REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 178 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 347 of 2008 of the Senior Resident Magistrate's Court at Kaloleni: Andayi W.F. – S.R.M.)

MTAWALI BOMU .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

JUDGEMENT

The Appellant **MTAWALI BOMU**, has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Kaloleni Law Courts. The Appellant faced a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**. The particulars of the offence were that :

"On diverse dates between 1st February 2008 and 1st March 2008 in Kaloleni District within Coast Province, unlawfully and intentionally committed an act which caused penetration of his male genital organ into a female genital organ namely vagina of M.M. a child aged 10years"

The Appellant denied the charge and his trial commenced on 6th March 2009 at which trial the prosecution led by **INSPECTOR NGOMO**, called a total of three (3) witnesses in support of their case. The complainant **M.M** told the court that she was 16 years old. She further testified that in February 2008 the Appellant who was hiring a room nearby called her to his room and told her to remove her panties. The complainant obliged and the two had sexual intercourse. These meetings continued for some time until the complainant's mother **PW2 J.M** noticed that her child was pregnant. She took the complainant to a doctor who confirmed the pregnancy. **PW1** revealed that it was the Appellant who had made her pregnant. The Appellant refused to take responsibility and the matter was reported to Mariakani Police Station. The Appellant was then arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he conceded that the complainant was his girlfriend and that they did engage in several acts of sexual intercourse which ***'by bad luck'*** resulted into her pregnancy. On 24th September 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant for the offence of defilement and thereafter sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

MR. ONSERIO who appeared for the Respondent state did concede to this appeal and having myself perused the record I am inclined to agree with this decision of the State.

Firstly although the Appellant claimed that he and the complainant were involved in a love affair, thus she was an active and a willing participant in their sexual encounters, this cannot amount to a valid defence in a charge of Defilement. A minor has no capacity in law to give informed consent to sexual relations, thus no matter how willing the minor may have been any and all acts of sexual intercourse with persons proved to be below the age of 18 years amount to an offence. Be that as it may there are several other anomalies and contradictions in the prosecution case. The charge sheet lists the age of the complainant as 10 years which brings this offence under the ambit of S. 8(2) of the Sexual Offences Act. However in her own testimony **PW1** says that she is 16 years old in which case S. 8(2) would not be applicable. **PW2** the complainant's mother says that her child is 16 years old having been born in December 1993. The P3 form filled by the doctor **PW3** **ABDULLAH GOBU GARURUMA** gives the complainant's age as 15 years. There is therefore no unanimity regarding the complainant's age. More importantly the age given in the charge sheet (10 years) is not supported by the evidence adduced by the prosecution witnesses. In charges brought under the Sexual Offences Act 2006, the age of the victim is a key and crucial element of the offence. This is because this age will determine what section of the Act will become applicable with regards to sentences. The penalty depends on the age of the victim. In a case where age is unclear then it becomes unclear what sentence is to be imposed. Indeed so important and vital is this issue of age that the prosecution is under an obligation to provide documentary evidence of the age of the child – this can be by way of a birth certificate, vaccination card, or by a school enrolment card or even a school report. None of the above documents were availed in this case. Thus the age of the child whether 10 years, 15 years or 16 years was not conclusively proved. In his judgement at page 2 line 20 the learned trial magistrate stated:

"I am satisfied what she [PW2] said is the truth and that the complainant was born on 22nd December 1993. This means that in February 2008 when the first act of sexual intercourse took place with the accused she was slightly above fifteen years. She was therefore a child. The complainant's age in the charge sheet is indicated as ten years but now that turns out to be incorrect. The investigating officer was not called to give evidence on how he came to that age or whether it was an error of typing. All the same I find the discrepancy to be minor given that the age proved shows that the complainant is still a child"

With respect the learned trial magistrate greatly erred in concluding that the age of the victim is a minor issue – it is actually the crux of the matter in offences under the Sexual Offences Act. Secondly once the trial magistrate found that the age quoted in the charge sheet did not correspond with the evidence adduced then he ought not to have convicted unless this anomaly was corrected by way of an amendment to the charge sheet. If the charge sheet states that the complainant is 10 years then the evidence adduced must support the charge sheet and must prove that the age of the complainant is actually 10 years not 15 or 16 years. As it was the evidence adduced did not support the particulars in the charge sheet. The investigating officer who could have shed light on this discrepancy was not called to testify which is a serious omission by the prosecution.

Aside from this question of age the mental state of the complainant is also a question that remains undetermined. **PW2** in her evidence told the court at page 9 line 4:

"My daughter has a mental disadvantage because I delivered her at five months of age"

This evidence brings into question whether the complainant was taken advantage of by the Appellant on account of her impaired mental state. My own reading of the complainant's evidence is that she appeared lucid, clear and in my opinion had no mental impairment. Infact she readily answered all questions put to her by the Appellant in cross-examination. The learned trial magistrate was also of the same view as he stated in his judgement at page 17 line 29:

"It would appear to me that the accused person took advantage of the complainant's mental status to

pull her into the room and engage with her in sexual intercourse. However the complainant's condition is not obvious from her character because when she gave evidence in court, she did not show any signs that she had any problem"

The question of the complainant's mental state having been raised by **PW2** ought to have been conclusively determined by way of a psychiatric report. This is because the outcome would affect the charge to be preferred. If indeed the complainant was mentally impaired then the Appellant ought properly charged with Rape of a child with mental disability under S. 7 of the Sexual Offences Act. Therefore I find that the police did not conduct conclusive investigations into this matter.

For the above reasons I find that the conviction of the Appellant was not sound and I do hereby quash that conviction. The subsequent ten year sentence is also unlawful as S. 8(2) if proved (which is not the case here) provides for a minimum sentence of life imprisonment. By convicting the Appellant under S. 8(2) then imposing a term lower than the mandatory minimum sentence the trial magistrate misdirected himself. Thus this unlawful ten year sentence cannot stand and I hereby set it aside. Finally this appeal succeeds. The Appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa this 11th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Onserio for State
Appellant in person