REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.219 OF 2013

(An appeal from the judgment of H.M. Nyaga, SRM Molo in Criminal Case No.2673 of 2010)

ERICK KIPKOECH BYEGON ....APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

JUDGMENT

The appellant (ERICK KIPKOECH BYEGON) was convicted on a charge of defilement contrary to **section 8(1) 4** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve 15 years imprisonment.

The charge against him was that on diverse dates, during the month of February and March 2009, at [Particulars Withheld], he caused his penis to penetrate the vagina of EC, a girl aged 15 years.

The appellant denied the charge and two witnesses testified in support of the prosecution case, whilst accused was the only defence witness. **EC (PW1)** told the court that at the time she was testifying (which was on 16th May 2012, she was 17 years old and had quit school because she got pregnant in March 2009 and eventually delivered a child named **BC** in December 2009.

It was her evidence that she met the appellant in the year 2009, he seduced her and convinced her to have sex with him on several occasions. He never used a condom, so when she got pregnant and told him, he promised to marry her. After delivery of the baby, the appellant was taken to the area chief because although he had promised to take care of the child, no help was forthcoming. The matter was taken over by the children's office which subsequently referred her to police.

The officer at Molo police station **PC LEAH CHESANG (PW2),** who was then assigned to the Children/Gender desk, received the report, and sent PW1 for an age assessment, where she was found to be between 16-17 years. She got a DNA test carried out and the report confirmed that the appellant was the father of the baby. The age assessment report and the DNA report were produced as exhibit by the police officer.

The appellant's unsworn defence was that he befriended PW1 after she had finished school; and she had told him she was 18½ years. They had sex and when she got pregnant, her parents demanded Kshs.200,000/= from him. He did not have the money, but undertook to take care of the girl and the child. He was thus shocked to realised he had been charged with the offence yet E had finished school,

and had told him that she was over 18 years old, he believed her and was persuaded she had been coached by her parents to lie about her age on account of his failure to pay the fine the parents had imposed.

The trial magistrate in his judgment relied on the age assessment report which placed PW1 at between 16-17 years, and held that since the appellant and PW1 were not strangers to each other, there is nothing to demonstrate that PW1 misled him. The trial magistrate's view was that the appellant ought to have taken steps to ascertain the girl's age.

These findings are challenged on grounds that:

1. The evidence was not adequate to conclusively determine the complainant's age at the time of the offence.
2. The appellant's testimony was uncontroverted.
3. The appellant had a good defence recognised under section 8(5) of the Sexual Offences Act.
4. The prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, Mr. Ochang submitted on behalf of the appellant that the age assessment report relied on was produced by an incompetent person i.e. the investigating officer who was not its author.

He urged this court to consider the decision in **Simon Wanjala V R Criminal Appeal No.59 of 2011** where Dulu J held that in matters of age assessment reports, the maker ought to be called as a witness.

It is counsel's contention that the appellant had a good defence, as he had explained how the complainant was his regular customer at his shop. Further, there was nothing to suggest that PW1 was a school going individual, as no teacher or Headmaster from the school testified to confirm that complainant was in class 8.

Mr. Ochang submitted that the two were in love and there was no opportunity for the appellant to think that she was a minor by asking for her identity card or report card.

He also pointed out a curious situation, that the charge was presented to court 2 years after the incident, and can only be because it was an afterthought.

Mr. Chirchir, on behalf of the State, conceded the appeal saying the charge was brought forth, and this was just a case of maintenance of the child born as a result of the relationship between appellant and PW1. He also agreed that the defence offered by the appellant was credible and should have been accepted by the trial magistrate.

There is no dispute that the appellant and the complainant had an amorous relationship which resulted in the birth of a baby. The issues for determination were:-

a. The age of the complainant.
b. Was the appellant aware of the complainant's age?

The age assessment report signed by one Pascal Sayani, was produced in court as exhibit without calling the maker. This denied the appellant the chance to interrogate the maker of the report on the findings thereto. Worse still it was produced by the investigating officer, and it was not even clear, on whose request the report was made.

The same goes for the DNA report although in this one, the appellant suffered no prejudice since he acknowledged that he had fathered baby Brenda.

The appellant explained that PW1 had told him she was 18½ years – was there anything to make him doubt? Although the prosecution claimed that PW1 was a school going individual (which would at least have caused the appellant to prod further about her age), yet not a single document either report card or a

letter from any school in respect of PW1 was produced. The trial magistrate noted that in the rural set up documentation or official records are not easily obtainable. I wonder whether two people, passionately involved would even pause to ask ***"where is your birth certificate?"*** **–** which in any event it seems PW1 did not have anyway.

Would an identity card have sufficed? In my view once the appellant explained that PW1 told him she was 18½ years and regularly went to his shop and her conduct did not in any way suggest that she was a minor, then I think his explanation found refuge under **section 8(5)** of the **Sexual Offences Act**.

Consequently I find that the conviction was unsafe. This appeal is properly conceded and is allowed.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 21st day of March, 2014 at Nakuru.

H.A. OMONDI

JUDGE