



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 35 OF 2019

REPUBLIC.....APPELLANT

VERSUS

SAMMY NGALA HINZANO..... RESPONDENT

(Appeal from original conviction and sentence in Kaloleni Criminal Case No. 6 of 2017 as presided over by Hon. L. N. Wasige (PM) at Kaloleni Law Courts dated 20th June 2019)

CORAM: Hon. Justice R. Nyakundi

Sombo for the appellant

Respondent in person

JUDGMENT

Background

Sammy Ngala Hinzano, the respondent to this appeal was charged, tried and acquitted for the offence of defilement of a child contrary to Section 8(1) (4) of the Sexual Offences Act.

The brief particulars of the offence were that on 28.1.2017 in Kayafungo Location, Kaloleni – within coast province unlawfully and intentionally committed an act of penetration by use of his male organ namely penis into the female genital organs namely the vagina of **NZW** a child aged 16 years.

At the trial, the prosecution adduced evidence of **PW1**, **NZW** aged 16 years who had dropped out of school prior to the commission of the offence.

According to (**PW1**) testimony the respondent was her husband with whom she started cohabiting together and in the course of their relationship she managed to conceive. That on 15.11.2017 she gave birth however when the mother (**DD**) discovered she could not hear of it but to report the incident to Kaloleni Police Station.

PW3 CPL Mmasea, of Kaloleni Police Station investigated the complaint from **PW2** with regard to the respondent having sexual intercourse with (**PW1**) which resulted in a pregnancy.

In **PW3** evidence the investigations revealed that the complainant engaged in sexual intercourse with the respondent at the age of 16 years old as per the birth certificate. **PW3** testified that he preferred a charge of defilement against the respondent.

PW4 Mwavuo Charo gave evidence that she was informed by the mother of the respondent that the complainant has spent a night at her home in company of the respondent. He further confirmed that the complainant had gone missing from her home and the family was on the look out to trace her whereabouts.

PW5 Bamington Charo the clinical officer attached to Mariakani Sub- County Hospital, testified to the effect that he examined the complainant who came to the hospital with a history of having been defiled by a known person.

On examination, **PW5** confirmed that the complainant (**PW1**) was found to have had her hymen broken with a four (4) week pregnancy. **PW5** presented the **P3 Form as Exhibit 2**. The **outpatient card Exhibit 3** and **Laboratory tests as Exhibit 5**.

PW6 – Mwalimu WS evidence was to confirm that the complainant was his daughter and in terms of the **birth certificate Exhibit 1** her age was 16 years old.

At the close of the prosecution case, the respondent was placed on his defence. He elected to give a sworn testimony where he stated that he met the complainant at Mariakani selling chapatis. He further admitted to have known the complainant for four years and at the time she alleged to have been nineteen years old. The respondent denied that he engaged in sexual intercourse with the complainant. He blamed it all on a grudge between him and the family of the complainant due to her habitual disappearance from home.

The trial court considered all these material evidence by the prosecution and the defence in rebuttal to reach a definitive decision that the defence of presumption of maturity of the complainant be availed in his favour to exonerate him of any criminal liability.

The essence of the Judgment by the court therefore was that the prosecution proved the case beyond reasonable doubt but for the test of age, it meant sufficiently that the element of penetration of a child about eighteen years old would be resolved in favour of the respondent.

As seen from the record above, the test applied by the Learned trial Magistrate was a nature and extent that the complainant presented herself as an adult to the respondent. The value of the surrounding circumstances when the respondent met the complainant working at Mariakani, selling chapatis also rooted in the mind of the respondent that she was far more than a child who cannot engage in sexual intercourse.

The appellant's submissions

It was submitted by the prosecution counsel that the Learned trial Magistrate acquittal of the respondent on grounds by the defence that the complainant at the time of the offence was presumably aged above 18 years old was erroneous and wrong in principle. To the appellant counsel the charge of defilement was proved beyond reasonable doubt against the respondent leaving no room for the Learned trial Magistrate to navigate so as to reasonably acquit the respondent.

According to the Learned prosecution counsel all the elements of defilement stipulated in the Law were proved to be in existence by the six witnesses called in support of the prosecution. It is therefore, her contention that the order of acquittal be reviewed, and set aside for being illegal, and unlawful, occasioning prejudice to the victim and a failure of justice.

Unfortunately, the respondent was never served with the court process and the record of appeal to participate at this trial. Notwithstanding, that position on absence of service, I would proceed to determine this appeal.

Analysis and determination

It is settled that this being a first appeal, the court has a duty to re-evaluate the evidence on record and make its own findings and or conclusions. For this legal position see the principles in **Okeno v R {1972} EA 32, Kiilu & Another v R {2005} IKLR 174.**

At the heart of this appeal is the question whether the Learned trial Magistrate was right in acquitting the respondent for reason that the respondent reasonably believed the complainant to be above 18 years old. The position of the law on exercise of jurisdiction and discretion is of importance at this stage of the proceedings.

In the case of **Bundi Makube v Joseph Onkoba Nyachiro CA No. 8 of 1983 the Court of Appeal** held as follows:

“However, the Court of Appeal will not normally interfere with a finding by the trial court unless it is based on no evidence or on misapprehension of evidence or the Judge is shown to have acted on wrong principles in reaching the findings he did.”

In this case, there is no dispute that the Learned trial Magistrate did not factor the prosecution case upon examination of the entire evidence. It became clear that the complainant had presented herself as a mature girl capable of consenting in her own free will to engage in sexual intercourse with the respondent. Child defilement under the Sexual Offences Act connotes when a male person has sexual intercourse with a girl who is under the age of eighteen years. Based on this definition it is also an act of defilement when a man engages in sexual intercourse with a male child under the age of eighteen years. It is presented in this context that under Section 2 of the Sexual Offences Act, the genital organs as defined includes the anal orifice. The official age of consent of sexual intercourse in Kenya is taken to be eighteen years and above.

It is therefore a complete defence for any person who engages into sexual intercourse with a girl above eighteen years so long as she consents to the sexual act.

The exoneration provision for an accused person in which he may be acquitted of the offence is found under Section 8(5) of the Sexual Offences Act. It follows therefore that it's a defence if proved that such a child deceived the accused person into believing:

(a). That he or she was over the age of 18 years at the time of the alleged commission of the offence and

(b). The accused reasonably believed that the child was over the age of 18 years.

Thus, from the record it is clear the Magistrate concluded that there was sufficient evidence for the respondent to believe the complainant to be of above the age of eighteen years old.

According to the defence in rebuttal to the prosecution case, the respondent alleged that he had asked the complainant about her age and by

her own statement she was 19 years old. Further the appellant found the complainant working at Mariakani selling chapatis, a sign that she was capable of venturing out as an adult.

This approach by the trial court on this issue to me was a crucial point of Law to draw from in determining the entire trial. This is a statutory defence which the respondent took advantage of to discharge the evidential burden of proof against the prosecution case.

In the precincts of the well settled principle in **Ruwala v R {1957} EA 370 and Answar Kipngetich v R CR Appeal No. 141 of 1985**, I have considered the material and evidence before the trial court and the decision subject matter of this appeal. The ultimate question is if the trial court was right in arriving at the conclusion made that the words of the statute given their natural meaning were applicable to the facts of the case to entitle the respondent an acquittal.

I am of the view that drawing inspiration from the principles in (**Okeno** (supra) **Ruwala** (supra), **Kiilu** (supra) authorities there was after all the advantage available to the Learned trial Magistrate to observe the demeanor, physical appearance and general dispositions of the complainant at the time of trial, to determine the held belief by the respondent.

On appeal that fact cannot be overlooked on account that the observations made were sufficient and reasonable cause to inform the Judgment of the trial court.

In the case of **R v Coet Zee {1943} 10 EACA 56** the Court held:

“A man who has carnal knowledge of a young girl whose appearance suggests that she is of or above the age of consent runs a decided risk and it is his business to address his mind to the question of age and assure himself on reasonable grounds that he is not committing a breach of the Law.”

Applying these principles to the facts of the case, in my view the evidence by the defence went far enough in establishing a link, and a connecting factor between the sex act and the cogent reason that the complainant was above the age of eighteen years old.

I consider that there was no mistrial or misdirection on the part of the Learned trial Magistrate to warrant an appeal court to interfere with the Judgment.

The appeal fails and is dismissed. That is the order of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF FEBRUARY 2020.

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R. NYAKUNDI

JUDGE