REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 82 of 2008

ABDISALAN BURALE ABDI…..……..…. APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from the Judgement of Senior Principal Magistrate Mr. S.M. Kibunja dated 6th March, 2008 in Criminal Case No. 480 of 2007 at Garissa Law Courts)

JUDGEMENT

The applicant was charged with the offence of defilement of a girl contrary to s.8(3) of the Sexual Offences Act, 2006 (Act No.3 of 2006). The particulars were that, between the months of October and November, 2006 at B[PARTICULARS WITHHELD]within Garissa District, in North Eastern Province, the appellant defiled one juvenile, ***HA***, aged 15 years, occasioning her pregnancy.

The appellant faced the alternative charge of fraudulent pretence of marriage contrary to s.170 of the Penal Code (Cap.63, Laws of Kenya). The particulars of this charge were that the appellant, during the month of October, 2006 at Bulla Masalani aforesaid, did lure one ***HA***aged 15 years, into having sexual intercourse, on the promise of marriage, and in the process occasioned her pregnancy.

The learned Magistrate after analysing the evidence, stated the object of the Court, in the trial, as follows:

"**The concern of this Court is not who the father of PW1's child is. The concern is whether the accused had carnal knowledge [of] or sexual intercourse with PW1, and if so, whether PW1 had the capacity to consent to sexual intercourse...By [PW1's] appearance she could not have been more than 15 years [old] as [at]...October 2006, which is the date this Court is concerned with."**

The learned Magistrate came to the conclusion that the prosecution had "proved their case against the accused beyond reasonable doubt", and convicted the appellant herein and sentenced him to a twenty-year term of imprisonment.

Learned counsel ***Mr. Mochache*** urged that no independent witness had been called to give such evidence as could sustain a conviction for defilement. He urged that the complainant's age was not determined; and the complainant herself said she did not know when she was born. Her father (PW2) had, by the complainant's evidence, told her she was 15 years old; but in Court, PW2 said he thought she was 18 years old. The complainant had made no claims about her age until some 6 – 7 months after she became

pregnant. She had had sexual intercourse with the appellant in October, 2006; but *it was only after members of her family found out she was pregnant, in April 2007, that she now divulged he fact of having had sexual intercourse.*

Counsel urged that even though *a* man would have been responsible for the complainant's pregnancy, there was nobody who saw the appellant committing the offence of defilement. The Magistrate relied only on the complainant's evidence; yet the complainant was not, it was urged, a reliable and truthful witness. It was the complainant's account that the appellant had *promised to marry her,* and she had reported the incident *only because* he later said he would not do so. And therefore, counsel urged, there had been *consensual sex.* The only question remaining was whether the complainant was *of age*, to be able to give consent to a sexual relationship. Counsel urged that it should be concluded the complainant was of age – because this was the information given by her father.

Whereas a form had been tendered in Court showing that the appellant was seven months pregnant, there was no like evidence of *age assessment*. No DNA test had been conducted to determine the paternity of the complainant's child.

So the evidence was inadequate to lead to conviction, counsel urged, citing the case of ***Bukenya & Others v. Uganda*** [1972] EA 549, for the proposition that, in a case where the evidence called to prove a charge is inadequate, the Court may infer that *witnesses not called* would have given evidence *adverse to the prosecution's case.* It had been important to produce *scientific evidence* showing sexual relations between the complainant and the appellant to have resulted in the birth of the complainant's child; and age-assessment evidence should have been given in relation to the complainant.

Given the state of the evidence placed before the learned Magistrate, learned counsel urged, the very nature of the judgement was that of *filling the gaps in the prosecution case*. Counsel submitted that the decision was based on wrong principles, and should be set aside, and the appellant acquitted. Counsel urged that the 20-year term of imprisonment was in any case harsh and excessive, even if any merits were to be ascribed to the prosecution case.

Learned respondent's counsel *did not contest* the merits of the appeal – especially on *standard of proof* in relation to the *age* of the complainant, and to the *credibility* of PW1 as a witness. Since the complainant herself said she did not know when she was born, it followed that *age had not featured in the trial* of a case of defilement.

As the merits of the appellant's case emerged prominently from the submissions of *both* counsel, the Court found it appropriate to make orders immediately setting the appellant at liberty; and those orders, now embodied in this reasoned judgement, were set out as follows:

"***I have heard the submissions of counsel on both sides; I have taken these into account; on that basis I will make orders, and give reasons later. These orders are as follows –***

(1) The appeal is allowed; the conviction quashed; the sentence set aside.

(2) The appellant shall forthwith be released, unless otherwise lawfully held.

(3) Reasons for this order shall be given on 17th September, 2008, and learned counsel for the appellant shall on that occasion be in attendance."

Those are the orders of the Court.

DATED and **DELIVERED** at Nairobi this 17th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Mochache

For the Respondent: Mr. Makura