REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 14 OF 2015

(An appeal from the Orders of the Principal Magistrate, Runyenjes in SPMCR. Case No. 530 of 2014 dated 19/2/2015)

GODFREY MWAURA........…...APPELLANT

VERSUS

PROSECUTION……..RESPONDENT

J U D G M E N T

The appellant was charged and convicted by Runyenjes Principal Magistrate of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve twenty years imprisonment. Being dissatisfied with the judgment, the appellant lodged this appeal relying on the following grounds:-

1. That the magistrate erred when he relied on evidence that was inconsistent and uncorroborated;

2. That the magistrate erred in failing to consider that that PW1 did not produce documents proving that she was a minor;

3. That the magistrate erred in failing to consider that the pw1 did not disclose her age to the appellant;

4. That the magistrate failed to consider that the appellant was held at the police station for more than 24 hours in violation of section 49(1) of the Constitution; and

5. That the magistrate failed to find that the prosecution did not prove its case to the required standard of beyond reasonable doubt.

The appeal was canvassed by way of written submissions.

The appellant in his submissions stated that the prosecution did not prove the case beyond any reasonable doubt. He argued that the charge is based on the fact that the appellant married an underage girl who was a student at [particulars withheld] Primary School prior to the incident. It was argued that there was no evidence to prove that the complainant was a student at the said school. The appellant stated that the complainant's parents were aware that she was cohabiting with the appellant and they took almost a week to report the matter to the police

it was claimed that there was delay in arresting him which was not addressed. Further that a birth

certificate to disclose the age of the complainant was not produced in order to prove that the complainant was underage. What was produced was a photograph of a birth notification which the magistrate wrongly admitted in evidence. The doctor PW4 only approximated the age of the complainant. It is not in dispute that the complainant was married to the appellant. It was further stated that the charge sheet was defective because it indicates that the appellant was arrested on 27/10/2014 while the appellant was actually arrested on 11/10/2014. it was contended that the trial court denied the appellant a chance to avail his witnesses despite having requested for time to do so.

The state opposed the appeal arguing that the prosecution proved the case beyond any reasonable doubt. PW1 testified that that she had been living with the appellant from 5/10/2014 and 26/10/2014 and that they engaged in sexual intercourse during that period. This evidence was not challenged by the appellant in cross examination. PW4 clinical officer testified that the PW1 had been infected with a sexually transmitted disease and that penetration had taken place.

The evidence of PW3 and PW5 was that the appellant cohabited with PW1. The evidence by the prosecution witnesses was watertight. PW1 testified that she was 15 years at the time when the offence was committed and produced a birth notification. This evidence was corroborated by the complainants' mother and the clinical officer thus proving the age beyond reasonable doubt.

It was further argued that the allegation that the prosecution did not prove the the complainant was a student is totally immaterial as it was not an ingredient of the offence. The appellant was arrested on 26/10/2014 at 1.00 p.m. and was arraigned in court on 28/10/2014. The State said that the appellant did not raise this issue in the lower court and this is therefore an afterthought. Had this been done, the prosecution would have had a chance to explain the delay.   It is trite law that delay in being arraigned in court does not guarantee an acquittal. The case was proved as per the required standards.

The duty of the 1st appellate court was explained by the Court of Appeal in **NJOROGE VS REPUBLIC [1987] KLR 19** It was held :-

> *"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570*

The prosecution's case was made up of six witnesses. PW1 testified that she was a pupil at [particulars withheld] primary school in class six and is aged 15 years. On 5/10/2014 she was going to church when she met the appellant who told her that he loved her.   On his request, PW1 accompanied the appellant to his house. The complainant stayed with the appellant for one week. During the period PW1 stayed with the appellant, they had sexual intercourse several times and she washed clothes for him. On 26/10/2014 at night, the police came and arrested them while they were in the house. Both were taken to Runyenjes police station. The following morning PW1 was taken to Runyenjes hospital for examination.

The complainant said that the appellant was her lover prior to 5/10/2014. PW1 said she did not want to live with the appellant. She also said in cross-examination that it was not true that she told the appellant that her mother had chased her away from home.

PW2 an assistant chief Mwenendega sub-location testified that on 10/10/2014 PW6 reported to him that there was a man who had married her daughter a girl in class six. He advised her to report the incident at Runyenjes police station.

On 26/10/2014 at 11.00pm he led the police to the house of the appellant. The occupants refused to open the door but police forced their way inside and found the appellant and the girl on the same bed. Both were arrested and taken to Runyenjes police station.

PW3 a police officer testified that on 26/10/2014 while on duty he received a call from IP Pamela who informed him that there was a suspect in a defilement case at a place called Gicheche. She instructed him to arrest him with the assistant chief of the area.

PW3 proceeded to the place accompanied by another police officer and the assistant chief. They found the appellant and the girl in the and escorted them to Runyenjes police station.

PW4 a clinical officer testified that she is attached at Runyenjes District Hospital. She was requested by OCS Runyenjes to examine the complainant who had a history of having been defiled. PW4 said that the estimated age of the complainant was 15 years. She found the genitalia normal save that the hymen was broken. The girl had been infected with a sexually transmitted disease.

PW4 also examined the appellant and found nothing relevant from the examination. She produced the two P3 forms in evidence.

PW5 IP Pamela stated that on 14/10/2014 at 8.00 a.m. she was on duty at Runyenjes police station when one Irene Mutitu reported that her daughter had gone to church on 5/10/2014 and never returned home. She said her daughter was aged 15 years.

The mother availed a birth notification which confirmed that her daughter was aged 15 years. The area Assistant Chief led Sgt. Tanzi and another officer to the appellant's house where the girl and the appellant were found sleeping. They were arrested and taken to the police station.

On 27/10/2014 in the morning, she issued P3 forms to the complainant and the appellant. Both were escorted them to Runyenjes Hospital for examination. PW5 produced the notification of birth in evidence.

PW6 stated that on 5/10/2014, PW1 went to church at Gicheche but did not return home on that day. On 10/10/2014 she reported the matter to the area assistant chief who later informed her that the appellant and PW1 had been arrested. PW6 accompanied PW1 to Runyenjes Hospital for medical examination.

In his defence, the appellant said that on 26/10/2014 at 11.00 p.m. he was at home at [particulars withheld] village. They were sleeping with PW1 when police arrested both of them and took them to Runyenjes police station.

He said that PW1 was his girlfriend since the year 2009. The appellant contended that at the time of the arrest, they were living as husband and wife and that they started living together in the month of September 2014. He said that he had not informed PW1's parents that they were staying together. He said that he did not know that PW1 was a minor and that he thought that she was an adult.

The evidence of PW1 was that she was 15 years old at the time of the incident. Her mother PW6 confirmed that PW1 was 15 years at the time of the offence. A birth notification was produced in evidence showing that PW1 was born on 6/8/1999. The offence according to the charge sheet was committed between 5/10/2014 and 26/10/2014. PW1 was therefore 15 years and about 2 months old at the material time.

According to 8(3) of the Sexual of fences Act;

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

It was the defence of the appellant that he did not know that PW1 was a minor.

Section 8(5) and (6)of the Sexual Offences Act provides that;

It is a defence to a charge under this section if—

> *(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and*
>
> *(b) the accused reasonably believed that the child was over the age of eighteen years.*
>
> *(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.*

Section 124 of the evidence act provides that;

> *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

Section 124 allows for uncorroborated evidence in criminal cases involving sexual offenses if the court is satisfied that the victim is telling the truth.

In the present case the the evidence of pw1 was clear and consistent. There was no indication by the court that it was not satisfied that the victim was not telling the truth. Further, even if it is not a requirement, the evidence of PW1 was corroborated by that of PW4 the doctor.

On the ground that the prosecution witnesses were inconsistent, the appellant has not pointed out any specific inconsistencies in the prosecution's case. The evidence by the prosecution was clear and inconsistent and found to be credible by the trial court.

The allegation that documentary evidence as to age of PW1 was not produced is not true since a scanned copy of the notification of birth was produced by PW5. It is worth noting that the appellant did not object to the production of the scanned copy of notification of birth. The evidence of the complainant and her mother was sufficient to prove age even assuming that the birth notification was not available.

In the case of ***RICHARD WAHOME CHEGE V REPUBLIC [2014] eKLR*** where the court held:-

> *"What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."*

As regards the defence, the appellant did not adduce any evidence to show that the complainant misled him into believing that she was of the majority age. The appellant did not adduce any evidence to support his defence that he reasonably believed that the complainant was of the majority age.

In his defence the appellant said the complainant has been his girlfriend since the year 2009. This was not a defence since PW1 was under age and not capable of consenting to marriage or sexual act. The appellant admitted in his defence that he had not informed PW1's parents as to her whereabouts.

There was evidence that the appellant and PW1 are village mates and that the appellant has known the complaint for reasonable time and cannot allege that he believed that she was over 18 years.

Other than alleging that he did not know that the appellant was a minor, the appellant has not

demonstrated that he took any steps to ascertain the age of the complainant. The complainant was a school going child and the appellant ought to have been extra cautious before engaging her sexually.

The fact that appellant ought to have demonstrated that he took steps to ascertain the age of the complainant was discussed in the cases of ***EDWIN OTIENO ONYANGO VS REPUBLIC [2015] eKLR and MUTHOKA MWALYA VS REPUBLIC [2015] eKLR.***

> *Under Section 8(5) the defence available to an accused person is not an absolute defence. There are certain conditions set out therein which the accused person wishing to benefit from that defence has to satisfy and/or explain to the trial court. Infact Section 8(6) places the duty squarely on the accused to take steps to ascertain the age of the complainant.*

Article 49(1)(F) of the constitution provides that an accused person has a right;

> *"to be brought before a court as soon as reasonably possible, but not later than—*
>
> *(i) twenty-four hours after being arrested; or*
>
> *(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"*

According to the charge sheet and proceedings, the appellant was arrested on 27/10/2014 and was arraigned in court on 28/10/2014. According to the calendar of the year 2014, the appellant was arrested on a Monday and brought to court the following day on a Tuesday. This was therefore within 24 hours of arrest.

The issue of delay should also be raised at the earliest opportunity so that the prosecution can be able to respond to it. In the instant case, the appellant never raised the issue with the trial court. This was held in the case of ***MUSEMBI KULI VS REPUBLIC [2013] eKLR*** that:-

> *We are not advocating for a blanket or prolonged detention by police officers but what we are saying is that delay or detention cannot lead to an automatic acquittal or release. We think the accused has a cardinal duty to raise the delay at the earliest opportunity, so that the court could satisfy itself from all the surrounding circumstances, and make an informed view based on the scales of justice.*

I find no basis on the allegation that the charge sheet was defective for indicating the wrong date of arrest as 27/10/2014 instead of 11/10/2014. The evidence of the arresting officer PW3, the Assistant Chief and the investigating officer was that the appellant was arrested on 27/10/2014. it is indeed the appellant who gave the wrong date (11/10/2014). Furthermore the date was not in the charge but on the body of the charge sheet. It is trite law that a mistake as to the date (even if it is the date of the offence) is not fatal to the charge.

The appellant argued that he was denied a chance of calling his witnesses. I have perused the proceedings and I find no indication whatsoever that the appellant told the court that he had witnesses to call. He gave his defence and closed his case. The allegation is not supported by the court record and therefor has no basis.

The magistrate observed that the complainant was rescued from the house of the appellant after her mother reported the case to the police. The appellant does not deny that he cohabited with the complainant in his house for about a week. The evidence of the doctor sufficiently corroborated the evidence of the complainant. The appellant failed to meet the threshold of the defence he raised that he honestly believed that the complainant was an adult.

What the prosecution was required to prove was that the appellant committed an act which caused penetration with the complainant who was a child. Penetration was proved and so was the age of the complainant. The prosecution therefore proved the ingredients of the offence without any reasonable doubt.

The appellant's defence was considered but found not plausible in view of the overwhelming evidence of the prosecution.

The ingredients of the offence were proved and I find the conviction safe. The sentence is within the law.

I find no merit in this appeal and it is hereby dismissed.

The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant

Ms. Nandwa for Respondent