REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.17 OF 2015

(Appeal originating from the conviction and sentence by Hon. Mbogo C. G. in Malindi Criminal Case No.4 of 2013)

S N C …..... APPELLANT

VRS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on diverse dates between April, 2012 and September, 2012 at [Particulars withheld] Village in Magarini District within Kilifi County, intentionally and unlawful caused his penis to penetrate the vagina of the complainant, a child aged 15 years old. He was convicted and sentenced to serve 20 years imprisonment.

The grounds of appeal are that none of the witnesses testified that the appellant's blood was taken for forensic purposes, that the Government Analyst (PW4) did not indicate the appellant's blood group, that vital witnesses were not called, that the case was not proved beyond reasonable doubt and that the trial court did not accord him the benefit of doubt. The appellant filed written submissions which mainly emphasizes on the contention that the case was not proved beyond reasonable doubt and that there is not evidence that his blood samples were taken for analysis. The State opposed to file written submissions but it appears that no submissions were filed.

The record of the trial court indicate that PW1 was the complainant. She did not know when she was born but her age was assessed to be 15 years. She was a class 4 pupil at [Particulars withheld] Primary School. She befriended the appellant who was a pupil at [Particulars withheld] Primary School. The appellant seduced her and she had initially rejected his moves but later gave in. This was in March 2012. The appellant bought her a pair of shoes. They started having sex until May 2012 when she realized that she was not getting her monthly periods. She was living with her grandfather. The appellant proposed that she aborts the child but it was too late. The appellant used to send PW1's friend by the name F W to call PW1 whenever they were to meet. She had had no sex before then. The matter was reported to the police and the appellant was arrested. She later own gave birth and blood samples were taken for DNA testing.

PW2, L M is a grandmother to PW1. She came to know about the pregnancy of PW1 in December 2012. The matter was reported to the assistant chief and PW1 was taken to hospital where she was confirmed to be pregnant. **PW3, Ibrahim Abdullahi**, is a clinical officer who is based at Malindi Sub-county hospital. He examined PW1 on the 2/4/2012 and filled her P3. PW1 was 3 months pregnant and her hymen was broken. **PW4, George Lawrence Oguta** is a Government analyst with the Government Chemist in Mombasa. He testified that, DNA testing was done on the blood samples of PW1, the appellant and child. It was found that the appellant was over 99% the father of the child.

PW5, Dr. Peter Ang'a was a dental specialist based at Malindi District Hospital. He produced the age assessment report conducted by Dr. Ariba whom he had worked with at the hospital. Dr. Ariba assessed PW1's age to be 15 years old. **PW6, PC Boniface Mwatiso** was based at Adu Police Station. He investigated the case. It was reported on 10/12/2012 by PW1's grandfather. The appellant was arrested at [Particulars withheld] Primary School. He took blood samples after PW1 had given birth to a

baby boy. The blood samples put the appellant, the child and PW1 were taken to the Government Chemist. The appellant was later charged with the offence.

The appellant was put on his defence, but he elected to remain silent.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence shows that indeed PW1 was defiled. Her evidence was that the appellant became her boyfriend and they used to have sex in the bush. Her friend F We was the go between. The appellant was also a primary school student. When he was told to mitigate on 15/3/2015 he informed the court that he was 18 years old and when he committed the offence he was a primary school student at [Particulars withheld] Primary School. He pleaded for leniency.

The evidence shows that the appellant was a pupil and engaged in sexual intercourse with PW1. The appellant was not taken for age assessment to determine his age. The offence occurred in 2012 and by March 2015 the appellant informed the court that he was 18 years old. It is clear from the evidence that it was the appellant who made PW1 pregnant. It is also established that both PW1 and the appellant were below the age of 18 years when they had the sexual intercourse. They could therefore not have given their consent to the intercourse. Under section 190 of the Children Act No.8 of 2001 no child is supposed to be sentenced to imprisonment. It is clear to me that the appellant committed the offence while he was a child. He ought not to have been sentenced to 20 years imprisonment. Section 191 of the Children Act provide for the method of dealing with child offenders. If a child is above 16 years, he can be sent to a borstal institution among other penalties.

Given the evidence on record, I do find that the offence was committed by two children who could not have consented to have sexual intercourse under the Sexual Offences Act. Both of them were under the age of 18 years. Under section 33 of the Sexual Offences Act, a child can not give his/her consent to sexual intercourse. The incident is regrettable but the sentence is unlawful. It is unfortunate that PW1 became a mother at the age of 15 years and it is equally unfortunate that the appellant became a father before he attained the age of 18 years. I do find that the circumstances of the case did not call for a prison sentence. The appellant was a child and he ought to have been dealt with under the provisions of section 191 of the Children Act.

In the end, I do find that this appeal is merited and is hereby allowed. Section 191 of the children Act empowers the court to deal with child offenders under section 35 of the Penal Code. The section empowers the court to discharge a person who is convicted of an offence taking in to account the circumstances of the case. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 29th day of October, 2015.

SAID J. CHITEMBWE

JUDGE