



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 80 of 2012

S K CAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 47 of 2011 of the Senior Resident Magistrate's Court at Mariakani – D.M. Machage- SRM)

JUDGMENT

The appellant **S K C** was on the 19th day of March, 2012 Convicted of the offence of defilement of a child contrary to section 8(1) as read with section 8(4) of the Sexual offences Act No. 3 of 2006 and was Sentenced to serve ten(10) years imprisonment.

The complainant at the time of the incident of defilement was a form two student at [Particulars withheld] High School. The appellant was also a student (form III) [particulars withheld] High School. The two were intimate friends and had severally engaged in sexual activities culminating in the complainants pregnancy on 27th August, 2011.

While admitting having had sexually known the complainant in the year 2009 the appellant conceded that he had parted ways with her from April 2010.

This case came into fore after the school authorities realized that the complainant was pregnant.

After interrogations she mentioned the appellant as the author of the pregnancy and he was thereafter arrested and charged with this offence.

It is conceded that no D.N.A test was taken as to paternity of the child, but the main issue before this Court is that of the age of the parties. In her evidence the complainant told the Court that she was seventeen (17) years old having been born on 10th November, 1994 as per her birth certificate. The appellant in his sworn statement also told the Court that he was aged seventeen (17) years old. Before his Judgment the trial magistrate did note this and ordered that the appellant be taken to a doctor for age assessment.

It is apparent that the assessment was done and the appellant was found to be aged nineteen (19) years old (page 1 of the Judgment).

Consequently the magistrate proceeded to treat the complainant as a child and the appellant as an adult and thereafter Sentenced him to ten(10) years Imprisonment.

Counsel for the appellant did seek leave from the Court to file supplementary grounds and to adduce additional evidence which application was granted. That additional evidence was in the form of a birth certificate of the appellant and the fact that he was a student at Mazeras High School. To that extent a photocopy of a birth certificate was produced indicating the appellants date of birth as 6th August, 1995 and the date of registration as 7th March 2012. Going by that certificate of birth, the appellant was aged 15 years at the time of the defilement and was younger than the complainant.

Counsel for the appellant Mr. Mushelle contends that the appellant is a child as he was under the age of eighteen (18) years at the time of commission of the offence and the trial magistrate should have exercised the various options of Sentencing found under section 19(1) of the children's Act instead of Sentencing the Appellant to ten years imprisonment. This appeal is opposed on the grounds that there is overwhelming evidence on record to the effect that the appellant had defiled the complainant over a period spanning the years 2009 to 2010. It is also the contention of Mr. Mureithi for the state that the birth certificate produced by the defence is not authenticated as it is a copy and further that a birth certificate is itself not conclusive.

Upon evaluating the evidence before the Court I find this case to be a borderline one. The alleged defilement which was subsequently proved by the prosecution was not a one day affair but a series of Sexual acts spanning the period of 2009 to 2010. The exact dates when the acts took place are not clear. The complainant did testify that even after 27th August, 2010 she had sexual intercourse with the Accused on 27th November, 2010. Prior to 27th August, 2010 she also had sexual intercourse with the appellant on 9th April, 2009.

As the complainant clearly testified that she had sexual intercourse with the appellant even before 27th August, 2010 it is not clear why the prosecution decided to treat 27th August, 2010 as the date of defilement but not 9th April, 2009 unless it was an attempt to beat the age bracket of 18 years.

I find that it was not properly established that at the time of the first sexual intercourse with the complainant (when he penetrated her) the appellant was of the age of majority (over 18 years old). There is conflicting, evidence before the court regarding his age varying from 15 years to 19 years, where the Court is in doubt, as to have been the case in this matter that doubt should have been resolved in favour of the appellant. There is no doubt that the appellant had sexual intercourse with the complainant severally and in a span of about one to two years but it was not established that he was not a child at the time .

Having found that at the time the appellant first defiled the complainant he was still a child the Court has to fall to section 191 (1) of the children's Act which provides,

“In spite of the provisions of any other law and subject to this act, where a child is tried for an offence and the Court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways

(a) by discharging the offences under section 35(1) of the Penal Code.

(b) discharging the offender on his entering into a recognizance, with or without sureties.

(c) by making a probation order against the offender under the provisions of the probation of offenders Act”

In view of the foregoing while not disturbing the Conviction, I do find that this is a good case to review the Sentence accordingly order for a Probation/Community service Report.

Same to be availed within ten days from today.

Judgment dated and delivered this **23rd** day of **November, 2012.**

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M. MUYA
JUDGE`

In the presence of:-

Mr. Jami for the State

Court clerk – Philip
Accused

Mention 7th December, 2012.