



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 21 OF 2015

ADAM MAKU THULUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 57 of 2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant, on the 6th December, 2013 at Malindi Township in Malindi District within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of M Y B, a child aged 13 years.

The trial court convicted the appellant and sentenced him to serve twenty five (25) years imprisonment. The grounds of appeal as amended are that key witnesses who purportedly saw the appellant with the complainant were not called to testify, that his arrest cannot be linked to the offence, that PW3, a medical doctor, examined another patient and not the complainant, that he was deceived by the complainant and her parents that she was an adult who could be married, that section 169 (2) of the Criminal Procedure Code was not adhered to and finally that the appellant's defence was not considered.

The appellant filed his submissions in support of the above grounds. He submitted that the complainant mentioned one Yusuf Ahmed who took them to Hola police station. That witness was not called to testify. The witness can be held to be the one who arrested the appellant and it was important that he testified. The appellant further submit that the complainant stated in her evidence that she had been told by Amina and Rayia that there was a boy who loved her and wanted to marry her. Those two people were not called to testify. It is those two people who knew that the girl was underage. The complainant's appearance show that she could be above eighteen years. The appellant is relying on the provisions of section 8 (5) of the Sexual Offences Act and states that the complainant is the one who deceived him that she was over eighteen. The appellant also contend that the judgement does not indicate for what offence he was convicted of as required by section 162 (2) of the Criminal Procedure Code.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel submit that the prosecution proved that the complainant was a child. The appellant lied to the complainant and took her to a lodging and defiled her. The complainant identified the appellant as he gave her money and asked her to accompany him to a lodging. The complainant narrated how she was forcefully defiled until she became unconscious. That shows she was forced. The medical evidence shows that there was forceful penetration. The father of

the child reported that his daughter was missing.

From the record of the trial court, PW1 was the complainant. Her evidence was that she was thirteen years old having been born on 6th April, 2001. She was living with her father (PW2) in Malindi and she was a class six pupil. On the 6th of December, 2013 at about midday she visited her aunt who lives about 50 metres from their home. She then left her aunt's home and met the appellant who was known to her as he used to visit her neighbor. The appellant asked her to follow him and he would give her money. She followed him up to a lodging and he gave her Ksh.200/=. The appellant had given her Kshs.200/= and Kshs.400/= before that date but did not tell her the reason for giving her the money. She did not know the house they entered but it was written guest house. The appellant took her into a room and forcefully had sex with her. She had never had sex before and started bleeding from her private parts. The appellant defiled her until nightfall. She became unconscious.

It is PW1's further evidence that after the defilement, the appellant told her that he wanted to take her to his home. They boarded a lorry which had some passengers whom she did not know. They travelled up to Hola and reached there in the morning at around 9.00 am. The appellant told her that they were waiting for another vehicle to take them to his home. She saw her uncle by the name Y A and she narrated to him what had happened. Her uncle had been called by her father and informed that she was missing. Her uncle took both of them to Hola police station where they were detained. They were later taken to Malindi police station. She was referred to Malindi hospital and had a PW3 form filled. It is her further evidence that A and R told her that there was a boy who loved her and wanted to marry her. She had not been shown the boy. The appellant abducted her and defiled her. She did not agree to go to Hola with the appellant. According to her the appellant lied to her and misled her.

PW2 Y B G is the father of PW1. He stays with PW1 as he separated from her mother. On 6th December 2013 at about 9.00 am, PW1 visited her aunt by the name M. At around midday the aunt called him to find out if PW1 had returned home. By that time PW1 had not returned. PW2 started calling relatives to find out if PW1 had been seen. He reported the matter at the Malindi police station. The next day at about midday PW1's uncle called from Hola and informed him that he had seen PW1 with a man. PW2 travelled to Hola and went to the police station where PW1 and the man were being kept. PW1 informed him that the man had misled her with money and had defiled her. He knew the man as he used to work at a slaughter house and was living in the neighborhood in Malindi. PW1 and the appellant were later taken to Malindi police station. He had never discussed with the appellant about any marriage neither did he receive money from him.

PW3 IBRAHIM ABDULAHI is a clinical officer who was based in Malindi District hospital. He examined PW1 on 13th December, 2013 and filled a P3 form. It is his evidence that PW1 was fourteen years old and her hymen was broken. Her vaginal wall was reddish, swollen and tender. Pregnancy test were negative. He concluded that PW1 was defiled.

PW4 Corporal MOHAMED BAKATA was stationed at Malindi police station and investigated the case. On 6th December, 2013 PW2 reported at the station that his daughter was missing. On 11th December, 2013, the appellant was brought to the station from Hola police station. The appellant and PW1 were arrested in Hola on 7th December, 2013 and taken to Hola police station. He referred PW1 to hospital and a P3 form was filled. PW1 informed him that she was a virgin before the appellant defiled her. PW1 was a class five pupil and the appellant knew that she was a student. The appellant informed him that he worked at Safaricom. Both the appellant and PW1 come from the same region in Tana River County. He charged the appellant with the offence of defilement.

In his sworn defence, the appellant testified that he lives in Bura in Tana River County. He works for Safaricom. He denied that he committed the offence. During cross-examination he stated that he used to take animals to a slaughter house and would see PW1. He did not know that she was a student. He got married in September 2011. He was arrested in Hola by police officers while going about his business. He did not have any sexual relationship with PW1. He denied that he was arrested in the company of PW1. It is his evidence that PW2 had a grudge with him involving the selling of cows. Yusuf is the one

who identified him to the police and he is a relative to PW1.

The appeal raises the issue as to whether PW1 was defiled and if so, who defiled her. It is PW1's evidence that she met the appellant on 6th December, 2013 while coming from her aunt. The appellant took her to a guest house and defiled her. After the defilement, they travelled on a lorry upto Hola town. They reached Hola town in the morning. According to PW1, she was thirteen years and still naïve. The appellant took advantage of her. The medical evidence by PW3 establishes that PW1 was defiled. I do find that PW1 was defiled.

In his defence, the appellant testified that he had no sexual relationship with the complainant. One of his grounds of appeal is that he was misled by the complainant and her parent that she was over 18 years. This is a contradiction. His defence during cross-examination is that he was arrested at Hola while going about his business. He had no relationship with the complainant. If that were to be true, there is no explanation as to why the appellant is now contending that he was misled to believe that the complainant was an adult.

The normal requirements for the offence of defilement are that: -

- i. **The victim must be a child under the age of eighteen (18) years.**
- ii. **There must be penetration.**

There are other ingredients which have come up due to the numerous cases of defilement being handled by the Kenyan Courts. These include: -

- i. **The use of force or threat to use force. This can be both before and/or after the defilement.**
- ii. **The element of deception, luring, or monetary promise.**

The above two ingredients come into place wherever the court is called upon to consider the provisions of section 8 (5) of the sexual Offences Act. That section allows the court to consider contentions by accused persons that it was the victim who made the accused believe that she was an adult. The use of force comes in when the victim is under the age of 18 years but sexually active. If it can be shown that the victim was sexually active, was not forced into the act and was not deceived; the court will consider the behavior of the victim and all the circumstances of the case. The offence of defilement should not be limited to the ingredients of age and penetration only.

In the current case, the complainant testified that the appellant abducted her, took her to a guest house and defiled her. He gave her money and then said he wanted to take her to his home. She was thirteen (13) years old as proved by her clinic card. She had seen the appellant in the neighbourhood as he used to visit her neighbour. PW1 also testified that the appellant had given her money twice.

It is established from PW1's evidence that she did not plan to run away with the appellant. She was lured into a guest house. She did not have any means of communicating to her parents. By coincidence, when she was taken to Hola she saw her uncle and narrated to her her predicament. This was the following day between 9.00 am and mid-day. They had travelled the whole night from Malindi to Hola. Her father was called by her uncle on 7th December, 2013 at mid-day from Hola and informed that PW1 had been seen with a man. The circumstances herein does not paint a picture of someone who was behaving like an adult. PW1 testified that she had not had sex before. She bled when the appellant defiled her. She became unconscious as per her evidence.

The appellant submitted that the medical officer examined someone else other than the complainant. PW1 gave her name and it is reflected on the P3 form filled on 13th December, 2013. PW3 testified that he attended to PW1 and observed that she was defiled. I do find that that ground of appeal lacks merit and is disproved by the record.

The evidence shows that both PW1 and the appellant were arrested at Hola on 7th December, 2013. The

appellant contends that his arrest cannot be linked to the offence. During cross-examination, the appellant testified that he was arrested at Hola while going about his duties. The appellant also testified that it is one Y, a relative of PW1 who pointed him out to the police who arrested him. The investigating officer testified that both PW1 and the appellant were taken to the Malindi police station on 11th December, 2013 from Hola police station. There is no doubt that the distance between Malindi and Hola is quite long and it need proper arrangement to move a suspect between the two towns. PW2 testified that he went to Hola police station and saw PW1 and the appellant at the station. This was on 7th December, 2013. I do find that the fact that Yusuf Ahmed did not testify does not affect the prosecution case. There is enough evidence that the appellant was arrested at Hola in connection with the defilement case. PW2 was called from Hola by PW1's uncle and informed that PW1 was at Hola. It is not mere coincidence that the appellant was at Hola at the same time PW1 was there.

It is also submitted that other crucial witnesses namely Amina and Rayia were not called to testify. These two witnesses had nothing to do with the case. If the appellant was using the two people to seduce PW1 for him, it was up to him to call them to testify in support of his defence. The two people did not play any role in the defilement case and there was no need to call them as witnesses.

The appellant also contend that section 169 (2) of the Criminal Procedure Code was not complied with. Section 169 (2) requires that in the event that an accused person is convicted, the judgement should indicate the offence and section of the law the accused is convicted of. The section also indicate that the punishment the accused is sentenced should be indicated. The judgement of the trial court indicate that the appellant was charged with offence of defilement of a girl contrary to section 8 (1) (3) of the Sexual Offences Act. The trial magistrate held that the prosecution proved its case and found the appellant guilty of the charge. The trial court convicted the appellant as per the provisions of section 215 of the Criminal Procedure Code. Section 215 of Cap 75 relates to the decision of the court. The appellant was therefore aware that he was convicted of the charge he was facing. The sentence cannot be included in the judgement as the accused's previous records have to be revealed before sentencing. The accused also has to be given an opportunity to mitigate before the sentence is passed. This is required even if the accused is facing a charge which gives one mandatory sentence. I do find that section 169 of the Criminal Procedure Code was complied with.

The prosecution evidence does prove that PW1 was defiled. It also proves that it is the appellant who defiled her. The contention that PW1's physical appearance show that she is over eighteen years cannot stand. The trial court saw PW1 and conducted voir dire before she testified. I am satisfied that PW1 was a minor and the appellant lured her by giving her money and took her to a guest house and defiled her. The prosecution proved its case beyond reasonable doubt.

The minimum sentence under section 8 (1) (3) is twenty (20) years imprisonment. The appellant was sentenced to serve twenty five (25) years which is within the law. However, being a first offender, I do find that the minimum sentence of twenty (20) years imprisonment is sufficient in this case.

The upshot is that the appeal on conviction lacks merit and is hereby disallowed. The twenty five (25) years imprisonment sentence is set aside and replaced with twenty (20) years imprisonment.

Dated and delivered in Malindi this 30th day of August, 2016.

S.J. CHITEMBWE

JUDGE