REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 17 OF 2016

(From original conviction and sentence in criminal case No. 196 of 2014 of the Senior Resident Magistrate's court at Hola – DM Kiprono - SRM).

GILBERT KIBASU..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged in the magistrate's court at Hola with defilement contrary to Section 8(1) as read with subsection 3 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on dates between 31st December 2013 and 6th August 2014 in Tana river County intentionally caused his penis to penetrate the vagina of SM a child aged 15 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 dates between 31st December 2013 to 6th August 2014 Tana river County intentionally touched the vagina of the same girl a child aged 15 years.

He was recorded as having pleaded guilty. After the facts were summarized, he also admitted the facts that he seduced the girl on 31st December 2013 and continued having sexual intercourse with her from time to time until on 10th August 2014 when a brother of the complainant caught both of them in the act of sexual intercourse.

In mitigation, he said that he was 17 years of age and the trial court ordered age assessment. On 27th of August 2014 it was reported to court that an age assessment had been done in respect of the appellant and that he was aged 18 years.

He was convicted and sentenced to serve 20 years imprisonment.

He has now come to this court on appeal, against both conviction and sentence. At the hearing of the appeal he tendered written submissions which he relied upon. In brief he said that he admitted the charge because he did not understand it as it was his first time in court and he was a young man. He also said that the Medical Practitioner only asked the police officer and himself about his age and recorded what the said.

Learned Prosecuting Counsel opposed the appeal and submitted that the plea of guilty of the appellant was un equivocal as the victim was aged 15 years. The appellant also understood Kiswahili language which was used in court. Counsel further submitted that though the appellant said that the girl said she

was 18 years in mitigation, he did not challenge the facts in the P3 form and admitted having sexual intercourse with the girl.

I have considered the record. I have also considered the submissions on both sides and the law.

This is a case where a person of relatively young age is said to have pleaded guilty to a serious offence. It is a serious offence because the statute says so. It is however common knowledge that young people have indulged in sexual activities between themselves for ages and they continue doing so to date.

The plea of guilty herein is not unequivocal. Though the learned prosecuting counsel said that the appellant admitted all the facts of the case, it is clearly on record that in mitigation the appellant said that the girl made him believe that she was 18 years. In his own words the appellant stated in mitigation before the trial court as follows:-

" the girl informed me she was 18 years old. She is over age and has weight. I am 17 years of age. I was born in 1997 in April."

Under Section 8(5) of the Sexual Offences Act No. 3 of 2006 it is a defence where an accused person reasonably believes that the victim of defilement is over 18 years of age. The section provides as follows:-

"8(5) it is a defence to a charge under this section if –

(a) if 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) the accused reasonably believed that the child was over the age of 18 years."

Though this fact of belief that the victim was 18 years old was raised in mitigation, the magistrate should have treated this as a plea of not guilty as that disclosure clearly meant that the appellant had raised a defence to the alleged offence. The same reason the magistrate decided to take action and order the age of assessment of the appellant, he should also have entered a plea of not guilty against him. The decision of the trial court to maintain the conviction in the face of this disclosure and sentence the accused was a mistake as the appellant had raised a defence to the offence which could only be disproved through evidence tendered in a trial.

The other important matter herein is that the offence is alleged to have occurred between December 2013 to August 2014. The appellant was purportedly assessed on age in August 2014. He said that he was 17 years of age. It is quite clear in my mind that in December 2014, assuming he was 18 in August 2014 he could as well have been 17 when he started having sexual intercourse with the complainant, the subject of the charge.

Assuming the complainant did not have capacity to consent to the sexual act because she was below 18, even the appellant did not have capacity to consent to the same act which was voluntary between the two of them. There is no allegation that any of them forced or coerced the other to engage in a sexual acts. In my view, such voluntarily acts between minors should be treated differently. It cannot be right to pick on one and charging him as if one is a victim and another one is a culprit. If there is a crime they both committed a crime. If there is a victim, they both are victims. In the circumstances of this case I find no culprit or victim, as if there was a culprit both of them were culprits. If there was a victim both of them were victims.

To conclude, I find that the appeal has merits. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held

Dated and delivered at Garissa this 16th day of September 2016.

GEORGE DULU

JUDGE