REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 220 of 2011

MOHAMMED MAKOKHA ……..…. APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

(Appeal against conviction and sentence of [MR. E.K. MAKORI, P.M.] in Mumias Principal Magistrate's Court in Criminal Case No. 715 of 2010)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on diverse dates between 1st and 31st December 2009 at [particulars withheld] in Mumias district within Western Province unlawfully had canal knowledge of HSS a girl aged 16 years. He was convicted and sentenced to serve 15 years imprisonment.*

The appellant's grounds of appeal are that the trial court failed to assess the age of the complainant and the appellant before determining the question of defilement, the burden of proof was shifted to the appellant and that the prosecution evidence was weak. He filed written submissions which expounded on his grounds of appeal. The appellant further submitted that the complainant was not a child and the birth certificate produced in court was for a different person called **TAABU** and yet the complainant is called **HSS.** Mr. Orinda opposed the appeal and stated that the appellant had sex with the complainant by consent. The complainant was under age and they did it several times.

The evidence on record shows that **PW1 HSS** was the complainant. Her evidence before trial court was that the appellant was her boyfriend since October 2009. They had sex without using a condom several times and did not tell her mother. In January 2010 she did not get her monthly periods and became pregnant. She was attending school and her mother was informed by the school. The matter was reported to the village elder and later to the police. Her further evidence is that she was born in 1995. During cross-examination she testified that the appellant was her husband and they were now married. She was aware that one was not to get married before the age of 18 years.

PW2, ZW, is the mother to PW1. Her evidence was that in April she realized that PW1 was pregnant and on inquiry she was told that it was the appellant who had impregnated her. PW1 delivered in August 2010 and she would like the appellant to take care of the child. The matter was reported to the police. Her further evidence was that she had severally gone to the appellant's house to remove **PW1. PW3, ISAAC MUKHWANA**, was a clinical officer who attended to PW1. He filled the P3 form and confirmed that the complainant was defiled. The complainant was pregnant when he examined her. **PW4, COPORAL ALICE YATOR** was attached to the Mumias Police station. On the 7th of July 2010 PW2 ZW went to the station with the complainant. The complainant was aged 16 years and alleged to have been defiled by the appellant and she was pregnant. She asked for the birth certificate and PW2 took it to her. She later charged the appellant with the offence.

The appellant was put on his defence. He testified that he was by the time he was testifying 18 years and he was doing jua kali work. He communicated with the complainant and they had sex by

consent.

It is clear from the prosecution evidence that the complainant and the appellant had sex by consent. The relationship resulted to pregnancy. The trial court found that the complainant was still under 18 years old could not have given consent and proceeded to sentence the appellant. While testifying the complainant referred to the appellant as her husband. She informed the trial court that she was married to the appellant. PW2, the complainant's mother testified that she had removed the complainant from the appellant's house several times. Although the trial court found that the appellant did not believe that the complainant was above 18 years old, I do find that the mere fact that the complainant made the appellant her boyfriend, had sex by consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girl ready to get married. It is also clear that the parents of the complainant were aware of that relationship. An abstract application of section 42, 43 and 44 of the Sexual Offences Act will lead to the conclusion that a girl who is under 18 years old cannot give her consent. Each case has to be evaluated according to its own circumstances. In this age where young girls are maturing fast and engage in sex knowingly and being aware of the consequences, it will be unfair to sentence the boyfriend to 15 years imprisonment yet the two parties were aware of they were doing. I do therefore find that the appellant therein does qualify to come with the armbit of the defence provided under section 8 (5) of the Sexual Offences Act No. 3 of 2006. The appellant was made to believe that the complainant was over the age of 18 and was ready to be married. The appellant did believe so and had sex with the complainant. It is the evidence of PW2 that the appellant admitted that the child was his.

In the end I do find that the appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of January 2013

SAID J. CHITEMBWE
J U D G E