



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 172 OF 2012

NICHOLAS MUTHUI KIBEBEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from conviction and sentence in Nyeri CM Criminal Case No. 12 of 2015 by Hon. W.A. Juma – Chief Magistrate delivered on 27th September, 2012)

JUDGMENT

The appellant **Nicholas Muthui Kibebe** was charged in the Chief Magistrate's court on 16th April, 2012 with the offence of defilement contrary to section **8(1) (4) of the sexual offences Act No.3 of 2006**.

The particulars of the offence are that on diverse dates between 18th March, 2012 and 15th April, 2012 at Embaringo village in Kieni West District of the Central Province intentionally and unlawfully caused his penis to penetrate the vagina of Esther Njeri Waithera a child aged 17 years old.

The appellant faced an alternative court of indecent Act with a child contrary to **section 11 (1) of the sexual offences Act. Act No.3 of 2006**.

The particulars of the offence are that on diverse dates between 18th March, 2012 at Embarigo village in Kieni West District within the Central Province intentionally and unlawfully touched the Vagina of Esther Njeri Waithera a child aged 17 years with his penis.

The appellant was after full trial found guilty of the main count and sentenced to serve 15 years imprisonment.

Briefly the evidence before the trial court was that PW3 Waithera Muchemi is the mother of the complainant Esther Njeri. On 18/3/2012 the complainant had gone to collect her certificate from Mafrun Polytechnic where she was learning tailoring. She saw the complainant and appellant alight from a motor bike. The complainant did not come home that day. On 14/4/2012 she saw her daughter carrying gumboots for the appellant and knew she was at the home of appellant. She reported to the assistant chief who referred her to police, where she made a report.

On 15/4/2012 police visited the appellant's home and found complainant also present. Appellant was arrested and taken to the police station and complainant taken to hospital for medical examination. The witness produced a birth certificate for the complainant which shows she was born on 2nd February, 1995.

PW2 Esther Njeri Waithera the complainant testified that she was born in 1995. She met the appellant

and he asked her if she would be his wife and she accepted. She went to his home and stayed with him from 18/3/2012 upto 15/4/2012 when both of them were arrested. During the stay together they had sexual intercourse and she became pregnant. She stated that she had been employed in Nairobi but left the job voluntarily. On being cross-examined by the appellant the complainant stated that she became his wife by choice. The complainant was examined by Dr. Victor who found that she was 16 weeks pregnant.

The appellant gave sworn evidence. He stated that he did not know that she was 17 years old and did not ask her her age but they married and took her as his wife and that she is pregnant with his child.

It is on the basis of this evidence that the appellant was found guilty of the offence of defilement and sentenced to 15 years imprisonment.

Dissatisfied with the conviction and sentence the appellant filed this appeal citing four grounds. That the trial magistrate erred in failing to evaluate the evidence of both the prosecution and defence adequately; that the trial magistrate failed to appreciate that the offence was committed with consent of complainant that trial magistrate failed to give cogent reasons for rejecting his defence and that the sentence was harsh in the circumstances.

The appellant filed and relied on filed written submission in support of his appeal. In his submissions the appellant contends that offence against him was not proved; that the prosecutionthe burden of prove and that his defence was not challenged and that the evidence of the complainant was that she was almost at age of majority when offence occurred.

Mr. Njue prosecuting counsel for the Respondent opposed the appeal. He submitted that both complainant and appellant admitted to having sexual intercourse. The complainant was aged 17 years old and therefore a minor who has no capacity to give consent; and that the trial magistrate considered the appellants defence but some did not fall within the prescription of section **8 5(a)** of the Sexual Offences which gives the appellant defence if he believed the complainant was above 18 years old and that there was no deception of the age by the complainant. Counsel submits that the sentence of 15 years imprisonment is lawful.

Both the complainant and the appellant testified that they have had sexual intercourse severely. Indeed they admit that they were staying as man and wife and that the complainant was 16 weeks pregnant. That there was penetration is therefore not in dispute. The age of the complainant was stated by the complainant to be 17 years old having been born in 1995.

The contention of the appellant, in his submissions is that the complainant consented to the sexual intercourse and he believed that she was capable of giving the consent or that she was over 18 years. He admits he never asked her but she told him that she had been working in Nairobi.

The appellant in his submissions is bringing himself to the provision of section 8(5) of the Act which provides.

5. It is a defence to a charge under this section 18.

a) it is proved that such child deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence and

b) That the accused reasonably believed that the child was over 18 years.

c) The belief referred to in sub-section 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”

Section 8(5) and (6) provide a defence and a charge of defilement where the complainant has misled the accused about her age, where the accused reasonably believed that the child was over 18 years; and such

belief will be determined taking into account the circumstances and steps taken by the accused to ascertain the age.

In the present appeal, the complainant stated that she was 17 years old. She confirmed she has been a student at tailoring at Masrun polytechnic and had even gone for her certificate. She also told the appellant that she had been working in Nairobi. These factors submit the appellant wide Reasonable think she was over 18 years as nobody will be employed without an identity Card in Nairobi. Would these factors have made the appellant believe the complainant to be over 18 years? I would be inclined to think so. The complainant was not in school. Had completed tailoring course at masrun polytechnic; had been working in Nairobi, and was on the bordering age of 17 years, all would reasonably lead the appellant to think that she was over 18 years. In my view the appellant has brought himself within the provision of section 8(5) which provides a defence to the charge of defilement.

The trial magistrate did address her mind to the provisions bar stated that he should have asked her for the ID Card. She however did not consider the other factors I have alluded to above. In the premises I find the appellant had a.....defence to the charge of defilement. I therefore allow the appeal, set aside the conviction and sentence of 15 years imprisonment, and order the appellant to be released forthwith unless otherwise lawfully detained.

Dated at Nyeri this 4th day of October, 2015.

S RIECHI

JUDGE

31/3/2016

Before – Hon S RIECHI – Judge

Catherine – Court clerk

Appellant – present

Njue for state

Court – the judgment read over and delivered in open court in presence of appellant and Mr. Njue for the respondent this 31st day of March, 2016.

S RIECHI

JUDGE