



SIMEON WANJALA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate

A.W. Mwangi delivered on 17/1/2011 in Kithimani S.O.A Case No. 35 of 2009)

J U D G M E N T

The appellant was charged in the subordinate court with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. In the alternative, he was charged with indecent act with a child contrary to section 11 (1) of the same Act. The allegations were that he committed the offences on a girl aged 14 years.

After a full trial, he was convicted on the main count and sentenced to serve 20 years imprisonment.

He has now appealed to this court against both conviction and sentence. In his amended memorandum of appeal, he has listed the following grounds:-

- 1. THAT the trial magistrate erred in both law and facts while convicting him on reliance of PW1's and PW2's evidence which remained totally doubtful and questionable.**
- 2. THAT the trial magistrate erred both in law and facts while convicting him on reliance in his mode of arrest in light of evidence from whoever arrested him to prove PW3's allegations.**
- 3. THAT the trial magistrate erred in law while rejecting his sworn defence that was not challenged by the prosecution side as required under section 212 of the Criminal Procedure Code.**

The appellant also filed written submissions. At the hearing of the appeal, the appellant stated that he had been living with the complainant. He had no bad intentions. The aunt of the complainant, one J, was aware of this. He stated however, that he did not know the age of the complainant, and was not informed of her age.

The learned State Counsel, Mr Mwenda, opposed the appeal. Counsel stated that the appellant admitted to living with the complainant. Sexual penetration was not disputed. There was also medical evidence. Counsel contended that the complainant testified that she was 14 years old. According to counsel, the appellant did not state in his sworn defence that he did not know that the complainant was under-age. Therefore, his present contention of lack of knowledge about the age of the complainant is an afterthought. Counsel argued also that the sentence imposed was lawful. The law provided for a sentence of not less than 20 years imprisonment.

This being a first appeal, the court is duty bound to evaluate the evidence on record and come to its own conclusions and inferences, taking into account the fact that the appeal court did not have the

opportunity to see the witnesses testify and determine their demeanour – See **Okeno –vs- Republic (1972) EA 32**.

I have perused the charge and evidence on record. I have also perused the judgment of the learned trial magistrate. There is certainly no doubt that the appellant lived together with the complainant, PW1 F W, for some days or weeks. The complainant stated that the two had sexual intercourse in the house of the appellant, on several occasions. The appellant admits as much. The evidence on the P3 form which was produced in court as an exhibit confirms that the complainant was not a virgin. The hymen was broken, and there were apparent bruises on the labia of the vagina.

The burden of proof in criminal cases is always on the prosecution to prove every element of the charge. It does not shift to the accused person. One of the elements or particulars of the charge is that the complainant was **“F W a child aged 14 years”**. It was therefore imperative for the prosecution to prove that the complainant was 14 years old.

The evidence of the age of the complainant was that of the complainant who testified as PW1 and stated:-

“I am F W. I am 14 years old. My surname is M”.

The other evidence on the age of the complainant was that of PW2 J S M, the aunt of the complainant. Her evidence on the age is as follows:-

“I started taking care of Faith when she was 8 years old. I lived with Faith for 4 years as at November 2009. She refused to go to school and so I told her to assist me run my small business. I enrolled her in school in the year 2008 where she stayed for 2 years, then quit. She was born in 1997.”

There was also the evidence of what was on the P3 form filled by Dr. Karuri but produced by Dr. Fredrick Muiruri. The front page of the P3 form, which is filled by the police, indicates her age as 14 years. On page 2 of the form it is stated:-

“Age Assessment, Molar not erupted, Age under 18 years.”

On page 3 of the P3 form the estimated age of the person examined is said to be **“14 years”**.

In my view, in such offences where the age is an essential ingredient of the offence, the prosecution has a burden to prove the age of the complainant to the standard required in criminal law, that is beyond reasonable doubt. There was need therefore to have either documentary evidence on the age from the family witnesses, or the doctor has to testify regarding what tests he did, and the basis of arriving at the age that he assessed. A mere statement that **“molar not erupted”** in my view, is not adequate. The prosecutor had an obligation to enquire from the doctor to explain the basis of his findings. Even if another doctor produces the P3 form, as in this case, the prosecutor should ask him to explain the technical basis of the findings. Failure to do so, leaves a gap. The court will then have to determine technical issues on conjecture and suspicion. That is not desirable in a criminal case. As was stated in the case of **Sawe –vs- Republic (2003) KLR 364** suspicion, however strong cannot be a basis for inferring guilt, which must be proved by evidence beyond reasonable doubt. In my view, the evidence of proof of age where it is an ingredient of the offence, has to be beyond reasonable doubt.

Therefore, the prosecution, by failing to establish from the doctor the scientific basis of the age assessment of the complainant, failed to prove an essential element of the offence. The benefit of that failure on the part of the prosecution, must be given to the appellant. I give that benefit to the appellant.

In the result, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Machakos this **12th** day of **June** 2012.

George Dulu
Judge

In presence of:-

The Appellant in person

Nyalo – court clerk.