



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 4 OF 2012

JOHN LELA MWAMSHA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 262 of 2011 of the Senior Resident Magistrate's Court at Wundanyi – Hon. Orenge – S.R.M.)

JUDGMENT

JOHN LELA MWAMSHA hereinafter referred to as the Appellant was Convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act.

The particulars are that:-

“On the 15th day of December, 2010 at [Particulars withheld] Village Mwatate–Taita Taveta County he had unlawful carnal knowledge of E a girl aged fifteen (15) years”

This appeal is on both Conviction and Sentence.

The grounds for the appeal principally are that there was no proper age assessment.

Secondly, that the Conviction was against the weight of evidence adduced before the Court and that the Sentence was harsh, excessive and unlawful.

On the age assessment it is the contention by Counsel for the appellant that a card produced by PW 5 (the clinical officer) as exhibit number 4 was a copy and there was evidence of tampering with the document and it ought not to have been relied upon by the learned trial magistrate. Secondly, the parents of the Complainant were not called to testify as to the age of the Complainant and her evidence was not corroborated in material particulars.

The appeal is opposed on the grounds that exhibit number 4 gives the assessment of the age of the Complainant. She was born on 8th January, 1995. The document was allowed as exhibit in Court. At the time of the offence the Complainant was aged fifteen (15) years and ten (10) months.

At page 2 line 20 of his Judgment the learned trial magistrate had this to observe,

“I have considered the evidence on record, the Accused was charged of defilement of a girl. The Compliant knew the Accused well. She told the Court that the Accused had called her to his house and they had sex. The Complainant told the Court that the Accused had asked that they be friends. Out of the said encounter the Complainant found she was pregnant. The matter was reported to police. The P3 form confirmed that the hymen had been perforated and she was twenty (20) weeks pregnant. The child health record shows that the Complainant was born on 8th January, 1995 as at the time of commission of this offence she was about fifteen (15) years”.

It is the reliance on exhibits number 2, 3 and 4 that the defence contends to have been misplaced because

1. ***There are erasures on exhibit number 4***
2. ***The three exhibits are copies and the whereabouts of the originals is not known.***

A perusal of the record of proceedings page 3 line 21 the Complainant is shown to have produced a booklet as exhibit number 2 (certified copies), treatment notes dated 2nd June, 2011 exhibit number 3, a child health card exhibit number 4 which was produced by PW 5 the clinical officer who also produced the P3 form as exhibit number 1.

There was no objection to their production at the time. It is only the booklet exhibit number 2 which is shown to have been produced in the form of certified copies. I have perused the said exhibits.

Exhibit number 1 is a P3 form which shows the age of the Complainant as fifteen (15) years. It also indicates injuries to the genitalia as perforated hymen. There are also remarks to the effect that the Complainant was twenty (20) weeks pregnant at the time of examination.

Exhibit number 4 is the child health card which is said to contain erasures.

A perusal of the same does show that where the child's name is supposed to be inserted there are wipe out marks before the name **E M** was inserted. The other details appear intact. The date of birth is given as 8th January, 1995. There doesn't seem to be an erasure on the date of birth.

The question that comes to mind is could there have been superimposition of the name of the Complainant on the card? The answer to that question is yes but as to whether the superimposition was with ulterior motives is another issue altogether. There is therefore a doubt created as to the exact age of the Complainant. Whereas the offence of defilement may not have been proved on account of age assessment Section 179 (2) of the Criminal Procedure Code provides for Conviction for offences other than those charged in the following manner,

“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be Convicted of the minor offence although he was not charged with it”.

In the present case it is not seriously contested that the Appellant had sexual intercourse with the Complainant as alleged.

The Complainant was in standard seven. The appellant knew her before as he had wanted to befriend her. It can safely be taken that he knew she was a primary school pupil who had not yet attained the age of consent.

Section 5(1) provides,

“Any person who unlawfully (a) penetrates the genital organs of another person with

- i. ***any part of the body of another or that person; or***
- ii. ***an object manipulated by another or that person except where such penetration is carried out***

for proper and professional hygienic or medical purposes

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of an offence termed Sexual assault”.

I am satisfied that the facts before the learned trial magistrate constituted the minor offence of Sexual assault which carries a minimum Sentence of ten (10) years.

The Imprisonment term of twenty (20) years is accordingly reduced to ten (10) years.

The appellant will therefore serve the imprisonment term of ten (10) years from the time of Conviction minus the time he has been out on bond. The appeal succeeds to that extent only.

Judgment delivered dated and signed this **20th** day of **May, 2014**.

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M. MUYA

JUDGE

20TH MAY, 2014

In the presence of:-

Learner State Counsel Mr. Ayodo

Learned Counsel for the Defence Mr. Omari holding brief Obura

The appellant present

Court clerk Musundi

M. MUYA

JUDGE

Court: Certified copy of the Judgment to be furnished to the defence Counsel and Director Public Prosecution.

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M. MUYA

JUDGE

20TH MAY, 2014