



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 43 OF 2013

FELIX TUTARA LILA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S.O. Temu Ag. Principal Magistrate delivered on 5/4/2013 in Kajiado Principal Magistrate Criminal Case No. 1352 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Felix Turara Lila** was convicted after a full trial for the offence of defilement contrary to **section 8 (1)** as Read with **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on diverse dates during the month of July 2010 in **Isinya District, Kajiado County** did cause his penis to penetrate the vagina of **LS** a child aged 17 years contrary to **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**.

2. The Appellant was sentenced to imprisonment for fifteen years. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 1. **That the trial magistrate erred in convicting the Appellant when the Birth Certificate produced by the Registrar of Births indicated that the complainant was over eighteen years of age at the time of the offence.**
 2. **That the trial magistrate erred in arriving at the finding that the Birth Certificate was not bonafide.**
 3. **That the prosecution case was not proved beyond reasonable doubts.**
 4. **That there was delay in taking the complainant to hospital and in arresting the Appellant.**
 5. **That there were inconsistencies and lack of corroboration in the prosecution case.**
 6. **That the defence evidence was not given adequate consideration.**
 7. **That the Appellant ought to have been given the benefit of doubt.**

3. The appeal was canvassed by way of written submissions which I have duly considered.
4. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
5. The case for the prosecution was that one day in the month of July 2010, **PW2 S O K P** received a telephone call from **[Particulars Witheld] Girls' Secondary School** where his seventeen (17)

year old daughter PW1 **LS** the complainant herein was a student. PW2 was informed that the daughter had disappeared from school. PW2 reported the matter to the area chief and to the police. PW2 started looking for his daughter and also informed the chief that he had a suspect who he named as the Appellant. That after three days the Appellant, the said daughter (PW1), the father to the Appellant and one elder went to the home of PW2 and informed him that the daughter was at their home. That the daughter was already expecting a child and could not therefore continue with school.

6. According to the daughter (the complainant) she became friends with the Appellant in April 2010 and became lovers and used to have sex on her way from school. That they had sex three times at the house of the Appellant in **Isinya** between the month of April and July 2010. Thereafter the complainant missed her periods and she realized that she was pregnant. The complainant then left school and went to inform the Appellant about the new development. The complainant and the Appellant then started staying together as man and wife. They later paid a visit to the complainant's parents and informed them of her whereabouts. Thereafter the complainant stayed at her parents' home for three days then went to live with the Appellant as his wife. She also stayed at her parents' home to be cared for during part of the pregnancy. While the complainant was at her parents' home she developed labour pains and was rushed to hospital. She delivered a baby boy. However, the baby passed away shortly after the delivery. The complainant then went back to her parents' home where the baby was buried after the Appellant failed to take responsibility. The complainant later went to the Appellants' home where she stayed up to 20/11/2011 when the Appellant was appointed as the Assistant Chief of **Osawani Sub-location**. A few days later the Appellant summoned elders and informed them without giving any reasons that he no longer wished to stay with the complainant as a wife. The complainant returned to her parents and the matter was reported to the authorities. The complainant was later taken for a medical examination and it turned out that she was expectant again. The matter was reported to the police and after investigations the Appellant was charged.
7. When placed on his defence, the Appellant gave sworn evidence. He stated that the complainant was a neighbour and that they used to share study materials. That during the school holidays in April 2010 the complainant visited him and requested for his friendship but he told her to complete her studies first. That in the month of July during the school midterm the complainant insisted that they become friends but he did not agree because the complainant looked expectant.
8. The Appellant denied having had any sexual intercourse with the complainant but stated that the complainant informed him that she was expectant and was afraid to go home. That at the complainant's request he took her to his father so that his father could take her to her home. That it was then that the complainant informed his father that the Appellant was responsible for the pregnancy. They agreed to carry out a DNA test to determine whether the Appellant was indeed the father. That there was a meeting between the parents from both sides but the complainant refused to go to her home. That the baby later died in unclear circumstances.
9. The Appellant stated that he refused to marry the complainant because he was not responsible for the pregnancy and the DNA test was not carried out. The Appellant further stated that the complainant was born in the year 1990 and was not a minor. That it was the complainant's father who insisted on the Appellant's arrest after the Appellant refused to marry the complainant.
10. The complainant (PW1) and her father (PW2) gave her date of birth as 6/12/1993. The documents produced to prove the complainant's age is an immunization card (Exh.1) and the complainant's Primary School Leaving Certificate (Exh.7). These two documents reflect the complainant's date of birth as 6/12/1993. This established that the complainant was seventeen (17) years old on the material date. The letter from the complainant's secondary school (Exh.6) reflected that the complainant was a form three student at the material time. This further corroborates the evidence of the complainant and that of her father that she was a form three student at the material time. Indeed even the evidence by the Appellant was that the complainant was a school girl.
11. PW6, **Fredrick Ayoga** a Clinical Officer at **Isinya Health** Centre filled in the complainant's P3 form (Exh.5) on 23/9/2011. His evidence was that the complainant was about thirteen weeks pregnant with her second child. The Clinical Officer's evidence corroborated the evidence by the complainant and her father that she was below eighteen years of age at the material time. The Clinical Officer also confirmed that the immunization card was the one used when the complainant was first seen for immunization at the clinic where he worked. He produced the

- same as an exhibit (Exh.1).
12. On the other hand, the Appellant's evidence was that the complainant was born in the year 1990. However, DW2 **Harrison Kako Lukanya** the Registrar of Births in **Kajiado** gave evidence that contradicted the Appellant in respect of the complainant's date of birth. The said Registrar gave the complainant's date of birth as 6/12/1991. The Registrar produced a certified copy of the Birth Certificate No. 311351. It was the Registrar's evidence that the said Birth Certificate was issued on 5/10/2012 when this case was already in court. It is noted that another Birth Certificate No. 955105 issued on 14/3/2001 reflects the complainant's date of birth as 6/8/1990. This second birth certificate is not referred to in the evidence of the Registrar. The only reference on the record regarding this second birth certificate is in the judgment of the trial court where the trial magistrate has stated that the same was annexed to the defence submissions.
 13. The Registrar (DW2) in his evidence admitted during cross-examination that he did not know who forwarded the application forms for the Birth Certificate (Defence exhibit No. 1) to his office. The Registrar did not know who collected the Birth Certificate (Defence exhibit No. 1) from his office. The Registrar further admitted that he could not tell whether the application for the said Birth Certificate had been made by an imposter. The court has ended up with a scenario where two birth certificates have ended up in court. Even disregarding the birth certificate said to have been irregularly attached to the defence submissions presented before the lower court, the Registrar's evidence has fallen short of proving that the birth certificate he produced was a genuine Birth Certificate issued to the complainant. **Section 26(4) of the Births and Deaths Registration Act Cap 149** does not therefore apply.
 14. The names of the complainant's father and mother as per their copies of identity cards produced in court differ from the details in the Birth Certificate produced by the defence. The copy of complainant's identity card produced by the prosecution gave the complainant's date of birth as 6/12/1993. There is no defence evidence that the Appellant believed the complainant was over eighteen years of age. The Appellant's evidence shows that he knew that the complainant was a secondary school girl. He therefore ought to have been more cautious and made efforts to ascertain her age.
 15. The complainant's evidence is that she had sexual intercourse with the Appellant. The complainant's evidence was corroborated by that of PW3 **Dr Kutai Kitee** whose evidence was that the complainant delivered a baby boy on 28/5/2011 but the baby passed away soon thereafter. The doctor produced the Birth Notification Form for the baby and the complainant's discharge summary as exhibits. The discharge summary which gives the complainant's age as 17 years at the time of delivery corroborates the complainant's evidence that she had engaged in sexual intercourse.
 16. Further corroboration of the complainant's evidence is found in the evidence of PW4 **JP** who is one of the thirteen people who met at the home of the complainant's father to hear the matter after the complainant was chased away. It is clear from the evidence of PW4 that the complainant who was a school girl had been living with the Appellant as man and wife.
 17. The Appellant's evidence that he had not engaged in a sexual relationship with the Appellant cannot be true in view of the strong prosecution evidence against him. The trial magistrate who saw the witnesses testify and observed their demeanour believed the complainant. I have found no reasons to differ with the findings of the trial magistrate.
 18. On the issue of DNA tests, the failure to carry out the same is not fatal to the prosecution case. The proviso to **section 124 of the Evidence Act** stipulates as follows:-

“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.”

19. With the foregoing, I am satisfied that the prosecution case was proved beyond reasonable doubts. The sentence is within the law. The appeal has no merits and the same is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of November, 2014.

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B. THURANIRA JADEN

JUDGE