REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 14 of 2009

KARISA KILONGO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

****

JUDGEMENT

The Appellant herein **KARISA KILONGO** has filed this appeal against his conviction and sentence before the lower court on a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT No. 3 of 2006**. The particulars of the charge were

"On the 25th day of August 2007 in Kaloleni District within the

Coast Province, unlawfully and intentionally committed an Act which caused penetration to S.K a girl aged 12 years"

The complainant in her evidence told the court that she was living with her uncle who married her off to the Appellant a man whom she did not know. She agreed to go to the Appellant's homestead on the understanding that he would not touch her physically as she was still young. She stayed in the Appellant's home for five days and he did not keep to their bargain but had sexual intercourse with her four times telling her that, it was traditional when one gets married to engage in sexual intercourse. Later on the chief stopped the complainant on her way to the posho mill. He questioned her and upon learning that she was married took her to his office. They later arrested the Appellant and charged him.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn statement in which he denied the charges. On 8th January 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant and after listening to his mitigation sentenced him to serve twenty (20) years imprisonment. It is against this decision that the Appellant now appeals.

This being a court of first appeal I am mindful of my obligation to reconsider and re-evaluate the evidence adduced before the lower court. [See **OKENO –**

VS- REPUBLIC 1971 EALR 32]

The Appellant presented to the court his written submissions in which he raised several grounds of Appeal the key ones being that of

Identification and the other that of Sufficiency of Evidence. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and conceded the appeal. I will first consider the basis or reason for the learned State Counsel's concession of this appeal. Mr. Onserio submitted that since the true age of the complainant was not established the charges could not hold. S. 8(3) of the Sexual Offences Act under which the Appellant was charged provides

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".***

Clearly then this section makes it important to establish the age of the victim. Mr. Onserio submitted that the witnesses gave contradictory evidence regarding the exact age of the complainant and as such this evidence could not be relied upon. With respect I do not agree. It is not necessary to establish the **exact** age of the complainant though this would have been ideal. What needs to be proved is that the complainant fell within the 12 – 15 year age bracket. This in my view has been achieved. The charge sheet gives the complainant's age as 12 years. The complainant says she does not know her date of birth nor her age but states that she is in primary class three (3). **PW2 K M** the complainant's uncle says that he does not know her date of birth but estimates her age to be 13 years. As a court I take judicial notice of the fact that many families in rural

Kenya do not record the birth dates of their children and even fewer have obtained birth certificates for their offspring. Thus it is not uncommon to come across many people who do not know their exact date of birth. However the court also notes that with late school enrolment the average age of a child in class 3 would be 10 – 12 years old. All these are indications that the complainant fell within the 12 –

15 year bracket provided for by S. 8(3). Lastly and most importantly **PW3 BILDAD BAROGE**, a Clinical Officer attached to Mariakani

District Hospital stated of the complainant at page 14 line 14

"I estimated her age to be twelve years"

This is the age which he recorded on her P3 form which was produced as an exhibit **Pexb 1**. This is expert evidence of one who is qualified to give an age assessment of any patient he examines. This evidence therefore holds great weight in establishing the complainant's age.

Lastly I do note the observations made by the learned trial magistrate with regard to this issue of age on page 23 line 5

> ***"There were no documents of her birth registration produced to support her evidence. However, she appeared before the court while giving evidence and I had the opportunity to assess her by her obvious appearance and physical stature and her mannerism while testifying. I am satisfied from my observation that she was <u>way below</u> [my emphasis] eighteen years of age and was therefore a minor"***

These are the observations of the trial magistrate who had the advantage of seeing the complainant and was therefore best placed to comment on her appearance and age. It is my considered opinion that notwithstanding the lack of birth registration documents, and not withstanding the failure of the complainant to know her exact date of birth, there is sufficient evidence provided by the evidence of the doctor who examined her and the P3 form as well as the observation of her physical appearance by the trial magistrate to place the complainant within the 12 - 15 year age bracket envisaged by S. 8(3) of the Sexual Offences Act. Therefore based on my own re-evaluation I am satisfied that the complainant's age fell within this bracket.

The second basis for the concession of this appeal by the learned State Counsel is what he termed the ***'unreliability'*** of the P3 form. The complainant testified that she had been defiled. It would ordinarily be the P3 form that would provide corroboration that such defilement had actually taken place. The complainant was seen by the Clinical Officer **<u>PW3</u>** on 28th September 2007. His evidence was that page 14 line 17

> ***"The hymen was perforated but there was no evidence of penetration of her vagina"***

<u>PW3</u> goes on to state that

> ***"Perforation could occur due to engagement in other physical activities such as games considering the age of the girl if there was penetration, the hymen would be more perforated i.e. it would be torn"***

I do agree that this evidence is inconclusive, contradictory and therefore unreliable. What in effect **PW3** is saying is that the complainant's hymen was not torn. Given that she has testified that the Appellant engaged in sexual intercourse with her four (4) times, I would have expected her hymen to be torn. As such this medical evidence does not corroborate the complainant's evidence that she had been defiled. This is in my view a major contradiction in the prosecution evidence which cannot be overlooked or glossed over. On this basis alone I do find that this appeal succeeds. A conviction based on this kind of contradictory evidence cannot be said to be sound. I therefore quash this conviction. The resultant sentence also has no basis and cannot stand. It is hereby set aside. The Appellant is to be set at liberty forth with unless he is otherwise lawfully held.

Dated and Delivered at

Mombasa this 21st day of June 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

21/06/2010