



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 37 OF 2012

TITUS NZIVO MAWELI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1046 of 2010 of the Senior Resident Magistrate's Court at Kwale – **Hon. Aminga - RM**)

JUDGMENT

The Appellant was Convicted and Sentenced to fifteen years imprisonment for the offence of defilement contrary to section 8(1) of the Sexual offences Act No. 3 of 2006.

The particulars are that on the 21st day of March, 2010 at Vanga Location – Msabweni – Kwale County he committed an act which caused penetration of his penis into the vagina of **J M K** a girl aged sixteen (16) years.

The grounds for appeal are that no voire dire examination was conducted before receiving the evidence of the Complainant.

Secondly that there was contradiction in the prosecution evidence adduced before the Court.

Thirdly that the case was not proved beyond reasonable doubt.

First on the issue of voire dire examination the Complainant was aged over twelve (12) years at the time she gave her evidence. The Appellant himself had placed her age at twenty (20) years.

The other grounds can be consolidated to one main one which is to the effect that the Conviction was against the weight of evidence adduced.

The appellant was a well known figure in the village from where the Complainant hails from as he was head of community police. He was a neighbour of the complainants family.

Upon evaluation of the evidence before the lower court it is apparent the appellants defence was that the complainant consented to the sexual act and that her age was not sixteen (16) years as indicated in the charge sheet but twenty (20) years.

During cross-examination at page 5 line 23 of the proceedings the compliant had this to say,

“ It is your evidence that we had sex by consent I am sixteen 16) years old. I am certain of my age. It is a lie that my age was reduced with my fathers help You forced me to have sex with you and it was not consensual. I maintain that we were not lovers and God is my witness. You used force”.

From the above what transpires is that the act of penetration was not in dispute but the bone of contention was the age factor. However, in his sworn statement the Accused took another tangent, this time introducing the issue of an existing grudge between the parents of the complainant and himself over a land dispute.

A perusal of the record of proceedings shows that at no time during cross-examination of the prosecution witnesses did the appellant raise the issue of a land dispute. The trial magistrate did correctly note this and treated the defence of the appellant as an afterthought.

On the issue of age, the, mother of the complainant (PW 2) did testify that her daughter was aged sixteen (16) years at the time of the incident.

A birth-certificate issued on 21st May, 2010 being No. C *[particulars withheld]* did show date of birth as 12th December, 1994. Same was produced in Court as exhibit. The allegation by the appellant that the complainant was twenty (20) years old at the time of the incident has no basis as he had no documentary prove to that effect. The Conviction was safe and the Sentence legal. I do find no good reason to interfere with both. The appeal has no merit and it is disallowed.

Judgment delivered dated and signed this **17th** day of **December, 2013**.

.....

M. MUYA

JUDGE

17TH DECEMBER, 2013

In Open Court in the presence of:-

Learned State Counsel Miss Ogweno

Appellant present

Court clerk Chepkwony.