

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO.93 OF 2012

J K SAPPLICANT

VRS

REPUBLIC RESPONDENT

(Appeal from the conviction and sentence by Hon. A. M. Obura, in Kilifi PM Cr. No.245 of 2010)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006 Laws of Kenya. The particulars were that on diverse dates between 1st March 2010 and 17th march 2010 at [Particulars withheld] area in Kilifi District within Coast Province intentionally and unlawfully committed an act which caused penetration of his genital organ namely penis into the genital organ namely vagina of A K a girl aged 15 years.

The appellant was convicted and sentenced to serve 15 years imprisonment. The grounds of appeal are that the trial court did not adequately consider the evidence on record, that PW1 did not undergo a voire dire process before she testified, that the age of the complainant was not verified and the case was not proved beyond reasonable doubt: the appellant filed written submissions which expound on the above grounds.

The State opposed the appeal and filed written submissions. It is contended that the complainant's age was assessed and found to be fifteen (15) years. The case was proved as medical evidence showed that there was penetration: Although the charge sheet indicated section 8 (3) to be section 8 (B), that anomaly was not fatal.

The record of the trial court shows that four witnesses testified for the prosecution. PW1 A K told the court that she was 15 years old. She was not in school having dropped out [Particulars withheld] Primary School at class 6: she testified that she got married to the appellant in 2009. She could not recall the date but this was around April. They lived together at [Particulars withheld] area until when they were arrested. She was taken to Malindi Remand Home. Her age was assessed. The appellant was yet to pay dowry.

PW2, Dr, Rashid Azaveri of Kilifi District Hospital produced the P3 form for the complainant. No abnormality was noted. The hymen was absent. The complainant's age was assessed at 15 years. The P3 form was filled on 22nd April 2010: PW3 P. C. Nora Obiero was based at the Kilifi Police Station. On 17th March 2010 she was assigned the case. PW1 was at the station and PW13 informed her that she was married to the appellant and had sex several times. PW1 lived with her husband (appellant) at the home of a boda boda rider. PW3 investigated the case and charged the appellant.

PW4 Athman Katana was the Senior Chief, Kilifi Township. He was informed that PW1 had been seen in a house occupied by two men. He went there and took PW1 who informed him that she was living with the appellant as her husband.

The appellant was put on his defence. In his unsworn evidence, he testified that he was arrested on 17th March 2010 at Kilifi stage: He was taken to the police station and later charged with the offence:

The main issue for determination is whether the prosecution proved its case to the effect that PW1 was

defiled. According to PW1, she had gone to Kilifi to work as a house maid when she met the appellant. She worked for a month. She got married to the appellant. The record of the trial court shows that PW1 testified before J. M. Gendani, PM on 6/8/2010 before the case started *de novo* under Mrs A. M. Obura SRM. It was the complainant's evidence that they planned to marry and her parents were informed. Through out her evidence, PW1 indicated that the appellant was her husband.

The evidence of PW2 is to the effect that PW1's age was estimated to be about 15 years. It is clear that she is under 18 years. Her evidence refers to incidents of April 2009. However, the charge sheet and P3 form refer to 2010. The charge sheet refers to March 2010. The P3 form was filled on 22/4/2010: when the appellant met PW1, she was not in school. It is not clear that the appellant lured PW1 into the marriage. PW1 testified that she used to visit the appellant in the company of her friend. They agreed to marry and her parents were informed.

Given the evidence on record, it is my finding that PW1 presented herself as a girl who was ready to enter into a marriage relationship. Indeed she seemed not to be complaining and was arrested while in the company of the appellant. She was surprised as to why they were arrested. This shows that she treated herself as an adult. She was not going to school. I do find that the defence under section 8 (5) of the Sexual Offences Act is available to the appellant. PW1 presented herself as an adult. The trial court saw her and even decided not to conduct a *voire dire*. The medical evidence shows that there was no injury to PW1's private parts. The objective of the law is to punish those people who either by force or trickery lure young children into sexual intercourse. In the current case PW1 Presented herself as an adult who was ready for marriage.

In the end, I do find that the appeal is merited and the same is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 25th day of May, 2015.

SAID J. CHITEMBWE

JUDGE