



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 290 of 2010

B J J APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 543 of 2009 of the Principle Magistrate's Court at Kwale – A.M. Obura – SRM)

JUDGMENT

The appellant **B.J.J.** was convicted of the offence of defilement contrary to section 8(4) of the Sexual offences Act No. 3 of 2006 and was Sentenced to imprisonment for a term of 15 years.

The appellant had been charged with defilement contrary to section 8 (2) of he Sexual offences Act No. 3 of 2006.

The age of the Complainant is shown in the charge sheet as sixteen (16) years although there is evidence of tampering, same is however not countersigned by the one who tampered with the charge sheet.

The age of the Complainant in sexual offences is of paramount importance more so in defilement cases as it determines the imprisonment term to be imposed, in the event of conviction.

Thee appellant has made the issue of age assessment as one of his main grounds of appeal.

A perusal of the proceedings before the Court does indicate that no proper assessment of the age of the Complainant was done. There was no production of a birth certificate or documentary evidence of assessment by a Doctor. However, the father of the complainant M M who testified as PW 2 in the lower Court did give the age of Complainant as between sixteen (16) years and seventeen (17) years.

It is the contention by Mr. Jami for the state that the evidence of a parent of a complainant is admissible and has referred **Criminal Appeal No. 371 of 2010.**

John Irungu Vs Republic in which Nzioka, Judge cited the authorities of **Charles Kahiro Ng'ang'a Vs Republic (2009) eKLR** and **Alfayo Gombe Okello Vs Republic 2010 eKLR** where the statement of the mother was held to be admissible.

I am of the considered view the trial magistrate did not misdirect herself when she decided to take or determine the age of the complainant as sixteen. As argued earlier, the appellant had been charged with defilement under section 8(2) of the Sexual offences Act which charge could be tenable if the age of the complainant was shown to be eleven years or less.

The decision to take the age of the Complainant to be 16 years did not prejudice the case for the appellant but did indeed act in his favour.

Though the appellant was Convicted under section 8(4) of the Sexual offences act which is a lesser offence to section 8(2) of the same act I do find that when the charge was read to him, he understood it and proceeded to plead not guilty both on the substantive and the alternative counts.

It has transpired in evidence that the appellant was an uncle to the complainant and as pointed out by Mr. Jami for the state he ought to have been charged with incest. Being such a close relative of the complainant he must be taken to have known her relative age.

The gist of the prosecution case is that the complainant a standard seven pupil at [particulars withheld] Primary School had befriended Salim S a student at [particulars withheld] Secondary School with whom they had intimate Sexual relationship but, the said S S had ditched her and befriended another girl by the name Z.

It was because of this repulsion that she sought the services of the Accused who was a medicine man.

The appellant informed her that the only cure was to have sexual intercourse with her but although, she refused he proceeded to hold her hand and she did not know what happened, only to find herself lying on a mat at his house pantiless and with sperms on her private parts. When she demanded to know why he had done this to her, he warned her not to tell anyone. She later reported the matter to her parents and the Appellant was arrested and later charged with this offence.

After evaluating the evidence adduced before the trial magistrate I am satisfied that she did warn herself of the danger of Convicting upon reliance of a single witness. She did further proceed to find that the witness was a truthful one and there was corroboration from the evidence of the doctor who found that she had a perforated hymen.

I find no good reason to disturb both the Conviction and Sentence. The upshot of it all is that this appeal fails and it is dismissed accordingly.

Judgment dated and delivered in open Court this **22nd** day of **November, 2012**.

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M. MUYA
JUDGE

In the presence of:-

Mr. Jami for the State

Philip – Court clerk

Accused.