



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 163 OF 2015

B M T.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal against the conviction and sentence of 20 years imprisonment for the offence

of defilement imposed by Hon. C. NJAGI (RM) in CR. CASE No. 1408 of 2013

at KWALE SPM's COURT on 21/08/2015)

JUDGMENT

1. The Appellant was convicted with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the sexual offences Act No. 3 of 2006 and he was sentenced to 20 years imprisonment.
2. The particulars of the charge were that on diverse dates between the month of July and August 2013 at [particulars withheld] village, Dzombo Location in Kwale County within the Coast Region, the Appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of XXX a girl aged 15 years.
3. The Appellant is facing an alternative charge of indecent act with a child contrary to section 11 (1) of the sexual offences Act in that on the same material particulars as in count 1 above, the Appellant committed indecent Act to XXX a girl aged 15 years old by touching her private parts namely vagina.
4. The prosecution evidence in summary is that the Appellant started a relationship with the complainant in June 2013 when she was still a school girl and he made love with her in the forest.

The complainant who said she knew the Appellant as a barber at the market place said the Appellant did not force her to make love with him.

In the month of September, the complainant was found to be pregnant. She produced her birth certificate which indicated she was born on 11/06/1998. She said she had not made love to anyone but the Appellant.

At the time of this incident, she was 15 years old and in class 8. She said she was in the company of the other school children when the Appellant called her and she remained behind.

5. The Appellant said in his defence that he is 20 years old and he lives with his parents. He said he was arrested and charged with this offence which he knows nothing about.

6. The trial Magistrate convicted the Appellant and sentenced to 20 years imprisonment. The Appellant has now appealed to this court on the following grounds:-

i. That the learned trial Magistrate erred in law by failing to find that the 20 years sentence meted out ought to be varied for the Appellant was below 18 years of age when the offence was committed contrary to what the law provides in provision of section 189, 190 and 191 of the children Act.

ii. That the learned trial Magistrate erred in law and fact in convicting the Appellant on the evidence of the complainant without corroboration contrary to what the law provides under section 124 of the Evidence Act.

iii. That the learned trial Magistrate erred in law and fact by failing to find out that the Appellant was not examined to find out if he suffered from any sexually transmitted disease contrary to section 36 (1) of the sexual offences Act.

iv. That the learned trial Magistrate erred in law by failing to sufficiently give due consideration to the Appellant's defence.

7. The Appellant submitted in writing as follows:-

i. That no age assessment report was produced in court in respect of the Appellant and that the trial Magistrate failed to note that he was 18 years old and therefore a minor.

ii. That the children Act section 190 prohibits the placing of children in detention camp and section 191 provides methods of dealing with the children and the same should have been considered by the trial Magistrate.

iii. That the evidence of the Doctor was not specific in that the Doctor said the complainant was pregnant and had a sexually transmitted disease. Further that the report was made 4 months after the time of the alleged offence and the Appellant was not examined to find out if he had the same sexually transmitted disease.

iv. The Appellant further testified that there was discrepancy in the complainant's testimony in that she did not testify how many times she had sex with the complainant. She said they made love in June and in September which is 4 months later she was 2 months pregnant.

v. That the trial Magistrate did not warn himself before relying on the uncorroborated testimony of the complainant and finally that the defence by the Appellant was not given due consideration.

8. The Respondent opposed the Appeal and testified as follows:-

i. That the age of the complainant was proved by production of the birth certificate which show she was born on 11th June, 1998.

ii. That penetration was proved as the complainant was pregnant and the Doctor who examined her said the hymen was missing.

iii. That the complainant identified the Appellant as the person who defiled her. She knew him as B and that he was a barber at the market.

iv. The Appellant stated that he was under 18 years old at the time of the alleged offence and therefore a minor. He relied on the authority of MWANYELE DANIEL THETHE V R

The respondent submitted that in that case the Appellant was 17 years old and the complainant was 15 years old when the offence was committed.

v. The Respondent submitted that the prosecution proved its case to the required standard and that the complainant testified that she had not had sexual intercourse with anyone else.

9. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”.

10. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. My findings are as follows:-

i. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as:-

“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.

I find that the Complainant’s testimony was corroborated by medical evidence that she pregnant and the hymen was missing. The Complainant also had a sexually transmitted disease. The Complainant testified that she made love with the Appellant on several occasions.

ii. The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she knew the Appellant prior to the incident. The Complainant said she knew the Appellant as B and that he was a barber at the Market.

iii. The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainant was established by the birth certificate which showed that she was born on 11th June, 1998 and that at the time of the alleged incident she was 15 years old.

iv. I find that on the issue that the testimony of the Complainant was not corroborated, under section 124 of the evidence Act, the testimony of the Complainant alone is sufficient to convict the Appellant and in this case the trial court gave reasons why the evidence of the Complainant was reliable. There is evidence that the Appellant and the complainant were in a relationship. The complainant said they made love for one month in the farm next to the market. She said she discovered she was pregnant in September 2013.

v. I also find that there is no basis for the ground that the Appellant was under the age of 18 years at the time of the alleged incident. The age of the Appellant was never an issue in this trial. The

authority of MWANYELE DANIEL THETHE is therefore not applicable as the circumstances in that case were different from the current case.

vi. From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** to the required standard (beyond any reasonable doubt). The Appellant's appeal on conviction lacks merit and is hereby dismissed.

The conviction is safe and I accordingly uphold it and confirm the sentence.

Delivered and signed at Mombasa this 16th day of November 2016.

ASENATH ONGERI

JUDGE.