REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J.)*

CRIMINAL APPEAL NO.598 OF 2006

BETWEEN

BONIFACE ONYANGO……..…… APPELLANT

-AND-

REPUBLIC ……. RESPONDENT

(An appeal from sentence imposed by Principal Magistrate Mrs. R. Kimingi on 9th October, 2003 in Criminal Case No. 8037 of 2003 at Makadara Law Courts)

JUDGMENT

The appellant was charged with the offence of defilement of a girl, contrary to s.145(1) of the Penal Code (Cap.63). The particulars were that on 26th August, 2002 at Korogocho Village within Nairobi, the appellant had carnal knowledge of ***E M*** a girl under the age of fourteen years.

On 15th April, 2003 this matter came up before Senior Principal Magistrate ***Mr. C.O. Kanyangi***, when the charge was read over and explained to the appellant herein, and he replied: "I admit". After several mentions, the matter came up before Principal Magistrate ***Mrs. Kimingi***; and the appellant herein, clearly in an attempt to persuade the Court not to adjourn on grounds that the Government Chemist's report had not yet been received, stated: "I had admitted the charge that I had carnal knowledge of a girl under 14 years." The learned Principal Magistrate again read out the charge, and explained every element thereof to the appellant herein, in Kiswahili. His response was: "*It is true. I had carnal knowledge of the complainant. I [had] started having carnal knowledge of the complainant [in] May 2002, as she was my girl-friend. I knew where she was staying. She is my neighbour. She was staying with her mother. I had been staying at the place since 2001. I had gone up-country [and, on my return] I found that she and her mother had moved into the place. This was in April, 2002 and we [became] friends [and] started… having sex in May, 2002…*"

The prosecutor then gave the facts of the case. On *26th August, 2002* at about 8.00 p.m., the appellant herein approached the complainant, a girl reported to have been 13 years of age, who then *accompanied him* to his house. The two spent the night together, and the complainant returned to her parent's house on the following day. On 30th August, 2002 the complainant, again, *went* to the appellant's house and spent a night with him, returning to her parent's house on the following day. Subsequently, the complainant's mother came to know of the sexual relationship which had taken place between the complainant and the

appellant herein. The complainant developed pain in her private parts, and her mother's inquiries as to cause, led to the revelation. The complainant told her that the appellant had had sex with her on "at least two occasions." Thereafter the complainant and her mother reported the matter to Ruaraka Police Post; and the appellant was arrested and charged. The complainant was examined by a Police doctor, who then completed the P3 form showing her medical condition. In the medical examination which took place on 17th September, 2002 the complainant was found to have no hymen.

After these facts were read out to the appellant, he admitted them to be true. The learned Principal Magistrate thereafter ruled:

> "***The Court found that the facts as admitted by the accused disclose the offence which the accused is charged with and which the accused has admitted. The Court also found that the accused understands the charge and the particulars thereof. The Court accordingly found the accused guilty on plea as charged and convicts him accordingly."***

The prosecutor asked that the accused be treated as a first offender; and the appellant then made a plea in mitigation, as follows:

> "I am a bicycle repairer. I had bicycles from customers which I kept in a store…I will be 18 years old at the end of this year. I was born on 20th May, 1983."

From the age-information given by the appellant, the prosecutor observed that the appellant was not eighteen, but *twenty* years old.

The learned Principal Magistrate after taking into account the appellant's mitigation statement, the fact that the appellant was a first offender, and the fact that the appellant had pleaded guilty and thus saved the Court's time, sentenced him to a fifteen-year term of imprisonment.

In his appeal which was confined to sentence, the appellant contended that the trial Court had erroneously imposed a harsh sentence without regard to the fact that he was a first offender, and the fact that the relationship prevailing between him and the complainant was that of *boy-friend and girl-friend*. The appellant contended that the trial Magistrate had "erred in law in imposing a harsh and excessive sentence, and in [failing] to appreciate that I am a young man whose life can be ruined by such a [harsh] sentence…" The appellant prayed that the sentence be reduced so as to be "commensurate with the circumstances of the case;" he asked that he be punished with a non-custodial sentence.

The appellant in his oral submission, said he was an orphan bicycle-repairer who carried responsibility for caring for his siblings; and he asked for leniency and for pardon.

Learned counsel *Ms. Gakobo* urged that the trial Court had taken into account the appellant's statement in mitigation, and had imposed a fifteen-year term of imprisonment out of a lawful maximum of life imprisonment. Counsel urged that the sentence awarded was, in the circumstances, not harsh; and besides, it had not been shown that the trial Court had been guided by wrong principles. She urged that sentence be sustained.

At the level of very broad principles I think, counsel's argument could not be said to be on the wrong course: sexual relationship took place, and the appellant generously admitted this; under the law, a sentence of as-much-as life-imprisonment could have been awarded, in a proper case; the trial Court took into account the fact that the appellant was a first-offender, that he pleaded guilty without hesitation, that he made a mitigation address; and the trial Court imposed a fifteen-year term of imprisonment.

However, on a more careful consideration, a different picture, as regards legal correctness, emerges. It is apparent to me that the burden of the appellant's case on appeal is that, though he had, in the terms of the prescriptions of the law, had sex with the complainant, this particular complainant and he, had previously behaved as *girl-friend to boy-friend*, and indeed, the two had been in the *habit* of having sex together, without any complaint arising thereafter.

In the prosecution statement it emerges that on *30th August, 2002* the *complainant* had gone into the appellant's house, and remained overnight withy the appellant at the appellant's abode. On that occasion, it emerges, the complainant and the appellant had sex.

It was the appellant's testimony which may, in the circumstances of this case, be taken to be true, that for several months, between April, 2002 and August, 2002 a friendship had grown between the appellant and the complainant, and they had been having consensual sex continually.

The appellant contends that he had committed no egregious wrong, as the complainant had been a willing partner in the acts of sex that had taken place between them, and which became the basis of the offence with which he was charged. Has this any materiality, in relation to the offence of *defilement?*

The basic principle underlying the prohibitions of the law on defilement is clearly stated in *J.J.R. Collingwood's Criminal Law of East and Central Africa* (London: Sweet & Maxwell, 1967) (at p.123):

> ***"Unlike rape, consent is no defence to a charge of defilement, as the law is concerned to protect the virginity of girls under the prescribed age. A limited statutory defence is, however, provided if the accused can show that he reasonably believed the girl to be of the prescribed age or more."***

S.145(1) of the Penal Code (Cap.63) which had at the material time not yet been repealed, and under which the appellant had been charged, made the prohibition against defilement, but also carried a *proviso,* in the following terms:

> ***"Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the Court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was above the age of sixteen years…."***

Where there is a *plea of guilty*, as was the case in the instant case, an accused – especially an accused not represented by counsel – needs to know of the "defence-proviso" in the law, *at the time of pleading;* otherwise such an accused runs the risk of declaring himself guilty, without understanding that had the matter gone to trial, *he could have an effective defence*. At the time of *pleading*, therefore, the proviso in the prescriptive law is to be brought to the attention of the accused; and failing this, the plea-taking must be held to have been *null.*

This position is supported in *Collingwood* (*op. cit*.), in which work it is thus stated (p.124):

> ***"Where an accused is not represented, the nature of the statutory defence should be explained to him. This explanation should be given to an accused before accepting a plea of guilty, or, in the case of a trial, before putting the accused on his defence. Failure to give this explanation may lead the appellate Court to quash the conviction, except perhaps where the girl is very young and her age well below the prescribed age."***

On the foregoing principles, this Court must ask whether, at the time of plea-taking, the appellant was informed that if he had formed an impression about the apparent age of the complainant, this could serve as a defence to a charge of defilement, in a proper case.

Further still, did the prosecution demonstrate before the Court the *actual age of the complainant*? If not, then there would be no basis for the charge of defilement.

On this point *Collingwood* (*op. cit.*, at p.123) thus states:

> ***"The facts which the prosecution must prove beyond all reasonable doubt are unlawful carnal knowledge and the age of the girl…..Proof of age is vital to a conviction for defilement."***

Collingwood, on the importance of ascertaining the age of a girl-complainant in a defilement

case, sets out a most pertinent paragraph from the judgement of *Francis, J.* in *R v. Mvula* 1 N.R.L.R. 84 (at p.86):

"*The question of age in a charge of this description is of the greatest importance and must be proved, and moreover, proved beyond all reasonable doubt*."

Collingwood **adds** (p.123) that age "*may be proved by production of a birth certificate, or, particularly in the case of Africans, by the evidence of a person present at the birth.*"

As already noted in this Judgement, it is beyond doubt that the appellant and the complainant had already had *consensual sex* on a good number of occasions, prior to the charge which was later brought against the appellant. Therefore, the plea-taking at which the appellant admitted guilt, would be defective and a nullity if, firstly, the complainant's *age* was not conclusively demonstrated before the Court; and secondly, if the complainant was not informed that he would have a valid defence if he could show, on a balance of probabilities, that he reckoned the complainant's age was not less than the prescribed age.

The Medical Report prepared by the Police Surgeon gives 13 years as the *estimated age* of the complainant; and this is the precise age indicated by the Police Officer at Ruaraka Police Post who issued the P3 form for the preparation of the said report. It is quite clear to me that no document is on file which shows the *exact age* of the complainant. That fact, by itself, undermines the very basis of the charge of defilement.

Secondly, it is quite clear from the record that the appellant was not informed at the time of plea-taking, that it would be a defence if he could show he had reasons to believe the complainant to be above the prescribed age.

Thirdly, the record shows clearly that the complainant had *willingly* visited the appellant and had sex with him, for a period running to months. Such conduct between the two, could very well give rise to the supposition that the complainant was under no age- incapacity, in legal terms, for the purpose of such a relationship; *doubts* in this regard, where the appellant had no opportunity to defend, must be resolved in favour of the appellant.

For the reasons set out in this Judgement, I declare the plea taken to have been a nullity, and I hereby acquit the appellant. The appellant shall forthwith be set at liberty, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Gakobo

Appellant in person