REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 471 of 2010

ANTHONY MUCHOKI KAMAU .....APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.449 of 2010 of the Principal Magistrate's Court at Makadara by A. Lorot – Senior Resident Magistrate)

J U D G M E N T

The appellant, **ANTONY MUCHOKI KAMAU**, was convicted for the offence of Defilement **contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act.**

The learned trial magistrate then sentenced the appellant to 20 years imprisonment.

In his appeal to this court, the appellant has submitted that the prosecution failed to prove that the complainant was a minor.

Whereas the particulars of the charge sheet indicated that the complainant was 13 years old, as at January 2010, when the incidents of defilement ceased, the appellant contended that the appellant had told him that she was born in 1992.

Therefore, I understand the appellant to be saying that by 5th November 2009, when he is said to have started the series of actions of defilement of the complainant, the said complainant as already 17 years old.

As the appellant believed what the complainant had told him, regarding her age, the appellant treated her as his wife.

It was the appellant's contention that throughout the trial, and even whilst he was prosecuting this appeal, he always believed that the complainant was not 13 years old, as had been asserted by the prosecution.

If the complainant was only 13 years old, the appellant says that he had been a victim of deceit.

He therefore invited this court to come to the conclusion that he ought to have been given the benefit of the defence spelt out in **section 8(5) of the Sexual Offences Act.**

His argument is that he was deceived by the complainant, and that he believed the information provided by the said complainant.

The appellant faulted the trial court for concluding that the complainant could not have cheated the appellant about her age because the two had lived as neighbours for a period of over six (6) years.

The trial court was also faulted for coming up with his own theories, which were unsupported by the evidence on record. In particular, the court is said to have erred by concluding that the appellant took advantage of the girl's fragile family structure, to toy with hEr situation, culminating in him impregnating her.

The complainant is said to have made it clear to the trial court that the appellant was her boy-friend.

As the appellant believed what the complainant had told him, he went with her, from Nairobi to his rural home in Muranga. And, according to the appellant, his mother and his siblings all treated the complainant as the wife of the appellant. Therefore, there was no question of the complainant having been abducted by the appellant.

Furthermore, as the complainant confirmed that she had consensual sexual intercourse with the appellant, the appellant submitted that the offence of defilement was not proved.

The appellant also pointed out that both he and the complainant were arrested by the police. Thereafter, no criminal charges were preferred against the complainant.

As the complainant was never chargeD with any criminal offence, the appellant submits that her arrest was simply calculated to frustrate and threaten the complainant. The sole intention of prosecuting the appellant, in his assessment, was to deny both the complainant and the appellant, their cordial love relationship. The said love relationship was not a criminal offence, he insisted. Therefore, he asks this court to quash the conviction, and set him free.

In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the conviction as sound.

As the complainant was born on 13th June 1996, whilst the offence was committed from 9th November 2009, the respondent submitted that the offence of defilement was proved.

During the period when the complainant and the appellant had sexual intercourse, the complainant conceived. That fact further confirmed that the appellant had committed the offence, submitted the respondent.

As the first appellate court, I am obliged to re-evaluate the evidence on record.

In that regard, the starting point is the charge sheet, as it specifies what the prosecution set out to prove. The particulars of the charge were that the appellant;

"***on the diverse dates between 5th November 2009 and 27th January 2010 at Nairobi East District within Nairobi Province, intentionally and unlawfully caused his penis to penetrate the vagina of MNW, a child aged 13 years"***

PW 1 was the complainant. She testified that she was 13 years old. She also said that her date of birth was 14th June, 1996.

PW 1 testified that she first got to know the appellant in 2007, when they lived within the same plot, in Dandora Phase IV. At that time **PW 1** was in Class 6.

The appellant, who was a carpenter, approached **PW 1** and asked her to become his friend. **PW 1**

agreed.

On 5th November 2009, the appellant invited **PW 1** to his house. **PW 1** spent that night in the same bed with the appellant. However, it was the testimony of **PW 1**, that "nothing happened" on that night.

On the next day, the appellant locked **PW 1** inside his house when he went away to work.

For the next 4 nights, **PW 1** continued to share a bed with the appellant, although nothing happened between them.

Then on the Friday, the appellant woke up **PW 1** from her sleep. He began to remove her clothes, prompting **PW 1** to resist. However, **PW 1** later gave in, and the appellant had sex with her.

Three days later, on a Monday, the appellant told **PW 1** that he would take her to his rural home. His reason for deciding to do so was that the mother of **PW 1** had threatened to have the police arrest the appellant.

On the Tuesday, the appellant took **PW 1** to his rural home in Murang'a. During the one week when **PW 1** and the appellant stayed in Murang'a, they had sex twice.

Thereafter, the appellant left **PW 1** in Murang'a, when he returned to Nairobi.

3 days later, **PW 2** who is the mother of **PW 1**, arrived at the appellant's home in Murang'a. She was accompanied by police officers. The complainant was escorted back to her mother's house in Nairobi.

Although the complainant's mother was not keen to have the appellant arrested at that stage, she later had him arrested on 27th January 2010, after the appellant had stayed with **PW 1** from 3rd December 2009 upto 27th January 2010.

During cross-examination **PW 1** explained that she only agreed to travel with the appellant to Murang'a because, by then she had already breached her trust with her mother. Therefore, **PW 1** feared to return home to her mother. Indeed, **PW 1** expressly told the appellant as follows:

"I had already breached my trust with my mother. You knew I could not go home. We went together. You forced me."

PW 2 produced the clinic card to prove that **PW 1** was born on 14th June, 1996.

When **PW 1** went missing from home, her mother reported to the police. However, for a whole week, **PW 2** received no information on her daughter's whereabouts.

A lady named Getau informed **PW 2** that the appellant had taken **PW 1** to the appellant's rural home in Murang'a. As the appellant had been a neighbour of **PW 2** for about 6 years, **PW 2** knew him well.

PW 2 reported to the Dandora Police Post, notifying the officers that the appellant hailed from Gacharu. The officers gave to **PW 2** a note to take to Gacharu Police Post.

On 18th November 2009, the officers from Gacharu Police Post helped **PW 2** track the home of the appellant.

PW 1 was taken back to Nairobi, by her mother. She was then taken to the Nairobi Women's Hospital, for medical examination.

Dr. Ketra Muhombe examined **PW 1**. In her report, which was produced in evidence by **PW 4**, the doctor established that **PW 1** was pregnant.

The doctor also noted old tears on the complainant's hymen.

According to the doctor, the complainant had been defiled. She was treated and sent for counseling.

Meanwhile, after the appellant was arrested, the complainant refused to go home with her mother. **PW 1** only agreed to return to her mother's home after she had been locked up in the cells for a couple of days.

During cross-examination, the appellant suggested to the girl's mother that the girl could have been his worker. **PW 2** denied that suggestion.

She also told the appellant that **PW 1** was a child, who had no capacity to understand what the appellant was doing to her. As far as the girl's mother was concerned, the appellant had totally brainwashed the complainant.

PW 2's complaint is that because her daughter was still a toddler, the appellant had breached her innocence.

PW 3, CPL. JAMES NGULA, was based at the Kiangochi Police Patrol base of Muranga Police Station, at the material time.

On 27th January 2010, **PW 2** went to the Patrol Base and informed the police officers present that **PW 1**, who had been reported missing, was within Kiangochi.

PW 2 told the officers that **PW 1** was 13 years old. She then handed over to **PW 3** a note issued to her, when she had reported at the Dandora Police Station, that her daughter was missing.

PW 3 was accompanied by PC Cheptoo when they went to the appellant's house late that night. The officers found the appellant and the complainant sleeping together in one bed.

They arrested the appellant, and on the next day **PW 3** escorted the appellant to Nairobi.

During cross-examination, the appellant asserted that the complainant was his wife. However, **PW 3** explained to him that the law does not allow a man to marry an under-age girl.

It was the explanation of the police officer that a girl of young age, such as the complainant, did not have the intelligence to make some decisions, such as about marriage.

PW 4, DR ADAN RIDHWAAN, produced the medical report that had bee prepared by his colleague, Dr. Ketra Muhombe.

PW 5, DR. ZEPHANIA KAMAU, examined the complainant on 2nd February 2010. He assessed her age as 13 years.

PW 5 also examined the appellant. He found that the appellant had no physical injuries and also that his genitalia was normal.

The appellant was 28 years old, according to the information provided by **PW 5** on the P3 form.

PW 6, PC EVERLYNE KEMUNTO, was at the Dandora Police Pot when the complainant's mother reported that her daughter was missing. **PW 6** informed the police that **PW 1** was 13 years old.

When **PW 2** informed **PW 6** that she had been informed that **PW 1** was traced to a place in

Muranga, the police officer gave to **PW 2** a note which she was to take to the OCS Muranga Police Station, for assistance.

After the appellant was apprehended in Muranga, he was taken to Dandora Police Station where he was held in custody.

After PW 6 testified, the prosecution closed its case.

Thereafter, when the appellant was put to his defence, he gave unsworn testimony.

He said that on the night he was arrested, he was in his house, together with the complainant.

He also said that **PW 1** had first gone to his house in November 2009. His assertion was that **PW 2** had thrown out **PW 1** from their house. It is then that **PW 1** allegedly told the appellant that she wanted to live with him.

After **PW 2** had got **PW 1** from the appellant's home, on the first occasion, the complainant later returned to the appellant of her own volition.

In other words, the appellant did not coerce her or use trickery to get her to come to him: that is the appellant's story.

The appellant also said that when he pleaded with the girl to tell him what her age was, she told him that she was born in 1992.

Having re-evaluated all the evidence on record, it is clear that the appellant confirmed that he had had sexual intercourse with the complainant.

His basic defences were that the complainant had led him to believe that she was born in 1992, and also that it was the complainant who went to live with him after her mother threw her out.

It is instructive that at no time when the appellant was cross-examining **PW 1**, did he suggest to her that she had told him that she was born in 1992.

The first time when the appellant introduced the suggestion that the complainant was born in 1992, was at the tail-end of his defence.

As the issue was never raised with the complainant or with the mother of the complainant, this court can only conclude that that line of defence was an after-thought.

Both the complainant and her mother expressly stated that **PW 1** was 13 years old. **PW 2** backed up that information by a clinic card which showed that the complainant was born on 14th June 1996.

At that stage, if **PW 1** had earlier misled the appellant about her age, it would have been expected that the appellant would have reminded **PW 1** about the said untruth. But he did no such thing.

The evidence also shows that the appellant forced the complainant to have sex with him, on the first occasion. Thereafter, the complainant agreed to have sex with the complainant because she found it hard to return back to her mother, after she had "breached" her trust.

Before the appellant locked up **PW 1** in his house, **PW 1** had not "crossed paths" with her mother. **PW 1** made that clear when the appellant was cross-examining her.

In any event, the offence of defilement is not akin to the offence of rape.

Under **section 3 (1) of the Sexual Offences Act** the offence of Rape is defined as follows;

"A person commits the offence termed rape if –

• He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

• The other person does not consent to the penetration; or

• The consent is obtained by force or by means of threats or intimidation of any kind. "

Pursuant to **sub-section 2 of Section 3,** the term "intentionally and unlawfully" is said to have the meaning assigned to it in **Section 43 of the Act.**

Section 43 (1) of the Sexual Offences Act stipulates as follows;

"An act is intentional and unlawful if it is committed –

• in any coercive circumstances;

• under false pretences or by fraudulent means; or

• in respect of a person who is incapable of appreciating the nature of an act which causes the offence."

In effect the person who commits the offence of rape will have caused the act of penetration with his or her genital organs, intentionally and unlawfully. His victim will have been forced into the act, or will have been intimidated into giving in to the act. In other words, the victim will not have consented to the act.

Alternatively, if the victim had consented to the act, such consent would have been obtained under false pretences or by fraudulent means. An example of false pretence is when a medical practitioner caused the patient to believe that the act was part of the necessary medical treatment, or where a man of the cloth causes a member of his congregation to believe that the act was a part of necessary religious practice.

In a nutshell, the victim of rape would not have given informed consent to the act.

Meanwhile, the offence of **defilement**, as defined in **Section 8 of the Sexual Offences Act** occurs when a person;

"commits an act which causes penetration with a child."

The next question is who a child is. And pursuant to **Section 2 of the Sexual Offences Act,** a child has the meaning assigned thereto in the Children Act.

Under **Section 2 of the Children Act;**
"child means any human being under the age of eighteen years."

Therefore, as soon as the appellant committed an act which causes penetration with the complainant, when she was under the age of 18, he committed the offence of defilement.

As Cpl. James Ngula told the appellant, when he was being cross-examined, the law deems minors to the incapable of making decisions about some matters in life. Two such matters are sexual relations and marriage.

There is a legal presumption that persons below the specified age are unable to make informed decisions about such matters. Therefore, the law comes to their protection.

Effectively, therefore, the offence of defilement could be described as a strict offence. If a person uses his or her genital organs to cause penetration with a minor, he or she is guilty of the offence of defilement unless; as stipulated under **Section 8(5) of the Sexual Offences Act;**

"(a) it is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years."

The appellant appears to have been well aware of that fact, hence his attempt to persuade the trial court that the complainant had misled him to believe that she was born in 1992.

However, it is noteworthy that the appellant did not challenge the testimony of the complainant's mother when she testified that the appellant had been their neighbour for about six (6) years. By necessary implication, therefore, the appellant must have started seeing the complainant from when she was about 7 years old. He ought to have had a very clear picture of the complainant's tender age.

In effect, there is no way that the complainant could have reasonably believed that the complainant was over 18.

If anything, even if his evidence had been accepted, the complainant would still have been only 17 years old.

But, the appellant did not as much as suggest to the complainant that she had made any efforts to persuade him that she was above 18 years of age.

Furthermore, because there was a clinic card which proved the age of the complainant as being 13 years old, I find that the conviction of the appellant was sound. I uphold the said conviction.

And as regards the sentence, I note that the learned trial magistrate handed down the minimum jail term stipulated for a person convicted for defiling a child between the age of 12 and 15 yeas.

Therefore, the sentence is also sustained.

Accordingly, the appeal is dismissed.

Dated, Signed and Delivered at Nairobi, this 15th day of November, 2012.

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FRED A. OCHIENG
JUDGE