then”.

PW2 M C is PW1's mother. This is what she told the court in her evidence in chief;

“I am M C. I reside at xxx. I am unemployed. R C is my daughter. On 16/5/2011 I recall she eloped and went to K house. I went for her. I returned her to Mikamini where she hails from. Accused lives at xxxx. She returned there. I came to learn she was pregnant. I sought the sub-chief's help. I could sense she was expectant as her stomach was bulging. The girl was taken to hospital. It was confirmed she was over one month pregnant. They were taken to xxxx Police Station. I knew the accused very well as a resident of xxxxx. I do not live at xxxxx. I never lived with her at xxxxx. She was in class 6 at xxxxx Primary School. She left school on her own accord at 16 years old. K is the accused”.

PW3 C K is PW1's father. He testified that on 18/5/2011 at about 11.00am PW1 eloped and went to the appellant's place. The next day the area assistant chief went to his home. PW4 learnt that PW1 was pregnant. It is his further evidence that PW1 and the appellant said they had a relationship and PW1 was pregnant.

PW4 Dr. Faraj Taher was based at the Kilifi District hospital. He produced a P3 form prepared by his colleague **Dr. Adnan** who had since left Government employment. He had worked with **Dr. Adnan** for one and half years. The P3 form was filled on 14/8/2011 and indicated that PW1 was 20 weeks pregnant. Her hymen was broken and her genitalia was normal.

PW5 PC Sara Amadi was stationed at the Kilifi police station. She testified that on 24/5/2011 the appellant and PW1 were taken to the police station by **PC Wanjala** from Bamba police station. She issued PW1 with a P3 form. The age of PW1 was assessed and found to be 18 years. She charged the appellant with the offence since PW1 was 17 years old at the time of the offence. PW1 told her that she was born in May 1993. PW5 saw the birth notification. According to PW5, the relationship between the appellant and PW1 started in March 2011. By 26/5/2011 she was one month pregnant and had attained the age of 18 years old. The offence occurred between March 2011 and April 2011.

PW6 Dr. Chege Wamulu is a senior dentist who was based at the Kilifi District Hospital. He assessed PW1's age and found it to be approximately 18 years old. He noted that at the time of the offence PW1 was below 18 years old.

In his unsworn defence the appellant denied committing the offence. He testified that he is a barber. On 22/5/2011 he was at work. The area assistant chief called him. He went to meet her (Mama Kumi) and he was taken to the police station. It is his evidence that PW2, the complainant's mother, had bought for him a shaving machine and other items for his business worth kshs.30,000/= . He could not repay the debt and PW2 warned him of dire consequences.

The issues for determination are whether the prosecution proved its case beyond reasonable doubt. Other issues which are included in the above general issue include the age of the complainant and whether PW1 was defiled. The prosecution evidence show that PW1 and the

appellant had a relationship. Although in his defence the appellant denied having sex with the complainant, it is clear that PW1 knew the appellant. The defence evidence does confirm that the appellant knew the complainant's mother. PW1 testified that the appellant told her that he loved her. She accepted. She went and spent the night at his place. She went to the appellant's house severally. She would spend there and then return to her parent's home. They used to have sex whenever she visited him.

The evidence of the parents, PW2 and PW3 is that the complainant eloped and went to stay with the appellant. The complainant testified that she was arrested by the assistant chief together with the appellant while at the appellant's place. According to the mother, PW1 eloped and went to live with the appellant. The mother took PW1 back home. PW1 later returned to the appellant's house. The father to PW1 also confirmed that the two informed them that they were in love. They had a relationship.

Apart from the above evidence, there is the evidence of PW1's age. The P3 form on the part filled at the police station indicate that PW1 was 18 years old. The P3 form was issued on 18th May 2011. the occurrence book number is not given. The evidence shows that PW1 and the appellant were arrested on 24/5/2011. This is clearly indicated on the charge sheet. The appellant was arraigned in court on 26/11/2011. There is no evidence as to how the P3 form could have been issued on 18/5/2011 which is earlier than the date the case was reported to the police station at Kilifi. The police officers from Bamba police station did not testify or indicate that they arrested the two on 18th May 2011.

The P3 form at page 3 indicate that the estimated age of PW1 was 18 years. The P3 form was filled on 14/7/2011. Apart from the P3 form, there is the age assessment report dated 26/5/2011. The report indicate that PW1 was approximately 18 years old as of that date of 26/5/2011. The investigating officer, PW5 testified that she saw the birth notification for PW1 which indicated that she was born in May 1993. The exact date is not given. PW5 is a police officer and knew that the birth notification is a crucial document. She did not bother to produce it in court. How can the court simply conclude that indeed PW1 was born in May 1993. The complainant testified on 19/7/2013. She had delivered her baby girl child by then. She stated that she was 17 years old when she befriended the appellant. By May 2011 she was one month and two weeks pregnant.

The P3 form indicate that the details of the relevant offence was rape. It further indicate at page two (2) that the probable type of weapon causing injury is rape. At page 3 the nature of the offence is given as rape. The question then is whether PW1 was raped or defiled. The charge sheet indicate that PW1 was 16 years old. This age does not appear anywhere in the proceedings. PW5 who investigated the case never stated that PW1 was 16 years old. PW5 must have seen the charge sheet as the investigating officer.

From the evidence on record, I do find that the prosecution did not prove the age of the complainant beyond reasonable doubt. The evidence on age is contradictory. If we are to go by the P3 form, then PW1's age was 18 years old. If we are to go by the age assessment form, PW1's age was approximately 18 years old by 26/5/2011. The word approximate denotes either more or less. In other words what has been estimated is not the exact position. It could be less than 18 years or more than 18 years old.

It is PW5's evidence that she saw the birth notification for PW1 indicating that she was born in May 1993. According to PW5, since PW1 was one month pregnant by 26th May, 2011, she must have conceived in April 2011 when she was below the age of 18 years. PW1 and her parents did not testify on the birth notification document where that document was or went only PW5 knows. I do find that PW1 was above the age of 18 years old. She was sexually active and had sex several times with the appellant.

Apart from the issue of age, there is the issue whether PW1 was defiled. It is her evidence that she went to the appellant's house several times. They would have sex during such visits. Her mother testified that PW1 eloped. The mother went for her but PW1 returned to the appellant's house. PW1 testified that the appellant was her husband. Although no DNA test was conducted, it is evident that the appellant is the father of the baby girl. The two loved each other. During the period of March, April and May 2011, PW1 would sleep over at the appellant's house. Definitely PW1's parents knew about it but never raised any complaint. It is the assistant chief who arrested the two and took them to Bamba police station. The mother (PW2) testified that PW1 left school on her own accord when she was sixteen (16) years. It means therefore that when she was having sex with the appellant she was not a student.

Given the circumstances of the case, I do find that PW1 behaved like an adult. She returned to the appellant as her husband. She was a mature girl who knew what she was doing. She was arrested at the appellant's house. The age of the appellant is not given. During mitigation, the appellant stated he was still a youth. The specific age is not given. I do find that PW1 was not lured into the relationship.

It has been held in several decisions that the offence of defilement is proved when the following ingredients are established;

1. Complainant's age

2. Proof of penetration

3. Identification of the penetration or offender

In my view, the above ingredients involve a clear case of defilement. There are other cases where even if the above ingredients are established, still the offence of defilement may not have been committed. These circumstances fall under the provisions of section 8(5) of the Sexual Offences Act. If the child makes the accused to believe that she is over 18 years old, that can be a good defence for the accused. By a good defence, the accused need not testify that he believed the complainant was over 18 years or that it was the complainant who told him that she was over 18 years old. Article 59(i) of the Constitution gives an accused person the right to remain silent during the proceedings. The right to remain silent is also a defence. The burden of proof as usual is upon the prosecution. Apart from proving that the complainant was below the age of 18 years old, the prosecution is also supposed to prove that the victim did not behave in a manner likely to suggest that she was over 18 years old. When the circumstances of the case suggest that the complainant was behaving like an adult, like in that case, the courts ought to go by the complainant's behaviour and conclude that she is an adult. Such circumstances will mainly occur when the complainant is over the age of thirteen years old. The intention of the Sexual Offences Act as pronounced on its preamble is to protect all persons from harm from unlawful sexual acts. If the complainant has been having sex with the accused for sometime, there

would be nothing to protect. Even if the accused is sent to prison, the complainant, having exposed herself to sexual habits, will continue with the sexual trend with other people. Although such views are condemned by some people, we have to live in the factual reality that young girls are starting to engage in sexual intercourse voluntarily at a very young age. The law penalises the age of complainant irrespective of her behaviour. If one simply confines his or her mind to the ingredients of age, penetration and identification, then the behaviour of the complainant becomes irrelevant. What that means is that a sixteen (16) year old girl can misbehave, have a boyfriend, report that she was defiled after disagreeing with him, pick another boyfriend at the age of 17, disagree with him and have him charged for defiling her. What should happen to those girls under 18 years who appear before court carrying children and telling the court that they are married. Should the court call for their husbands to be prosecuted.

My view on the issue of the ingredients of the offence of defilement are that apart from proof of age, penetration and identification, the following also need to be considered;-

- 1. Was the complainant forcefully defiled**
- 2. Was the complainant threatened**
- 3. Did the accused take advantage of the complainant's young age and lured her into sex.**
- 4. Were the two in a sexual relationship. How long did that relationship last.**
- 5. What was the complainant's behaviour**

We are living in a different world. Nowadays young girls below 18 years age are the proud owners of mobile phones. They can watch pornographic material on their phones which leads to raising their sexual emotions. They can date their boyfriends and meet wherever they want. Judicial officers should be able to differentiate between “**real**” defilement and cases where the alleged victim was simply trying to fulfil her sexual feelings. Such differentiation should take into account the age of the complainant. A child of “**tender**” years, which is defined as below ten (10) years under section 2 of the Children Act, may not be in a position to venture into such sexual exploits. Where the alleged victim is 15, 16 and 17 years old, great caution should be exercised before the accused is sent to jail. This does not mean that people falling within such age bracket are not defiled. What I mean is that the circumstances of the case should not be such that the alleged victim was in a sexual relationship with her perceived boy friend.

Turning to the circumstances of this case, it is clear to me that the age of the complainant was not proved beyond reasonable doubt. The appellant should have the benefit of the view that PW1 was above eighteen (18) years old. Further, PW1 treated the appellant as her husband. She behaved like a grown up and went to live with the appellant. PW1's parents did confirm that the two were in a relationship. PW1 eloped and went to live with her “**husband**”. Why should we punish the perceived husband.

In the end, this appeal is verily merited. It is hereby allowed. The conviction and sentence is hereby set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT MERU THIS..... DAY OF AUGUST 2017

SAID CHITEMBWE

JUDGE

Dated, signed and delivered at Malindi this 20th day of September, 2017

WILDON KORIR

JUDGE