



MAHAT GALLE ABDIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 146 of 2010 in the Principal Magistrate's Court at Mandera – R. Odenyo (PM) on 1st October 2010)

JUDGMENT

1. **Mahat Galle Abdi**, the appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006** . He was thereafter sentenced to serve 15 years imprisonment.

2. The chief facts were that on diverse dates between 1st December 2009 to 15th December 2009 at [...] Location of Mandera East District within North Eastern Province, he unlawfully penetrated S.A.J, a girl aged 16 years.

3. The appellant has now brought an appeal against both conviction and sentence in which he has advanced several grounds which may be summarised as follows:

(i) *That the complainant was an adult aged 20 years,*

(ii) *That he may be treated with lenience for the offence is out of character, and he is the only bread winner of the family.*

4. Miss Mwanza, the learned state counsel urged that the evidence of **PWI**, the complainant was that she was 16 years old when the defilement occurred and that they had plans to marry each other with the appellant. The learned state counsel urged the court to order a retrial and direct that DNA test be performed on the baby and the appellant to establish whether he was the father.

5. I have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. In **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts’ own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.”

6. It follows therefore that my mandate as a first appellate court is to weigh the evidence on record and make my own findings and draw my own conclusions.

7. Mr. Emmanuel Matunda, a Clinical Officer at Mandera District Hospital testified as **PW5** and produced the P3 Form marked Exhibit 1. He examined the complainant on 8th April 2010. **PW5** observed that S.A.J was in fair general condition. There were not tears or blood stains on her clothes, and she had no obvious physical injury on her. There were no abnormalities in her genitalia but she was found to be four months in gestation. **PW5** placed her age between 16 and 17 years.

8. Both the appellant and the complainant are young people. The case boils down to the word of the complainant against that of the appellant. That is, “**he said she said**” scenario. Whereas the complainant told the court that the appellant defiled her on several occasions and that she was a willing participant because he promised to marry her, things came to a head when she fell pregnant and he abandoned her to marry another girl. The appellant, on the other hand, denied defiling the complainant and requested for DNA tests which he said would exonerate him.

9. The issue for determination by this Court is whether a retrial of the appellant should be ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji - versus- Republic [1966] EA 343**, wherein Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

Applying the above principles to this case, I am satisfied that the evidence is insufficient to warrant this court to order that the appellant be retried.

10. In the circumstances of this case it was not possible to establish the complainant’s age with any degree of certainty. For a charge of defilement to succeed the age of the complainant must be established through documentary or factual evidence. See **Geoffrey Ogeyo vs Republic Cr. App 232 of 2009 [2010] eKLR.**

11. The age of the complainant was stated by herself to be 16 years, while **PW2** her father testified that she was 17 years of age, and **PW5** the medical witness placed her somewhere between 16 and 17 years of age. Secondly, the complainant did not disclose the defilement to anyone until several months after the alleged encounter when her grandmother questioned her on her apparent pregnant state. They also did not report to the police until it became evident that the appellant was not willing to marry the complainant, and was dying responsibility. There is a danger that the complainant may have settled on the appellant as a person she considered to have a promising future to provide a safety net for herself and her unborn baby. I find that the evidence adduced before the trial court was such that it gave rise to a doubt whose benefit should have been given to the appellant.

12. I therefore allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant by the learned trial magistrate. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **18th day of July 2012.**

L. A. ACHODE

JUDGE