REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 22 OF 2019

SKM.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in S.O.A. case No. 121 of 2018 of the Chief Magistrate's Court at Busia by Hon. S. O Temu – Principal Magistrate)

JUDGMENT

1. The appellant, SKM, was charged with an offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that in on the 27th October 2018 in **Teso North** Sub County of **Busia** County, intentionally and unlawfully caused his penis to penetrate the vagina of **SC**, a child aged 17 years.

3. He was convicted after trial and sentenced to serve fifteen years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was represented by Mr. Okeyo, learned counsel. He raised six grounds of appeal that I have summarized as follows:

a) That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

b) That the learned trial magistrate erred in law and in fact by failing to appreciate that the complainant presented herself as an adult.

c) That the learned trial magistrate erred in law and in fact by relying on the evidence of the complainant who was drunk.

d) That the learned trial magistrate erred in law and in fact by disregarding the defence of the appellant.

5. The state opposed the appeal through Mr. Gacharia, learned counsel, who contended that the conviction and sentence were proper.

6. The facts of the prosecution case were briefly as follows:

The complainant and the appellant were classmates. On the material day, the two and another person called X imbibed alcohol in the latter's house. Xavier later left the complainant and the appellant. The two had sex. When the complainant went home, she was interrogated and it was established that she was bleeding from her genitalia. She disclosed to the doctor what had transpired.

7. The appellant in his defence denied defiling the complainant. He only contended that he had taken some books to her.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. When evidence was adduced to the effect that the complainant and the appellant were classmates, the first duty for the trial court was to establish the age of the appellant. This is in spite the fact that on the face of the charge sheet, his apparent age is indicated as adult. Unfortunately this was not done. Had this been done, the approach would have been different.

10. There is no doubt that the complainant at the time of the alleged incident was 17 years old and therefore a minor. This is borne out by the

certificate of birth produced. When she testified, she said she was 18 years old. The probation officer's report prepared on 14th June 2019 gave the age of the appellant as 18 years. This would mean that his apparent age at the time of the offence was 17 years. These were two age mates and who were minors at the time of the offence.

11. What is defilement? Section 8 (1) of the Sexual Offences Act defines defilement as an act which causes penetration with a child. It states:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

12. In order for the offence of defilement to be established the prosecution ought to prove the following ingredients beyond any reasonable doubts:

a) Whether there was penetration of the complainant's genitalia;

b) Whether the complainant is a child; and

c) Whether the penetration was by the appellant.

13. This was held Joel Ngugi J. in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR**. He stated:

> **Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.**

14. The answer to the three ingredients of defilement in this case is in the affirmative. However, it was from this point the learned trial magistrate ought to have made further interrogations now that we know both the appellant and the complainants were minors.

15. In my view the correct approach would be to find whether the sexual intercourse was consensual or force was used by the perpetrator. If it is established that it was consensual, then it would be unfair to punish the boy child. The offence of defilement can be perpetrated against a boy as well. Both children ought to be taken through counselling and in my view it would be foolhardy to punish the duo.

16. If the evidence on record on the other hand, though both the girl and the boy are proved to be minors, established that the perpetrator of the defilement complained of used force, coercion or undue influence, then this conduct must be punished. However, the perpetrator would not be treated as an adult in meting out the punishment but as a minor. The proceedings ought to have been conducted as provided for under sections 189 and 191 of the Children Act, 2001.

17. In the instant case, I find that the appellant, Xavier and the complainant herein, took alcohol willingly. This is what S.C (PW1) testified to:

On 27th October 2018 I was from the market going home. I was alone. I had met my cousin X and he asked me to go to his home. We had gone to his house and we had found the accused there and we stayed there [sic]. I had taken the vegetables to our home before we proceeded to X's house. We had drunk at X's house the three of us [sic]. X had left me with the accused [sic]. X had locked the door from outside from 5 p.m. [sic]. The accused had given me more alcohol [sic].

18. In spite of the grammar usage, it is clear that the complainant was not forced or tricked to take alcohol. No reasonable tribunal can impute that the complainant was tricked to take alcohol.

19. The narration of PW1 as to how they ended having sexual intercourse does not disclose that any force was used. Evidence on record disclose consensual sex. In a scenario minor is the victim and an adult is involved, the fact that sex was consensual would be immaterial subject to the known defences. This is because a minor has no capacity to give consent. This is however a different case where both are minors. **S.C (PW1)** on this point testified as follows:

> **He asked me to go to bed. He had removed my skirt and pant and he had removed his clothes. The accused had inserted his penis into my vagina. We had sex and I started to bleed from my vagina as my cervix [sic] was torn.**

20. The complainant wanted to paint a picture that she was tricked into her cousin's house who locked her with the appellant from outside. This is clearly not true. If it was, then she ought to have testified as how she found her way out after her sexual escapade with the appellant. I take note from her evidence that she was not a truthful on this point. This is what she testified:

> **I went home and I had informed my mother while bleeding [sic]. I had walked home. My aunt PC had taken [sic] me to hospital after I had informed her what had happened**.

If the door was locked from outside, she did not tell the court how she managed to get out. From the evidence of PCN (PW2) the aunt of the complainant and GKW (PW4), her mother, we learn that she only disclosed what had happened after she was threatened with a beating.

21. Having found that the sexual liaison between the appellant and the complainant was consensual and having made a finding that both were minors at the time, the conviction of the appellant herein was erroneous. The "offence" which was committed when the appellant was a minor ought not to have been a conviction but a finding of guilt. Secondly he wronged the complainant in equal measure as he was wronged.

I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 18th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE