



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HCRA NO.41 OF 2014

(Appeal from the sentence and conviction by Hon. L. Gicheha in Malindi CM Cr. No.821 of 2012)

DAVID THOYA KITSAO.....

APPELLANT

VRS

REPUBLIC

.....

RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to section 8 (1)(4) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that the appellant on 29/9/2012 at in Malindi District within Kilifi County, intentionally and unlawfully caused penetration of his genital organ namely penis into the female genital organ namely vagina of ZM, a girl aged 15 years.

The trial court convicted the appellant and sentenced him to serve 15 years imprisonment. The grounds of appeal are that the medical evidence was not reliable, that the arresting officer did not testify, that the case was due to grudge between the appellant and the complainant's father, that the case was not proved to the required standard and that the defence evidence was unreasonably dismissed.

The appellant relied on his written submissions. He contends that the evidence was mere allegations and the case was not proved beyond reasonable doubt. The victim was pregnant and it was not determined who was responsible for the pregnancy. No DNA tests were done to determine the paternity of the child. The investigating officer and the arresting officer did not testify.

The State opposed the appeal. Mr. Alenga, state counsel, submitted that all the ingredients of defilement were proved. The age of the complainant was assessed and she was found to be 15 years. The complainant informed the court how the appellant seduced her and she became pregnant. She ran away from home. The appellant even had the audacity to offer dowry for the complainant. Penetration was proved as PW1 became pregnant. The defence evidence was mere denial. PW1 was old enough to be capable to identify her defiler.

Before the trial court PW1 was the complainant. She testified that she was 16 years old and a class 6 pupil. She met the appellant in August, 2012. On 29th September, 2012 she was in the appellant's home. The appellant informed her that he loved her. He would call her and she would go to his home and sleep with him. She later realised that she was pregnant. Her father reported the matter to the police and she was taken to Malindi Hospital. Her age was assessed and P3 form filled.

PW2, F Y is the father of PW1. His evidence is that on 29/9/2012 he did not see PW1 at night. In

the morning, he started looking for her. He saw her carrying her clothes in the company of a young man. The young man ran away. He took PW1 home and informed her head teacher. She was taken to hospital and it was found that she was pregnant. The appellant sent his uncle and mother to find out how much dowry was required. PW1's age was assessed to be 15 years.

PW3, Ibrahim Abdullahi is a Senior Clinical Officer who was stationed at Malindi Hospital. He filled a P3 form for PW1. Her hymen was broken. She was pregnant but no scan was done to determine the age of the pregnancy. He concluded that penetration had occurred.

In his unsworn defence, the appellant testified that he runs a hotel at Kakuyuni. He informed the court that he had a grudge with a man called Mkire. The complainant was married at Ngongoni and lives there.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The record shows that the investigating officer did not testify. However, PW3, the Clinical Officer, produced the P3 form and age assessment form. The evidence of PW1 is quite scanty. It appears that PW1 had ran way from home. Her evidence was that she used to go at the appellant's home. Her evidence was that she used to go at the appellant's home at 10.30 presumably in the evening and then go home in the morning. According to her father, the children sleep in their own home. The medical evidence does not state how old the pregnancy was. There is no date given when PW1 delivered. PW1 informed the court that she was not going to school in April and May as she was giving birth. She was testifying on 25th April, 2013. The incident occurred in September 2012. It could be possible that she could be eight months pregnant by April 2013 if she had started the friendship in August, 2012 as per her evidence. The charge sheet gave a date of 29th September, 2012 as the date of the offence. By 25/4/2013 when PW1 was testifying, this gives a period of seven months.

It is clear from the evidence that PW1 was having an affair with the appellant. I am satisfied that PW2, the father of PW1, was aware of that relationship. The position only changed when PW1 became pregnant. It is not normal for the appellant's mother to go and offer dowry with the victim's father knowing the arrangement. The appellant informed the court that PW1 was already married.

Given the evidence on record, I do find that PW1 presented herself as a mature girl who was ready to get married. She would sleep at the appellant's house and leave in the morning. It cannot be said that in all those occasions from August to September 29th, she was just being lured or seduced. PW1 was enjoying the relationship. When she became pregnant, the appellant told her that there was no problem. The purpose of the law is to punish those who lure the young into sexual intercourse. However, when the young behave like adults and start engaging in sex, section 8 (5) of the Sexual Offences Act comes to the rescue of the accused. It is clear to me that the complainant's father was aware of the relationship.

In the end, I do find that the prosecution did not prove its case beyond reasonable doubt. 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 8th day of **December**, 2015.

SAID J. CHITEMBWE

JUDGE