REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 460 OF 2013

P K K……….................................………..……………….APPELLANT

VERSUS

REPUBLIC………………………………….…....…………..RESPONDENT

(Appeal against Conviction and Sentence in Kangema SRM Criminal Case No 149 of 2013 – J. O. Magori PM

J U D G M E N T

1. The Appellant **P K K** was on 20/06/2013 convicted after trial of ***defilement*** contrary to **section 8(1) & (4)** of the ***Sexual Offences Act, 2006*** (the **Act**). The particulars of the offense were that on 24/09/2011 in Kangema District within Murang'a County he intentionally caused his penis to penetrate the vagina of one **EN**, a child aged 16 years. He was sentenced to fifteen (15) years imprisonment.

2. He has appealed against both conviction and sentence. His grounds of appeal with regard to the conviction are to the effect that the complainant was lawfully married to him under customary law, they had been blessed with a child, and that at any rate she had attained 18 years of age at the time of his arrest. As for the sentence, he complains that the same was manifestly harsh and excessive.

3. Learned Prosecution Counsel for the Respondent supported both conviction and sentence. She submitted that the evidence presented at trial established that the complainant was a minor; that penetration was not in dispute, a child having been conceived and born out of the sexual relation between the Appellant and the complainant, a child that the Appellant admitted was his; and that the Appellant did not discharge his burden of proof under **section 8(6)** of the Act to establish on a balance of probabilities his belief that the complainant was over the age of 18 years.

4. As for the sentence, learned Prosecution Counsel submitted that though a custodial sentence was not mandatory for the offence the Appellant stood convicted of, he nevertheless deserved the sentence; and having decided on a custodial sentence, the trial court imposed the minimum allowed by law.

5. I have read through the record of the trial court in order to evaluate for myself the evidence placed before the court. This is my duty as the first appellate court. I have borne in mind however that I did not myself see and hear the witnesses testify, and I have given due allowance for that fact.

6. Let us first look at the age of the complainant at the time of commission of the offence. According to a clinical card produced in evidence by PW 4 (Exhibit P1), the complainant was born on 05/03/1994. The alleged offence having been committed on 24/09/2011, it means that the complainant was then aged 17 years, six (6) months and nineteen (19) days.

7. The Appellant's defence throughout was that he believed the complainant to be over eighteen years old and his wife. The evidence placed before the trial court established that the relationship between the Appellant and the complainant was well-known, even to the complainant's mother (PW2). The complainant at some point was living with the Appellant who had manifested his intention to marry her. There had been negotiations between the two families about marriage between the Appellant and the complainant and the upkeep of the child that they were expecting. It was only after the Appellant's apparent failure to keep up with the maintenance of the child that a complaint was made to the Children's Officer, who in turn referred the matter to the police, leading to the Appellant's prosecution.

8. The very circumstances of this case fully established the Appellant's defence under section 8(5) of the Act. To begin with the complainant was over 17 years and six (6) months old at the time of the alleged offence. The physical distinction between a 17½-year-old girl and one who is 18 years old may not be that obvious. Secondly, at some point the Appellant was openly living with the complainant with the apparent approval of her mother. There were marriage negotiations between the families of the Appellant and the complainant, and also specific negotiations regarding the maintenance of the child they were expecting. After the child was born the couple again resumed living together, and it would appear that at the time of the trial they were living together as man and wife at the Appellant's mother's (DW2's) home.

9. From her own testimony the complainant presented herself to the Appellant as an adult. She was already 17½ years old and freely negotiated with him about sexual intercourse. After she became pregnant he agreed to marry her. By the time she gave birth 9 months later she was well over 18 years old. The complainant's mother and others appeared to approve of the relationship. The Appellant had no reason to believe that the complainant was anything but over 18 years old!

10. I am satisfied that the Appellant's defence under section 8(5) of the Act was established on a balance of probabilities. He should not have been convicted.

11. I will allow his appeal in its entirety. The conviction is quashed and the sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held. It is so ordered.

12. I will say more. Even if the conviction could be upheld, this is a case where the trial court should have considered alternative punishment other than a custodial sentence. The circumstances of this case now included the fact that a child had been born out of the relationship between the Appellant and the complainant. He had already undertaken to maintain the child and had even negotiated marriage with the complainant and her family. Surely the welfare of this child ought to have been a consideration when sentencing the Appellant?

13. In this context I must point out that the only mandatory custodial sentence in the Act s that provided under section 8(2) which states –

> **"8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

A custodial sentence is not mandatory under section 8(4) of the Act which states –

> **"8. (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

But once the court decides that the convicted accused deserves a custodial sentence, then it must impose the minimum provided for.

14. In the present case however, the trial court ought to have considered a non-custodial sentence, if for nothing else, for the welfare of the child born to the Appellant and the complainant.

15. As it is, the appeal is allowed in its entirety, as already stated.

DATED, SIGNED AT MURANG'A THI 23RD DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF JULY 2015