REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL CASE NO. 10 OF 2013

((From the original conviction and sentence in Criminal case no. 439 of 2012 of the Principal Magistrate's Court at Kilifi before Hon. E. M. Kagoni – Ag. SRM)

REPUBLIC …..... PROSECUTOR

VERSUS

SHABAN GAMBO MUYE..... ACCUSED

JUDGMENT

The accused is charged 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. The particulars of the offence are htat the Appellant on diverse dates between 1st January, 2012 and 9th March, 2012 at [particulars withheld] sublocation, [particulars withheld] location in Kilifi county within Coast province, intentionally caused your penis to penetrate into the vagina of T G K a child aged 13 years.

The Appellant was also charged with an alternative count of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. The Appellant was convicted of the main count of defilement and sentenced to serve twenty two (22) years imprisonment.

The grounds of appeal are that the officer who produced the DNA test was not called to testify and to be cross-examined, the maker of the DNA report was also not called to testify, the prosecution did not prove its case beyond reasonable doubt, that the prosecution evidence is full of contradictions and that the Appellant's defence was not considered.

The Appellant filed written submissions and he entirely relied on them. The submissions explain the above grounds of appeal. It is contended that the DNA report came alter after the Appellant had testified and that he was not accorded an opportunity to cross-examine the maker of the report. He was entitled to be informed in advance of the evidence against him but this was not done.

It is also contended that the charge sheet gives the name of the Complainant as T G K while the clinical card gives the name of J G K. These are tow different names. The Appellant submits that its alleged the Complainant's hymen was broken but the date that happened was not given.

Miss Kitilit, State Counsel, opposed the appeal. Counsel submitted that DNA results showed that the Appellant was the father of the child that was born as a result of the defilement. The sentence given to the Appellant is a bit low as the minimum. Sentence is 20 years imprisonment. Counsel would like the sentence to be enhanced. The Complainant was 13 years old.

The record of the trial court shows that four witnesses testified for the prosecution. PW1 was the Complainant. Her evidence was that she was born on 29th January, 2000 and was a class four pupil at [particulars withheld] Primary School. In January, 2012, the Appellant went to her home and asked her to follow him. They went to the bush and had sex. She did not tell anyone. The following day they met again at a construction site but did not have sex. They alter met frequently up to 9th March 2013 and had sex. PW1 later discovered that she was pregnant. She informed her mother (PW2) who informed the school head teacher. She was taken to Kilifi District Hospital and it was confirmed that she was pregnant. She was issued with a P3 form. The Appellant did not use to take her far from her home for sex. She did not know him before the first incident.

PW2: H G K is the mother of PW1. She testified that PW1 was a class four pupil and was twelve years old. It is her evidence that pW1 told her that she had an affair with the Appellant from November, 2011. In April, 2012, PW1 told her she was expected. PW2 went to report at the school and was referred to the police. The matter was reported to the police and the Appellant was arrested.

PW3, CORPORAL DORCAS RAGWORIA was based at the Kilifi Police station. The case was reported to her on 3rd April 2012 by PW2 who was with PW1. She referred PW1 to Kilifi District Hospital and investigated the case. She produced PW1's immunization card which shows that PW1 was born on 29th January, 2000. She caused the Appellant to be charged with the offence. PW4, DOCTOR MALIK was based at the Kilifi District Hospital. He produced the P3 form. According to his examination, PW1 was expectant. Her hymen was broken. There was no discharge, blood or infection.

The Appellant was put on his defence. In his unsworn testimony he stated that he is a mason. He was arrested on 27th April, 2012 while sleeping at his house with his family. He was later charged with the offence. He denied committing the offence.

The main issue for determination is whether the prosecution proved its case. The record of the trial court shows that judgment was fixed for 26th October, 2012. it was not ready and it was read on 6th November, 2012. The trial magistrate read the judgment and made an order for DNA tests as the magistrate noted that PW1's expected date of delivery was 9th October, 2012. The DNA test was conducted and filed in court. A ruling was made on 12th February, 2013 which was made on 12th February, 2013 which ruling finds the Appellant guilty of the main count of defilement and sentenced the appellant to 22 years imprisonment.

The record of the trial court shows that PW1 gave unsworn evidence. The *voire dire* does not show that PW1 did not know the meaning of telling the truth. When one says she does not know what an oath is it does not mean that she/he cannot be sworn. PW1 informed the court that she had gone to court to testify and that she goes to a mosque where she is taught always to say the truth. She was however cross-examination by the Appellant. The trial magistrate ought to have allowed her to testify under oath. I however find that the procedure taken was not fatal to the prosecution case.

PW1 was born on 29th January, 2000. There is no doubt about her age. It is evident from the evidence of PW2 that the relationship started in November, 2011. The Appellant used to visit PW1's home and he would take her to the bush. The relationship could have continued for long had PW1 not become pregnant.

It is clear that under the Sexual Offences Act, a child under the age of 18 years cannot give her consent to sexual intercourse. However, that aspect of the law should not be applied mechanically. There is no evidence that PW1 told the Appellant that she was a student. There is also no evidence that the Appellant is their neighbour. PW1's testimony does not show that it was her first time to have sex. According to her the relationship started in January 2012 but her mother testified that it started in November, 2011. PW1 clearly held herself as a mature woman who was ready for sex. She had sex several times with the Appellant until when she realized that she was pregnant. They used to meet and at times they would simply meet and have not sex.

From the evidence herein, I do find that PW1 made the Appellant believe that she was mature and over

the age of 18 years. The Appellant's defence was mere denial and did not disprove the fact that the Appellant had an affair with PW1. The Appellant is entitled to the defence under Section 8(5) even if he did not raise it in his defence before the trial court. The intention of the law is to punish offenders who lure young children into sex. However, where the child behaves like an adult, the other party should be accorded the benefit of doubt.

The procedure used by the trial magistrate to order for a DNA test was not proper. None of the parties asked for the test. The court made the order which is contained in the judgment. The record does not show that blood samples were taken from the Appellant even if the report notes that aspect. The judgment did not find the Appellant guilty of the offence. The conviction is contained in a subsequent ruling delivered on 12th February, 2013. The DNA test was extra evidence which ought to have been subjected to cross-examination.

In the end, I do find that the Appellant is entitled to the benefit of doubt. I am satisfied that it is the Complainant who made the Appellant believe that she was over 18 years. There is no evidence that when PW1 had sex with the Appellant for the first time, she felt pain or she started bleeding or that she was forced or lured. It was like a normal thing to her and she continued having sex with the Appellant. The defence under Section 8(5) of the Sexual Offence Act No. 3 of 2006 comes to the Appellant's rescue. The appeal is merited and is hereby allowed. The Appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Malindi this **26th** day of **February, 2015.**

Said J. Chitembwe

JUDGE