



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 124 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 674 of 2012 of the Principal Magistrate's Court at Kwale – A. O. Aminga, RM)

SHABAN RAMADHAN NGAZI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl 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 are as follows-

“SHABAN RAMADHANI NGAZI: On the diverse dates between December 2011 and February 2012 at [Particulars withheld] Village in Kwale County within Coast Region, intentionally caused his penis to penetrate the vagina of M S a child aged 16 years.”

2. When the charge was read out to the Appellant he responded by saying '**True**'. A plea of guilt was entered by the learned Magistrate.
3. Thereafter the prosecution read out the facts of the case. Because the facts of the case form the basis of this judgment I will set them out fully as follows-

“Facts

Sometime in December, 2011, the accused approached the complainant who is a class 6 pupil in [Particulars withheld] Primary School in Kwale County. She was then aged approximately 16 years. The accused wanted the complainant to be his girlfriend. The complainant gave in. A love relationship bloomed. Accused used to follow up the complainant and even visit school. They had sexual intercourse on a certain day when the complainant visited the accused at his homestead when they had some occasion at the homestead. The accused went home and the following day. The two had a 2nd sexual intercourse on 18/12/2011. No protection was used. In February, 2012 the complainant discovered some strange symptoms. She also missed her monthly periods. Later she informed the accused as she suspected she may have conceived. The accused assured the minor he would marry her instead of her aborting. One of the complainant's teachers grew suspicious about the complainant's case and she alerted

her parents, who on interrogating the minor confirmed the pregnancy. The matter was then reported to the police. The complainant was examined on 21.5.2012 and pregnancy confirmed at about six (6) months old. Accused was then arrested on 29/5/2012. AP3 form was filled – Exh. 1.”

4. As stated before the Accused pleaded guilty and accordingly Section 348 of the Criminal Procedure Code Cap 75 applied. That Section provide as follows-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a Subordinate Court, except as to the extent or legality of the sentence.”

5. Although the Appellant presented other grounds of appeal I believe the Court had to examine whether the charge, conviction and consequently the sentence meted out to the Appellant by the learned Magistrate were legally sound.
6. The Appellant as stated before was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of Act No. 3 of 2006. Section 8(1) provides as follows-

“8(1) A person who commits an act which causes

penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

Section 8(4) provides-

“(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

7. Those provisions make it clear that the sentence of one convicted under Section 8 was dependent on the age of the child.
8. In this case I wish to refer to the facts as read out by the prosecution and reproduced above in this judgment. The prosecution stated that the child was approximately sixteen years old. Section 8 does not provide for approximation of the age of the child and as it will be seen under Section 8(4) the age of the child determines the sentence meted out to the accused person.
9. The learned Magistrate therefore sentenced the Appellant on the basis of an approximated age of the child.
10. I have noted that the P3 form dated 18th May 2012 indicated the age

of the child as sixteen years. It is not clear whether that was the age that was given to the officer who filled the form or it was the age determined after an age assessment was undertaken. It was also not clear whether the age was proved by production of a Birth Certificate. Certainly when the facts were read out by the prosecution a Birth Certificate was not produced before court. The Magistrate noting that the facts did not support the charge should have advised the Appellant to withdraw his plea of guilt and to plead not guilty.

11.All in all there is doubt about the age of the child allegedly defiled and

it is for that reason that the conviction and sentenced of the Appellant would be set aside.

12.To that extent the Appellant's appeal against conviction and sentence

does succeed. The lower Court's conviction is hereby quashed and the sentence is hereby set aside. The Appellant is ordered to be set free unless otherwise lawfully held.

Dated and delivered at Mombasa this 27th day of November, 2013.

MARY KASANGO

JUDGE

a