

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 78 OF 2013

(From the original conviction and sentence in criminal case no. 189 of 2012 of the Chief Magistrate's Court at Garsen before Hon. J. Kituku – Ag. PM)

A B A APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

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 the 9th day of June, 2012 at [Particulars withheld] village, Salama location in Tana Delta within Tana River County, committed an act which caused penetration by inserting his penis into the vagina of B S a girl aged 17 years thereby impregnating her.

The Appellant was convicted and sentenced to serve ten (10) years Imprisonment. The grounds of appeal are that the Complainant testified that she was 19 years old and the Appellant thought he was dealing with an adult there was no evidence that the complainant's pregnancy was in any way connected to the Appellant, the trial court did not evaluate and analyse the evidence properly and that his sworn defence was not considered.

The Appellant contends that the Complainant's parents knew about the affair.

Mr. Nyongesa, State Counsel, conceded to the appeal. Counsel submitted that the Complainant made the Appellant believe that she was over 18 years old. The trial court acknowledged that the Appellant was misled but went ahead to convict the Appellant.

The record of the trial court shows that five witnesses testified for the prosecution. PW1 G S M was the Complainant. She testified that she was 19 years old and was not in school. She referred to the Appellant as her husband. It is her evidence that she met the Appellant in a vehicle while travelling from Malindi and they exchanged mobile phone numbers. On 10th June, 2012, they decided to get married. The Appellant went to her home and he slept at her brother's home. She went to stay with the Appellant for two weeks but her mother went and collected her. She later realized that she was pregnant.

PW2 M S G is the mother to PW1. She noted on 11th June, 2012 that the Complainant was not at home. She reported to the area chief. According to her, the Complainant was 17 years old and was supposed to be a Form II student at [Particulars withheld] High School. The Complainant became sick and had not been attending school for some time. PW3 ELIJAH WACHIRA was a clinical officer based at Garsen Hospital. He examined PW1 on 23rd July, 2012 and noted that she was pregnant. According to him, PW1 was 19 years old. PW4 S G is the father of the Complainant. His evidence is that PW1 disappeared from home on 6th June, 2012 at midnight. The Appellant's father went to meet him and reported that PW1 was with the Appellant. PW4 promised to discuss the issue with his wife, PW2.

PW5, Pc. FIDEL MUNYI was based at Gamba Police Station. He investigated the matter and caused the Appellant to be charged with the offence.

The Appellant was put on his defence. In his unsworn evidence, he stated that he found the Complainant at their home and she asked him if they could get married. The next day his father went with PW1 to their home. Later the police went and arrested him. The Complainant had told him that she was not a student.

The evidence on record shows that it is the Complainant herself who made the Appellant believe that she was over 18 years old. According to the birth certificate, the Complainant was born on 12th December, 1994. The Complainant testified that she was 19 years old. This was on 16th August, 2012 about two months from the date of the offence. The P3 form indicates that the Complainant was 20 years old. PW3 attended to PW1 on 23rd July 2012 about one month from the date of the offence. From the birth certificate, it is clear that pw1 was approaching 18 years by June, 2012. It is established by the evidence that it is PW1 herself who informed the Appellant that she was 19 years old. In fact PW1 referred to the Appellant as her husband.

The evidence also shows that the parents of both parties were aware of the relationship. PW4 testified that the Appellant's father went to discuss the issue with him. The trial court acknowledged the fact that the Appellant was made to believe that PW1 was an adult. The trial court ought to have accorded the Appellant the benefit of doubt. The defence under Section 8(5) of the Sexual Offences Act is available to the Appellant. It does not matter whether the Complainant was under age and could therefore not give her consent. So long as the Complainant made the Appellant believe that she was an adult, then the Complainant's age becomes immaterial. Even the Complainant told the court that she was 19 years old and that she had informed the Appellant that she was 19 years.

I am satisfied that the appeal is merited and is hereby allowed. The State was correct in conceding to the appeal. The Appellant shall be set at liberty unless otherwise lawfully held.

Delivered and Dated in Malindi this **16th** day of **December, 2014** in the presence of:

Said J. Chitembwe

JUDGE