REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 52 of 2012

PAUL MUNYWOKI……..APPELLANT
VERSUS
REPUBLIC……...RESPONDENT
JUDGEMENT

Introduction

[1] Paul Munywoki, the appellant, was arraigned before the Senior Resident Magistrate at Mwingi on defilement charges. The victim of the offence is **L.M.W** a girl aged 14 years who testified as PW1. The offence was alleged to have been committed on diverse dates between April and 23rd May 2011 at {*particulars withheld*} Kitui County is framed thus:

Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No 3 of 2006

Evidence

[2] After full trial with four (4) witnesses testifying for the prosecution, the trial magistrate analysed the evidence placed before him, found the offence proved and sentenced the appellant to a prison term of twenty (20) years.

[3] PW1 told the court that she was aged 14 years in standard four (4); that in after schools opened after the April 2011 holidays, she refused to return to school; that she wanted to be married by the appellant and she went to his home where she stayed with him for two (2) days when one Solomon told her to return home. She was arrested seven (7) days later. She testified that for the days she lived with the appellant, they used to have sexual intercourse and that the first time she had sex with him she bled.

[4] PW1's mother, **M.M,** who testified as PW2 told the court that her daughter refused to return to school claiming that she was being ridiculed by other pupils for being the only big girl in their class. On hearing rumours that PW1 wanted to get married she confronted her and PW1 admitted; that she disappeared after some time and after one week PW2 received information that her daughter had been married to the appellant. PW2 went to appellant's home and found her daughter there but the daughter refused to accompany her mother home; that the appellant and PW1 lived together for one month before the appellant was arrested. PW2 further testified that the appellant had gone to her home and informed PW2 that he had married the complainant.

[5] Further evidence shows that the appellant was arrested on 23rd May 2011 for reasons other than defilement allegations relevant to this case. He was arrested by the area Chief and escorted to Migwani Police Station on allegations of planting cannabis sativa in his farm. No. 81503 PC Kennedy Wekesa, PW3, who received the appellant, visited the scene on the same day in company of other police officers. It

was while they were at the scene that they received information that the appellant had married an underage girl. PW3 went into the appellant's house and found PW1. PW1 led him to her parent's home, some 500 meters from the appellant's home. PW1 obtained a clinic attendance card from PW2, the mother, which confirmed that the girl was born on 8th February 1997.

[6] Dr. Indumwa, PW4, examined PW1 on 24th May 2011 and found that her hymen had been broken and that she had engaged in multiple sexual intercourses. The doctor found no injuries or signs of forced penetration. He formed an opinion that PW1 had been defiled.

[7] The appellant chose not to testify after the court found he was implicated and explained to him the requirements of section 211 of the Criminal Procedure Code.

Grounds of Appeal

[8] The appellant is challenging the conviction and sentence by the lower court. Initially he had put in six (6) grounds of appeal which he filed on 16th April 2012. He later amended the grounds of appeal with leave of the court and put in written submissions in support of the grounds of appeal. The amended grounds of appeal were filed on 10th January 2013 and read as follows:

i. That the learned trial magistrate erred in law and fact and or misdirected himself by holding that I did not enquire for the age of the complainant (sic).

ii. That the learned trial magistrate erred in law and fact or misdirected himself by failing to observe that the complainant herein deceived me to believe that she was a grown up (sic).

iii. That the learned trial magistrate erred in law and fact by failing to accord me the benefit incurred (sic) by section 8 (5) (a) (b) and (6) of the Sexual Offences Act No 3 of 2006.

Submissions

[9] In his brief written submissions, the appellant states that he believed that the complainant was an adult; that he asked her how old she was but she failed to disclose her age; that the defence under section 8 (5) (a) and (b) is available to him. He also stated orally in court that he did not know how to defend himself in the lower court since it was his first time to be arrested.

[10] Learned State Counsel made oral submissions in response. He opposed the appeal and submitted that the age of the complainant is not disputed; that clinic attendance card as produced as an exhibit in the lower court confirms that she was born on 8th February 1997 which makes her 14 years of age and which is within the provisions of section 8 (3) of the Sexual Offences Act; that under the provisions of section 42 of the Sexual Offences Act a child under the age of 18 years cannot give consent and therefore the relationship between the appellant and the complainant cannot be consensual; that the evidence of PW1 and PW2 was not shaken by the appellant who failed to cross examine them and also chose not to testify in defence; that the appellant's mitigation took away the allegation that the complainant did not disclose her age to him. Counsel further submitted that the defence afforded by section 8 (5) (a) and (b) has to be proved by the appellant and it is not enough to rely on these provisions; that the evidence of the prosecution witnesses was overwhelming and credible and this has not been challenged. He asked the court to dismiss the appeal for lack of merit and to uphold the conviction and sentence.

Determination

[11]From the evidence, it is obvious that PW1 thought she was mature and ready for marriage. She left school saying that she wanted to be married to the appellant. In her words, **"On 27th December 2010 I had gone to the accused's home where I told him he should marry me. He said that he had not refused. I went back. I proposed to him that I should get married in April 2011.**" Evidence shows that she went to the appellant's home in April 2011 and stayed with him as man and wife.

[12] Her mother PW2 thought her daughter was mature for marriage as well. After PW1 left home, her mother did not do anything to show that she was against the so called marriage. She never went to bring her daughter home, never went to see the parents of the appellant and did not report to any authority. In her evidence, PW2 told the court that the appellant went to her home and told her that he had married her daughter. She did nothing about it and when asked by the police (PW3) she said she did not know that it was wrong for her daughter to live with the appellant. It is shown in the evidence of PW3 that the appellant's home was 500 metres from that of PW2. It seems like a case where the complainant needs protection from the appellant and her own mother who does not seem capable of taking care of her underage daughter. There is no mention of a father or other relatives and this court doubts the capability and capacity of PW2 to take care, counsel and guide her daughter.

[13] In my view, it is this casual nature of handling this issue that made the appellant find nothing wrong in living with the complainant as man and wife. Had the police not arrested the appellant on the offence of growing cannabis sativa on his farm, it seems nothing was going to be done about this girl who to me needs counselling and guidance. The appellant did not raise the defence that he had been misled into believing that the girl was an adult. As a matter of fact, he did not raise any defence at all. During mitigation, he told the court that he did not know her age because she did not disclose it to him. He also stated that he did not know she was a pupil; that she went to his house and her parents did not complain. This court finds the statement that the appellant did not know that PW1 was a pupil doubtful. She was his neighbour and according to PW3 they live 500 metres apart.

[14] The appellant's appeal revolves around one single issue: the belief that PW1 was an adult. The relevant section of the law is section 8 (5) (a) and (b) which states thus:

It is a defence to a charge under this section if (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years.

[15] It is my singular duty to determine firstly whether there is proof that PW1 deceived the appellant that she was over the age of eighteen years and secondly whether the appellant reasonably believed that PW1 was over the age of eighteen years. All the circumstances including any steps the appellant may have taken to ascertain the age of PW1 are to be taken into account in determining the belief referred to here (see Section 8 (6) Sexual Offences Act).

[16] The appellant did not adduce any evidence showing the steps he took to establish the age of PW1. The record shows that it is PW1 who testified that the appellant asked her how old she was but she refused to disclose. In mitigation the appellant told the court that he did not know PW1's age because she did not disclose it to him. Evidence further shows that the appellant lived 500 metres from the home of PW1. They were neighbours. PW1 was a pupil and they had been living together for a month before the appellant was arrested. Before that time, PW1 said she had proposed to the appellant on 27th December 2012 that they get married. It was in April, 2013 that PW1 went to the appellant's home and they started living together after she refused to return to school. Can the appellant claim to have reasonably believed that PW1 was an adult? In his submissions he says he took steps as contemplated under Section 8 (6) to establish her age by asking her. Even assuming for a moment that this is true, there is evidence to show that PW1 did not state her age and therefore the appellant cannot claim to have been told the age. I find no evidence from the appellant or any other evidence by prosecution pointing to anything that could have shown that the appellant had reason to believe that the complainant was an adult.

[17] Section **111** (1) of the Evidence Act states that:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

[18] This section shifts the burden of proof to an accused person to tender evidence to prove the existence of circumstances bringing the case within any exception or exemption from, qualification to, the operations of any law creating the offence. In this case, the burden was upon the accused in the lower court to tender evidence to support that PW1 lied to him about her age and he reasonably believed her. He did not give such evidence in the lower court. This court has examined the evidence tendered in the lower court to determine if there was evidence given by the prosecution to show that the appellant was deceived about PW1's age and he reasonably believed the same to be true. If such evidence existed, it would allow the appellant to benefit from the proviso to section 111 of the Evidence Act. I find no such evidence. On the contrary, evidence shows that PW1 did not disclose her age to the appellant. To my mind the appellant cannot benefit from the proviso to Section 8 (6) of the Sexual Offences Act simply because no age was disclosed to him. I also find that there is no evidence by the prosecution witnesses to make this court find that the burden of proving that the appellant was deceived about the age of PW1 and that he reasonably believed she was an adult has been discharged.

[19] My careful analysis of the evidence adduced at the lower court leads to the conclusion that evidence pointing to the appellant taking any steps to establish the age of PW1 is lacking. He may have enquired about the age of PW1. If he enquired, it is shown that PW1 concealed her age. I have also pointed out that the appellant cannot plead ignorance of the fact that PW1 was a school going girl. The appellant was a neighbour within 500 metres apart. PW1 has been going to the appellant's home on and off until April when she stayed with him until his arrested on 23rd May 2011.

[20] The appellant did not raise his defence under section 8 (5) (a) and (b) of the Sexual Offences Act in the lower court. He is raising it at the appellate stage before this court. In my view, this is an afterthought. It is my considered view that the appellant has not discharged the burden placed on him by law to establish that he was deceived into believing that PW1 was an adult. The statutory defence afforded by section 8 (5) (a) and (b) of the Sexual Offences Act is not available to him. To me it seems that the appellant, just like the complainant and her mother, handled the matter casually perhaps due to ignorance of the legal requirements that 'marrying' an underage girl is a crime punishable under our law. Under section 42 of the Sexual Offences Act the complainant does not have the freedom and capacity to make a choice. She is not able to consent to marriage or to a sexual relationship due her being a child under the law. She is aged 14 years and this has been established by the clinic attendance card that confirms that age.

[21] My consideration of the evidence by the prosecution shows that the offence was proved beyond reasonable doubt. The medical evidence supports the charges and the admission by the complainant that they lived as man and wife having sexual intercourse confirms that this offence was committed. The grounds of appeal have no merit and therefore this appeal must fail. The appeal is hereby dismissed and the conviction by the lower court upheld by this court. Section 8 (3) of the Sexual Offences Act prescribes 20 years imprisonment as the minimum sentence for defilement where the complainant is between 12 and 15 years. This court will therefore not interfere with the sentence imposed by the trial court. The appellant will continue serving sentence imposed by the lower court. I make orders accordingly.

S. N. MUTUKU
JUDGE

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Dated, signed and delivered this 20th day of May 2013 in open court in presence of the appellant and Mr. for the State.