REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 108 OF 2013

ZABLON ITHAKA MUNENE .... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU (M. ONKOBA – AG. S.R.M) IN SEXUAL OFFENCE CASE NO. 18 OF 2012 DELIVERED

ON 24TH MAY, 2013)

JUDGMENT

ZABLON ITHAKA MUNENE (appellant herein) was on 24th May 2013 convicted by the Acting Senior Resident Magistrate at Gichugu Court (M. ONKOBA) for the offence of defilement contrary to ***Section 8 (1) and (2) of the Sexual Offences Act*** and sentenced to serve twenty (20) years imprisonment.

He has filed this appeal against both the conviction and sentence raising the following ten (10) grounds of appeal i.e.:

1. ***He pleaded not guilty***
2. ***That the trial magistrate erred in law and in fact by failing to consider the testimony of the Doctor (PW6) who said there was no spermatozoa on the complainant***
3. ***That the trial magistrate erred in law and in fact by failing to consider that the appellant was denied the right of medical examination***
4. ***That the trial magistrate erred in law and in fact by not considering that the complainant (PW2) declined to testify before excessive pressure was put to her which was prejudicial to the appellant***
5. ***That the trial magistrate erred in law and in fact by failing to consider that the charge was stage managed***
6. ***That the trial magistrate erred in law and in fact by failing to consider that PW3 claimed she saw appellant with PW2 creating a doubt why she did not inform PW1 who had asked PW3 to inform her if she saw PW2***
7. ***That the trial magistrate erred in law and in fact by failing to consider that the appellant was denied medical report (P3) and other key witnesses statements***
8. ***That the trial magistrate erred in law and in fact by relying on the evidence of PW1 who lied to the Court that the complainant was aged 14 years which was disproved by the birth certificate***
9. ***That the trial magistrate erred in law and in fact by addressing himself that the case was proven***

beyond any reasonable doubt yet the case was "full of inherent and collaborative witnesses" – I presume the appellant meant there were contradictions in the evidence of prosecution witnesses

10. ***That the trial magistrate erred in law and in fact by failing to consider his unshaken defence***

The charge facing the appellant in the trial Court was that on 7th day of October 2012 in Kirinyaga East District within Kirinyaga County he unlawfully and intentionally caused his penis to penetrate the vagina of MWG a child aged 14 years.

As a first appellate Court, I have re-examined the evidence as adduced in the trial Court in order to arrive at my own conclusion as to whether or not to confirm the conviction and subsequent sentence. I have also considered the appellant's submissions in which he urged me to consider his sentence because he is suffering in jai. In support of the conviction and sentence, the State through Mr. Omayo State Counsel urged me to find that both the sentence and conviction were proper.

The case for the prosecution and defence is really very straight forward. On 7th October 2012, the complainant left church and met the appellant who seduced her, took her to his home and stayed with her upto 10th October 2012. All this time the appellant had sex with the complainant. his defence was basically that the complainant was his girl friend and he wanted to marry her and he didn't know it was wrong.

On the ground of appeal that no spermatozoa was found on the complainant, there was evidence from HEZRON MAINA (PW6) a Clinical officer who examined the complainant on 11th October 2012 and although he found no spermatozoa, he was satisfied that there was evidence of "***habitual defilement upon the complainant"*** and also that ***"there was penetration"***. That no spermatozoa was found on complainant does not aid the appellant bearing in mind that the complainant was examined a day after she had been found and therefore any spermatozoa may have been washed off. In any event, there is the direct evidence of the Clinical officer (PW6) that she had been penetrated. That ground fails.

Appellant also raises the ground that he was denied right of medical examination and also that excessive force was used on the complainant before she testified. According to the Clinical officer, tests done on the complainant for HIV proved negative. Therefore, as there was no evidence that complainant contracted any sexually transmitted disease, there was no need in examining the appellant as such an examination would have been of no consequence to the prosecution case since it was never their case that he infected her with any disease. On the issue that the complainant was forced to testify, no such questions were put to the complainant by the appellant when she first testified and was cross-examined on 1st February 2013 or even when she was further cross-examined on 13th March 2013. Indeed all that comes out of the cross-examination of the complainant by the appellant is that she consented to having sex with him. There is no suggestion that the complainant was forced to testify against him. There is also no suggestion that this charge was stage managed against the appellant and if it was, the appellant did not at his trial suggest who of the witnesses called by the prosecution would have had any motive to give false testimony against him. Accordingly, grounds 4, 5 and 6 of his appeal are dismissed.

The appellant in ground 7 of his appeal says he was denied the P3 form and statements of other key witnesses. The record shows that on 29th October 2012 the trial was adjourned at the request of the prosecution who were not ready and the appellant asked for witnesses statements and the trial magistrate made an order that the same be availed. It would appear that the same had not been availed by 12th November 2012 and the trial was again adjourned and an order made by the trial Court that statements be provided. The same situation occurred on 29th November 2012 and again on 11th January 2013. On 1st February 2013, the case proceeded to trial after the appellant himself said he "***was ready***". Having sought and obtained adjournments previously on the ground that he had not been provided with witnesses statements, it was the appellant's responsibility on 1st February 2013, when the first witness testified, to inform the Court that witnesses statements and other documents

had not been availed to him as earlier ordered by the Court. It is true that ***Article 50 (2) (j) of the Constitution*** allows an accused person "***reasonable access***" to the evidence against him but it is equally his duty to complain to the Court, as he did, that such evidence has not been availed to him. That is essentially a matter within his knowledge and when he told the trial magistrate that he was "***ready***" for the trial, it was an indication that he had fully prepared for the trial and if the statements or other exhibits had not been availed to him, he should have said so. Indeed on 28th February 2013 he sought an adjournment on the basis that he was not "---- ***psychologically prepared to proceed with this case to-day***" and sought time to "***settle down and prepare for trial***". If he did not have the witnesses statements, he certainly would have said so. The fact that he did not clearly means that the same had been availed to him as earlier directed by the trial magistrate. Further, his cross-examination of the prosecution witnesses does not suggest that he was in any way handicapped due to lack of witnesses statements. That ground of appeal similarly fails.

In ground 8 and 9, the appellant state that the complainant's mother (PW1) lied about complainant's age which was disproved by the birth certificate and that the trial magistrate erred in law and in fact by finding that the case against him was proved beyond reasonable doubt. The complainant's mother JWG (PW1) told the Court that her daughter was born on 9th March 1998 and was 14 years old at the time she gave evidence. She then produced her birth certificate (Exhibit 3) which shows that indeed she was born on that day. She was therefore aged fourteen (14) years and seven (7) months when she testified on 7th October 2012. PW1 therefore did not lie to the Court about the complainant's age and infact the birth certificate which is the best evidence in such cases supported her oral testimony. That ground also fails.

On the ground that the case against him was not proved beyond reasonable doubt, the appellant himself in his defence admitted that he stayed with the complainant in his house during that period adding that he did not know it was wrong. He also said complainant was his girlfriend. His defence was therefore essentially a combination of consent by the complainant and ignorance of the law and specifically ignorance of the provisions of the ***Sexual Offences Act*** under which he was charged. There was nothing to suggest that the complainant deceived him about her age or that he had reason to believe she was over eighteen (18) years of age. Indeed in his own defence, he concedes that complainant told him she didn't have an Identity card which of course she could only obtain upon attaining eighteen (18) years. Clearly therefore, there were no circumstances that could bring this matter within the provisions of ***Section 8 (5) and (6) of the Sexual Offences Act*** and the trial magistrate did consider this and arrived at the correct decision on the matter and I agree with his findings on that. There were really no contradictions in the prosecution case because appellant admitted that he was with the appellant all this time and only seemed to suggest that she consented. At her age, the complainant could not be said to have consented and the only available defence to the appellant was that provided for under ***Section 8 (5) and (6) of the Sexual Offences Act*** and there is no evidence that the complainant deceived the appellant into believing that she was over the age of eighteen (18) years. And even in his own defence, the appellant has not suggested that he believed the complainant was over the age of eighteen (18) years. On the issue of the complainant having consented, it is clear that she was aged 14 years at the time she was defiled. She was therefore a child as defined in the ***Children's Act*** and a reading of both ***Sections 42 and 43*** of the ***Sexual Offences Act*** shows that a child has no capacity to consent. The offence of defilement is not based on consent or lack of it. What is to be proved is that the victim was a child and that she was penetrated. That has been established in this case and therefore that ground of appeal fails.

Lastly, the appellant says his "***un-shaken defence"*** was not considered. Having told the Court himself that he was living with the complainant at the time she was defiled and having said the complainant had "***consented to my request"*** and this Court having found that the complainant was in-capable in law of consenting, there was really no "***un-shaken defence"*** left for the trial Court to consider. All that could have aided the appellant in his defence was if the provisions of ***Section 8 (5) and (6) of the Sexual Offences Act*** applied but as the trial magistrate has found, and rightly so, that complainant neither deceived the appellant nor was there evidence that he reasonably believed she was over eighteen (18) years of age, the only conclusion that any trial Court could have arrived at was that of conviction.

Ultimately therefore, having re-considered the appeal as a whole, I find that his conviction was on proper evidence and I dismiss the appeal on conviction.

On sentence, the trial magistrate imposed a prison sentence of twenty (20) years. This is the minimum sentence provided for under ***Section 8 (3) of the Sexual Offences Act*** in a case where the complainant is aged between twelve (12) and fifteen (15) years. That sentence was lawful. The appeal against sentence is equally dismissed.

The up-shot of the above is that the appeal against both conviction and sentence is dismissed.

B.N. OLAO

JUDGE

11TH DECEMBER, 2013

11/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered in open Court this 11th day of December, 2013.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal 14 days explained.

B.N. OLAO

JUDGE

11TH DECEMBER, 2013