REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO.43 OF 2013

(Being an appeal against the conviction and sentence by Hon. C. Njagi in Malindi Cr. No.166 of 2013)

ALI KAZUNGU ZETH……...…..……..APPELLANT

VRS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8 (4) of the Sexual Offences Act No.3 of 2006. the particulars of the offence were that the appellant on 2/7/2012 at [particulars withheld] Village in Malindi District within Kilifi County, intentionally and unlawfully caused penetration of his penis into the vagina of S S a girl aged 17 years.

The appellant was convicted and sentenced to serve 15 years in prison. The grounds of appeal are that the charge sheet was defective as section 8 (4) was used instead of section 8 (1). that the age of the complainant was not considered, that the arresting officer did not testify, that the prosecution did not prove its case beyond reasonable doubt and that his defence was not considered.

The appellant filed written submissions. On the issue of the defective charge, he relies on the Case of **Mutinda Mwai Mutana v Republic, Msa Cr. Appeal no.282 of 2008** where Justice Maurine Odero held a charge which did not include section 8 (1) to be defective. It is further contended that the age of the complainant was also not ascertained. PW2, the complainant's mother testified that she was not sure of her daughter's age but she knew she was not 18 years old. On the other hand, the father, PW3 testified that PW1 was 16 years old. The complainant testified that she was 17 years old. The appellant finally contends that his defence was not considered and that the arresting officer did not testify.

Mr. Nyongesa, prosecution counsel opposed the appeal. Counsel submitted that the case was proved beyond reasonable doubt. All the ingredients of defilement were proved. The appellant's age was assessed and that the charge sheet did not prejudice the appellant. All crucial witnesses testified and that under section 143 of the Evidence Act, there is no particular number of witnesses required to prove a case.

Before the trial court PW1, the complainant, testified that she was 17 years old and a class five pupil. On 29/6/2012 she left home with her cousin sister R at 8.00 p.m. R was going to meet her boy friend M at [particulars withheld]. They met M who was with the appellant. PW1 did not know the appellant. They went to the forest and had sex. R was having sex with M while she had sex with the appellant. It was her time to have sex. It if her further evidence that on 2/7/2012 they returned to the forest with R and had sex the same way they did on 29/6/2012. On the second occasion, they reached home and were beaten by their parents. They revealed to their parents that they had had sex in the forest. They were taken to

the chief and later the matter was reported to the police. She was taken for medical examination. M was arrested but was released. PW1 was recalled and testified that the appellant seduced her and she agreed to have sex with him. She also testified that they had sex in the appellant's house on both occasions.

PW2, K K is the mother to PW1. She testified that she was not sure of PW1's age but she was not 18 years old. R who lived with them is older than PW1. On 2/7/2012 at 8.00 p.m she left the children in their room. When her husband arrived, he discovered that they were not in the room. They returned at midnight and on inquiry they informed them that they had gone to meet boys at [particulars withheld]. They went to [particulars withheld] and met M with his parents. They did not go to the appellant's house. The girls told them that they had had sex with the boys. The matter was reported to the headmaster of [particulars withheld] Primary School and later to the police. The appellant told them that PW1 had been given to him by his friend.

PW3, S K is the father to PW1. His evidence it that Rose (PW4) is his brother's daughter but he lives with her. On 2/7/2012 he arrived home at about 8.00 p.m and found that PW1 and r were missing. They went to the forest to check on them but to no avail. The girls returned at night. He notified R's father, M and the girls revealed that they had gone to meet boys. M and PW2 went to [particulars withheld] and met M's parents. PW3 did not go as he was unwell. The matter was later reported to the police.

PW4, R M, testified that she was 17 years old and had completed her KCPE. On 2/7/2012 she went to [particulars withheld] meet her boyfriend, M. She was with PW1, her cousin. She had sex with M while the appellant had sex with PW1. They went home at night and their parents bit them up. They revealed that they had gone to meet boys at [particulars withheld]. The matter was later reported to the police. She further testified that on 26/6/2012 together with PW1 they had visited M and the appellant.

PW5, P. C. Samuel Muturi was based at Malindi Police Station. He investigated the case. The report was made on 12/7/2012 at 10.00 a.m. He referred PW1 to hospital. Her age was assessed at 17 years old. The appellant was summoned to the police and was arrested. He informed him that he was 22 years old. The charges were preferred against the appellant.

PW6, Ibrahim Abdullahi is a Clinical Officer who was based at Malindi District Hospital. He examined PW1 on 17/7/2012 and filled her P3 form. PW1 informed him that she had been defiled by someone known to her on several occasions. No treatment was given as she habitually had sex. Her age was assessed to be 17 years old. She told him that she had had sex several times with her consent and with someone known to her.

In his unsworn testimony, the appellant testified that he was a casual labourer. He played football on 8/7/2012 and one S called him. He told him that he will face unknown trouble. He was arrested on 27/7/2012 and charged on 28/7/2012. He denied committing the offence.

The main issue for determination is whether the appellant defiled PW1. The trial court correctly observed that the offence of defilement is committed when an act which causes penetration is committed. The court went ahead to analyse the cat of penetration as per the Sexual Offences Act. The evidence on record does prove that PW1 had sex wit the appellant. Although PW1 testified that she only had sex twice with the appellant, PW6, the clinical Officer informed the court that PW1 told him that she had had sex several times with the appellant. When PW1 was recalled, she charged the venue where they had sex from the forest to the appellant's house.

I have always repeated the intention of the law is to punish those people who lure innocent children into sex or who forcefully defile children. However, where female children become the hunters and look for boys for sex, then it becomes unjust to punish the boys. The punishment for defilement is extremely severe and the court must be convinced that what happened was defilement and not an act of exploration by the alleged complainant.

The evidence in the case is quite clear. If we are to believe PW1 that she left home with PW4 and went to meet boys and that it was her first time to engage in sex, then why did she return to have sex with the

appellant on 2/7/2012 if she was against the idea? It is also not clear to me as to why only the appellant was charged and not M who equally had sex with PW4 was released. R alleged that she was 17 years old.

The framers of the Sexual Offences Act brought in a safeguard measure through section 8 (5) of the Act. It is a defence if it can be held that the complainant made the accused to believe that she was an adult. The fact that one goes to Primary School cannot be taken as conclusive proof that he/she is below the age of 18 years old. In this case, PW1 behaved like an adult. This made the appellant to believe that he was dealing with an adult. A mechanical interpretation of the Sexual Offences Act usually leads to conviction of innocent people who are hired into sex by children or who are made to believe that they are dealing with adults. The essence of justice is fairness. I do find that the circumstances of this case do not call for 15 years of incarceration of the appellant. Literally, PW1was below 18 years and therefore could not have given her consent to sex. However, the reality is that although PW1 was below 18 years, she was sexually active and had the audacity to willingly escape her parent's home at 8.00 p.m and have sex with the appellant upto midnight. Can such a person be held to be a child. I do not think so. This is an adult who is out to enjoy sex. It is also clear that she is not a reliable witness. Initially she testified that she had sex in the forest. She later changed the story and stated that she had sex in the appellant's house. She alleged that it was the first time to have sex when she met the appellant on 29/6/2012. She immediately returned to the appellant about three (3) days later on 2/7/2012 and had sex. She informed the Clinical Officer that she had had sex on several occasions. PW6 found her to be normal and the hymen seems not to have been freshly perforated. According to PW6, PW1 informed him that she had habitually had sex.

Given the evidence on record, I do find that there was not defilement. PW1 behaved like an adult and was only made to complain when her parents became surprised that she was engaging in sex. She made the appellant believe that she was an adult. The is no justification of having the appellant believe that she was an adult. There is no justification of having the appellant who is 22 years old languishing in prison while his friend M, who also had sex with his girlfriend, PW4, is roaming freely. The prosecution did not prove its case beyond reasonable doubt.

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

Dated, signed and delivered at Malindi this 23rd day of July, 2015.

SAID J. CHITEMBWE

JUDGE