REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 101 OF 2014

(From original conviction and sentence in criminal case No. 823 of 2014 of the SPM Magistrate's Court at Mwingi – M. W. Murage)

K M.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court at Mwingi with 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 on diverse dates between the month of August 2011 and 24th November 2011 at Kyethani Location in Mwingi Central District within Kitui County did an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of MJ a girl aged 17 years.

In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between August 2011 and 24th November 2011 at Kyethani Location in Mwingi Central District within Kitui County committed an indecent act which caused the contact of his male genital organ namely penis with the female genital organ namely vagina of MJ a child aged 17 years.

He denied both counts. After a full trial, he was convicted of the main count of defilement and sentenced to serve 15 years imprisonment.

Dissatisfied with the decision of the trial court the appellant has now come to this court on appeal. He filed his initial petition of appeal on 25th November 2014. However before the appeal was heard, the appellant with permission of the court, filed an amended petition of appeal and written submission, which he relied upon.

His grounds of appeal are as follows:-

1. The trial magistrate erred in convicting him without considering that the prosecution failed to prove their case beyond reasonable doubts as required under Section 109 and 110 of the Evidence Act.

2. The trial magistrate erred in convicting him without considering that crucial witnesses were not summoned in court to establish the truth.

3. The trial magistrate erred in convicting him without considering that the DNA report was not

credible as it was produced contrary to Section 36 of the Sexual Offences Act.

4. The trial magistrate erred in convicting him without considering that the medical report was dubious.

5. The trial magistrate erred in convicting him without considering that there was no corroboration in the prosecution evidence.

6. His defence which was straight forward and self explanatory was not considered while the age of the complainant was not ascertained.

At the hearing of the appeal, the appellant relied on his written submissions. He elected not to tender oral submissions. I have considered the said written submissions.

Learned Prosecuting counsel Mr. Okemwa opposed the appeal and urged this court, as a first appellate court, to peruse and evaluate the record.

Counsel stated that the prosecution had proved the three elements for a charge of defilement. With regard to the age the complainant, PWI was consistent in her evidence that she was 17 years old which was confirmed by the age assessment report produced as exhibit 1. According to counsel the appellant and the complainant were in an obvious relationship and as a consequence, the appellant made the complainant pregnant. Counsel emphasized that the DNA report relied upon by the prosecution proved that sexual penetration had occurred.

The counsel underscored the fact that both the complainant and the appellant agreed that they were living together as husband and wife Counsel finally urged this court to discourage such incidences of adults taking advantage of minor girls.

In response to the prosecuting counsel's submissions the appellant said that he asked for a birth certificate of the complainant at the trial, which was not produced in court. He maintained that he did not know that the complainant was a young person and that, and agreed with the complainant's story that the two were married. He complained that when his father went to report the marriage to the parents of the complainant, he discovered that the mother had already reported the incident to the assistant chief.

The appellant also complained that the doctor did not come to court to confirm the DNA test of paternity of the child.

The brief facts are as follows:-

During the trial the prosecution called 3 witnesses. The defence called four witnesses. The appellant was employed by the grandmother of the complainant as a farm worker. The complainant PWI who lived with the grandmother as the parents were away in Kapsabet, was attending school in upper primary.

In the year 2011 the appellant and the complainant became lovers, and were involved in several sexual activities from around August 2011. By November 2011 the complainant confirmed that she was pregnant and the two eloped and went to live together.

This information reached the mother of the complainant in Kapsabet who came home and reported the incident to the Assistant Chief. As a result both the complainant and the appellant were arrested and the appellant charged with the offence.

This being a first appeal, I am required to re-examine all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witness testify in the trial to determine their demeanor – see the case of ***OKENO –VS- REPUBLIC (1972) EA 32.***

I have reevaluated the evidence on record. The appellant has come to this court on appeal of several grounds.

The ingredients to be proved by the prosecution in a case of defilement are firstly the age of the complainant who should be less than 18 years. Secondly, the prosecution has to prove that there was penetration. Thirdly, the prosecution has to prove that the accused is the culprit. Each of these ingredients of the offence has to be proved beyond any reasonable doubt See the case of ***WOOLMINGTON –vs- DPP (1932) AC 462.***

I will start with sexual penetration. From the evidence on record which is supported by the defence, the complainant and the appellant were involved in several sexual acts. The appellant infact took the complainant to his home and lived with her for a few days as his wife. He sent his father and uncle that is DW3 J M and DW2 P M to the home of the parents of the complainant to report that they were living together as husband and wife, only to discover that a report of a criminal nature had already been made to the Assistant Chief. A DNA report on the child of the complainant was produced in court as an exhibit. The appellant has challenged the DNA report saying that it was not produced by the maker. However that DNA report shows that the appellant was the biological father of the child.

In my view, penetration of the complainant by the appellant was proved by the prosecution beyond reasonable doubt. The fact that they eloped with the complainant when she was already pregnant and they proceeded to live together as a married couple, proved sexual intercourse. In my view also the DNA report was properly produced in court, as there is no mandatory requirement that it be produced by the person who signed it. Section 77 of the Evidence Act(cap.80) is clear on this. It is a detailed report and in my view it proves that the first child of the complainant, who by the time of hearing of the case in 2014 had another child who was the appellant's child.

I thus conclude that penetration occurred on several occasions.

The above finding also settles the element of the appellant being the culprit, as there was no mistake that the appellant indeed sexually penetrated the complainant.

I now turn to the issue of age of the complainant. The prosecution was required to prove this element of the offence beyond any reasonable doubt.

The complainant stated that she was aged 17 years. An age assessment report was produced in court. The mother PW2 R M J did not say when the complainant was born. The appellant said in his defence that he did not ask for the age of the complainant and was not aware that she was below 18 years.

The burden is always on the prosecution to prove every element of a crime beyond reasonable doubt and in the present case the mother of the complainant did not state when she was born. The complainant also did not tell the appellant that she was under age while when the two got into a love relationship. The age assessment report produced in court was worded as follows:-

> ***"to whom it may concern.***
>
> ***Re- age assessment.***
>
> ***I have today examined MJ and found him/her to be 17 years old."***

The above age assessment report was said to have been signed by Dr. Yumbia whose qualifications were not indicated on 9th December 2011. He signed however as the medical Superintendent of Mwingi District Hospital.

In my view the above age assessment report did not establish that an age assessment of the complainant was done. There is no indication whatsoever on how, and through what processes the conclusions that the complainant was 17 years old was reached. In short there is no scientific proof or facts to show that

indeed a process of ascertaining the age of the complainant was conducted.

In my view the mere statement by the complainant that she was aged 17 and the entries in the age assessment report produced in court did not establish beyond reasonable doubt that indeed the complainant was below 18 years. On that account this appeal will succeed as I am of the view that the prosecution did not prove the important ingredient of the age of the complainant beyond reasonable doubt.

It is apparent that emphasis was laid by the prosecution on the fact that the complainant was in upper Primary School to show that she was a minor. The fact that a girl is attending Primary school is not an ingredient of the offence of defilement. Besides, sometimes children start schooling at a later age and sometimes they repeat classes. In any case adults have been known to join school in pursuit of education.

Consequently and for the above reasons I allow the appeal, quash the convictions and set aside the sentence. I order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 19th day of July 2016.

GEORGE DULU

JUDGE