



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 20 of 2007

HARUN THOYA TAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Harun Thoya Taura, the appellant, was charged in the Senior Resident Magistrate's Court at Kaloleni with the offence of defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code. The particulars of the offence were that the appellant, between the month of April and November 2004, at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] unlawfully and carnally knew **H. I. N.** (hereinafter "the complainant"), a girl aged 12 years, a standard three pupil at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] and impregnated her.

The appellant was arraigned before Andayi, then a Resident Magistrate, later an Ag. Senior Resident Magistrate, on 20th November 2004 and pleaded not guilty to the offence. The prosecution called five (5) witnesses and after hearing their evidence, the court found that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement in which he denied the offence contending that he had been framed by the complainant's mother. Upon analyzing the evidence of both the prosecution and that of the appellant, the Learned Magistrate found the appellant guilty as charged, convicted him and sentenced him to five (5) years imprisonment.

The appellant was not satisfied and has appealed to this court against both conviction and sentence. He has raised several grounds which, in the main, allege that he was convicted on insufficient evidence; that the ingredients of the offence were not established; that there was no corroboration; that the complainant was not proved to have been pregnant and neither was she proved to be a minor and that his defence was not considered. When the appeal came up for hearing, the appellant appeared in person and Mr. Onserio appeared for the State. Having previously filed written submission, the appellant relied upon the same which were an elaboration of the grounds stated above. Mr. Onserio, opposed the appeal contending that, the prosecution adduced evidence which supported the charge and that the complainant's evidence was corroborated although the same was not necessary. Learned counsel further contended that the issue of pregnancy was proved and so was the age of the complainant. Counsel further submitted that the appellant's defence was considered and properly rejected.

This is a first appeal. I am therefore duty bound to re-evaluate and re-consider the evidence which was adduced before the Learned trial Magistrate to reach my own conclusion. In doing so, I bear in mind that I did not hear or see the witnesses testify, an advantage which the Learned trial Magistrate had. (See **Okeno – v – Republic [1972] EA 32**). I am also alive to the established principle that an appeal court

will not ordinarily interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court is shown to have acted on wrong principles in reaching the findings it made. (See **Chemogong – v – Republic [1984] KLR 61**).

The case before the trial court was short and straight forward. **H. I.**, the complainant, stated that she was a pupil of [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] until she was impregnated by the appellant who had lured her with money on several occasions. She narrated to the trial court that she was 13 years of age and before her testimony she had known the appellant who owned a shop at M which shop she frequented and at which they made love frequently. The appellant promised her many things including marriage and training. When the pregnancy started taking a toll on her, her mother, **K.M.** (PW 2) got concerned and on interrogating the complainant she disclosed that the appellant was responsible for the pregnancy. Her mother then interviewed the appellant who initially denied responsibility but later suggested that the pregnancy be terminated, a suggestion which PW 2 rejected. Together, the complainant and her mother, reported to the police at Mariakani Police Station who issued the complainant with a P3 form which was subsequently completed by PW 5, Robert Simiyu, incorrectly recorded as PW 4. The P3 form was filled by Robert Simiyu, a Clinical Officer on 15th December 2004 and it showed that the complainant was six months pregnant. The appellant was subsequently arrested by PW 4, PC Robert Okoth and charged as already stated.

When put to his defence, the appellant in an unsworn testimony stated that he had been framed by the complainant's mother (PW 2) because she was not happy that he had diverted her palm wine customers elsewhere. The trial court considered all that had been placed before it by way of evidence and came to the conclusion that the appellant was guilty as charged.

Having analysed the evidence, I am also satisfied that the appellant was convicted on sound evidence. There can be no doubt that the complainant was aged below 16 years. She told the court that she was aged 13 years at the time of her testimony. The defilement must have been committed when she was about 12 years. Her mother confirmed that testimony and so did the Clinical Officer, PW 5. There was therefore sufficient basis for the finding by the trial Magistrate that the complainant was aged 12 years when she was defiled.

The complainant narrated the sexual relationship she had with the appellant in detail which resulted in her pregnancy. The Learned trial Magistrate believed her and held that the pregnancy was evidence of the defilement as it proved that the complainant had had sexual intercourse. I have found no basis to fault the Learned trial Magistrate's finding.

With regard to the appellant's defence, Learned trial Magistrate exhaustively examined the same and came to the conclusion that the appellant's allegation that he had been framed was far fetched. On my independent evaluation of the same, I too hold that the complainant's mother, PW 2 did not fabricate the case against the appellant because the appellant had diverted her customers. The testimony of the complainant itself excluded that allegation.

In view of the foregoing, I have no alternative but to dismiss this appeal. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2009.

F. AZANGLALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

27TH JULY 2009