REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 170 OF 2012

(An Appeal from the whole judgment of Honourable PAMELA ACHIENG, SRM delivered on the 18th day of July 2012 in Kakamega Chief Magistrate's Court in Criminal Case (S.O) No. 8 of 2012)

FREDRICK LUBEMBE SHIVANDA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to Section 8 (1)(4) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge were that on diverse dates between August 2011 and 9th March 2012 at [particulars withheld], Kakamega East District within the Western Province unlawfully and intentionally caused his penis to penetrate the vigina of S M B a girl aged 17 years.

He was in the alternative charged with the offence of indecent act with a child contrary to Section 11 (1) of the said Act.

After a full trial, he was found guilty on the main count, convicted and sentenced to serve 15 years imprisonment. He was aggrieved with the decision of the lower court and appealed to this court through his counsel Momanyi, Manyoni & Co. advocates. The grounds of appeal are as follows -

1. the learned magistrate erred both in law and fact in holding that the prosecution had proved its case beyond reasonable doubt against the appellant.
2. The learned magistrate erred both in law and fact by convicting the appellant in respect of a defective charge.
3. The learned magistrate erred both in law and fact in analysing the evidence before herself and hence arrived at a wrong finding.
4. The learned magistrate erred both in law and fact by disregarding and/or rejecting the defence offered by the defendant.

At the hearing of the appeal, Mr. Manyoni for the appellant submitted that the evidence on record did not establish commission of the offence of defilement. Counsel contended that the Clinical Officer PW5 only established that the complainant was pregnant and that there was no evidence that either the appellant impregnated her, nor that there was penetration by the appellant. In counsel's view, a DNA test should have been conducted. Counsel also argued that the charges were defective as the duration given in the diverse dates was so wide that it was prejudicial to the appellant.

Thirdly, counsel argued that the complainant had separate sexual relations with another man. In Counsel's view, with the evidence on record, the learned magistrate was wrong in connecting the appellant to the pregnancy of the complainant. Lastly, counsel argued that the learned magistrate did not consider the defence evidence.

Mr. Oroni, learned counsel for the State opposed the appeal. Counsel argued that there was evidence that the appellant and the complainant had sexual relations from August 2011. When the complainant was examined by the Clinical Officer PW5, she was actually found to be three months pregnant. In counsel's view, there was no possibility that the pregnancy was from the previous boyfriend with whom they had parted in March 2011.

The facts in brief are that the appellant and the complainant knew each other. The complainant, who was PW1, was schooling at [particulars withheld] High School in Form Two. She lived with her grandmother PW2. The complainant disappeared from home for about 6 days in March 2012. When she went back, the grandmother inquired from her what her problem was, and she informed her that she was about 3 months pregnant. The grandmother got annoyed and told her to go back to where she got the pregnancy. The complainant then went away and she was traced on 9th March 2012 at the home of the appellant. The complainant was then medically examined by a Clinical Officer PW5, who confirmed that she was pregnant. The birth certificate of the complainant showed that she was born in June 1995.

The appellant was therefore arrested and charged for the offence.

When put on his defence, the appellant stated on oath that the complainant was his friend, and that they had even lived together for 2 weeks in December, 2011. He stated that the complainant came to his home, where she was found, after having been chased away from her home due to the pregnancy.

After considering the evidence tendered, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt, convicted him and meted out the sentence. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, I have an obligation to re-evaluate the evidence on record afresh and come to my own conclusions and inferences. Several cases have emphasized this point. It suffices if I cite the case of ***Okeno Vs Republic [1972] EA 32***.

I have re-evaluated the evidence on record. I will deal with the technical points first.

The appellant's counsel has argued that the charge was defective. That the diverse dates are very wide and that this prejudiced the appellant at the trial. From the facts and evidence tendered, I don't see any prejudice occasioned on the appellant by the broad gap in the diverse dates given in the charge sheet. The appellant and the complainant had a love relationship and that they even lived together within the period of those diverse dates. The appellant himself admitted so. He was aware of those diverse dates and did not give any indication that he was confused or prejudiced. Therefore in my view, the wide gap in the diverse dates did not make the charge defective, nor were same prejudicial to the appellant.

Counsel for the appellant has argued that there was no evidence that the appellant impregnated the complainant PW1. The charge was not one of impregnating a girl, but of defilement. Even assuming he did not impregnate her, if he had sexual intercourse with her and she was below the age of 18 years, the offence of defilement would have established. The complainant, who was PW1, gave detailed evidence on the relationship and sexual engagement they had with the appellant between August 2011 and March 2012. She stated in her evidence that she got pregnant in the month of November, 2011 and that they had started the relationship in the month of October, 2011. She stated that in the month of December the same year, she went and lived with the appellant for some time. She also stated that they engaged in sexual intercourse with the appellant several times and that she had a relation with another man, whom they parted in March, 2011. With all this evidence having been tendered in the presence of the appellant, he stated as follows when asked to cross-examine her.

"I have no questions to the witness as she has said the truth."

In addition, in his sworn defence, he stated that he started a friendship with the complainant in August 2011 and that in December the same year, they lived together for two weeks. This, in my view, was not a denial of the allegation of the complainant. It was infact an admission of what the complainant had stated. There was therefore no need for a DNA test. The evidence of the prosecution on the alleged defilement was actually accepted or admitted by the appellant. Therefore in my view, the conviction was proper.

Counsel for the appellant has argued that the learned magistrate did not consider the defence of the appellant. That is not the position. I have perused the judgment. The learned magistrate did consider the defence of the appellant, which in any case, was an admission of the story of the complainant. Therefore in my view, the learned magistrate was not in error in the way she handled the defence. I dismiss that ground of appeal.

The sentence of 15 years imprisonment for a first offender may appear to be harsh. However, that was the minimum sentence for the offence. Therefore, it was a lawful sentence and I will uphold the same.

Lastly, I wish to state that the appellant did not indicate in any way at the trial or in this appeal, that he did not know that the complainant was a minor. Therefore, the provisions of Section 8 (5) of the Sexual Offences Act cannot be applied in his favour.

Consequently, and for the above reasons, I find that the learned magistrate was correct in convicting and sentencing the appellant. I dismiss the appeal and uphold both the conviction and the sentence.

Dated and delivered at Kakamega this 21st day of November, 2013

George Dulu

JUDGE