



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 2 OF 2020**

**BARTON ONGAGI KENYATTA.....APPELLANT**

**-VRS-**

**THE REPUBLIC.....RESPONDENT**

*{Being an Appeal against the Judgement of Hon. A. C. Towett – SRM dated and delivered on the 6<sup>th</sup> day of January 2020 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 616 of 2016}*

**JUDGMENT**

The appellant is serving a term of imprisonment for twenty years for the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the charge against him were that on diverse dates between June 2015 to June 2016 at Bosamaro Masaba location, Nyamira South, Nyamira County he UNLAWFULLY AND INTENTIONALLY CAUSED his genital organ to penetrate the genital organ of AB a child aged fifteen years. The appellant pleaded not guilty to the charge. He was represented by Mr Ogari, Advocate.

The prosecution called five witnesses. The sum total of their evidence which was admitted by the appellant was that he was living with the victim as his wife. The victim’s mother(PW2) testified the victim was sixteen years old and was a form one student when she and the appellant started having sexual relations. She produced a birth certificate showing the victim was born on 31<sup>st</sup> September 2000 (Exhibit 1). It also emerged that at the time of the trial the victim was pregnant with the appellant’s child. Although her mother maintained she was sixteen years old, the victim’s testimony was that at the time she started living with the appellant she was eighteen and that she had told him that much. She referred to the appellant as her husband. The trial Magistrate finding that penetration and identification of the perpetrator were proved and that the birth certificate was conclusive proof of the victim’s age proceeded to find him guilty, convicted him and sentenced him accordingly.

In his defence the appellant admitted that he was living with the complainant but stated that she had told him she was eighteen and was engaged in doing business. He denied knowing she was in school. He further told the court that as at the time of the trial they already had two children and she was still staying at his home.

This appeal is premised on the following grounds:

**“1. That my lord the trial learned magistrate failed both in law and fact when maliciously based the conviction on flawed evidence yet the same was extremely below the standard required by law for the proof of the crime of this nature which makes the sentence meted against upon me to be unsafe and oppressive.**

**2. That my lord, I did not plead guilty to the charge and I firmly maintain the same.**

**3. That my lord the trial learned magistrate further failed both in law and fact when erroneously based on shrouded and incapacitated evidence advice in court by the prosecution witnesses, that the prosecution case was mired with irregularities which lessened its significance.**

**4. That my lord the trial learned magistrate similarly faulted both in law and fact seemingly based the conviction on acrimonious evidence conspired and fabricated by the prosecution side and the complainant sibling behind in that kind of allegation scheme and hatched out by the prosecution.**

**5. That my lord the sentence of 20 years imprisonment was manifestly oppressive and extra-excessive in human given to the fact that was not a complicity of the crime in question.**

**6. That my lord the learned trial magistrate erred both in law and fact when he failed to observe that the medical officer’s**

report disapproved the allegation raised against me falsely when he testified that there was no perpetration or any traces of spermatozoa to connect me to the offence as was alleged.

**7. That my lord the trial learned magistrate erred both in law and fact that when he failed to scrutinize the given evidence that I defiled the falsely alleged complainant without any prior reported to any other authority and what facilitated the allegation of the medically unfruitful allegation now in question.**

**8. That my lord I apply for the count's investigation and the findings over the matter under section 362 and 3 (1-2) of the c.p.c. of the redress.**

**9. That my lord the overall effect is that may this appeal be allowed conviction quashed and the sentence set aside and set me to liberty."**

The appellant who was unrepresented at this appeal canvassed it by way of written submissions to which Mr. Majale for the State responded to orally.

In his submissions the appellant reiterated that the complainant was his wife; that she herself testified that she was eighteen years when they began living together and that the trial Magistrate therefore erred in finding he had committed an offence. He sought to discredit the birth certificate tendered in evidence by stating that it was obtained by PW2 merely for purposes of registering the complainant for the national examination. He contended that the birth certificate was not genuine and stated that thorough investigations ought to have been conducted in regard to the age of the complainant. He alluded to the church records as a source of more reliable evidence on the issue of age. He also submitted that the charge may also have been militated by incitement of the complainant by third parties such as PW3 who seemingly had an interest in him and that the birth certificate was concocted to fix him.

Mr. Majale countered the appellant's submissions and submitted that the six witnesses called by the prosecution gave a detailed and corroborative account. Mr. Majale submitted that evidence was adduced to the effect that the appellant begun living with the complainant in June 2015 and that it was not until July 2016 that her family discovered her whereabouts. Mr. Majale pointed out that it was the complainant's testimony that the appellant had sexual relations with her during that period. He stated that this was corroborated by medical evidence which confirmed that the complainant was pregnant. Counsel contended that the appellant took advantage of the complainant knowing well that she was a school going child. Counsel further submitted and urged this court to find that the certificate of birth produced by PW2 conclusively proved the age of the complainant. He contended that the defence raised by the appellant could not hold because the appellant knew the complainant was in school and should have interrogated her claim that she was eighteen. He invited this court to find that the defence raised did not meet the threshold of **Section 8(5) of the Sexual Offences Act**. He urged that the ingredients of the offence which are age, penetration and identification of the perpetrator were proved beyond reasonable doubt. On the sentence, Counsel drew the attention of this court to the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** but urged it not to interfere with the sentence meted by the trial court. Counsel submitted that the circumstances of this case were peculiar as upon luring the complainant the appellant indoctrinated her into believing that she was his wife. Counsel urged this court to uphold the conviction and the sentence.

As the first appellate court the duty of this court is to reconsider and evaluate the evidence in the trial court and arrive at its own independent conclusion while bearing in mind that it did not benefit from seeing and hearing the witnesses- **see Okeno V Republic [1972] EA 32**.

The appellant readily admits that at all material times he lived with the complainant and had sexual relations with her. In his own words they even got two children and for all intents and purposes she is his wife and she continues to live in his home as such. **The issues for determination therefore are the age of the complainant and whether the defence raised by the appellant avails to him.**

The certificate of birth tendered by the mother of the complainant states that she was born on 31<sup>st</sup> September 2000. The offence is alleged to have been committed on diverse dates between June 2015 and June 2016 meaning that if the date on the certificate is correct she was fifteen years at the time this offence is alleged to have been committed. The appellant disputes the contents of the certificate on the ground that it was obtained for purposes of registering the complainant for the national examination. His contention is that the trial court and this court should find the complainant was eighteen when he started living with her. I have considered this issue carefully and my finding is that the evidence of PW2 and the certificate of birth are the best evidence of the complainant's age. Firstly, Pw2 being the complainant's mother is the witness best suited to know when she was born. Secondly, the certificate being a public document its contents are governed by **Section 83 of the Evidence Act** which states: -

**"83 (1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—**

**(a) declared by law to be admissible as evidence of any particular fact; and**

**(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and**

**(c) purporting to be duly certified by a public officer.**

**(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document."**

The certificate itself bears on its face a notice to the effect that: -

**“This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Director of Civil Registration shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.”**

There is therefore a presumption under the law that the certificate is a valid document and that the dates and facts therein are correct. Other than stating that the certificate was obtained for purposes of registering the complainant for the exams, the appellant does not give any other reason for questioning its validity. It is my finding that the reason advanced by the appellant is not of itself sufficient to dislodge the presumption of validity as provided in **Section 83**. This is even more so given that it was obtained long before the commission of this offence and not for purposes of this case. It is my finding that in the absence of evidence to the contrary, then this court is enjoined to make a finding that the certificate is valid and correctly reflects the age of the complainant. It is instructive that the medical officer who examined her also approximated her to be sixteen. Her apparent age therefore matches with the date of birth in the certificate. In the premises I find that it was proved beyond reasonable doubt that she was fifteen years when the appellant started living with her although she denies it.

The next issue is whether the appellant’s defence that she deceived him into believing she was eighteen avails.

**Section 8(5) of the Sexual Offences Act** makes it a defence if the child deceived the accused person into believing she was over the age of eighteen and the accused reasonably believed that to be the case. However, **Section 8(5)** contains a proviso. The same states-

**“(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”**

The effect of this proviso is that it is not enough for the accused person to allege that he was deceived and that he reasonably believed the child was over the age of eighteen. The defence is to be considered based on the circumstances and any steps the accused person took to ascertain the information given to him by the child. In this case there was evidence that the appellant knew the family of the complainant. As a matter of fact, the complainant’s mother had confronted him when she learnt of the affair between him and her daughter. He was also their Pastor. It is clear from the evidence that he went ahead and started living with her despite being notified she was still a child. Had he taken steps to ascertain her age, which he should have done given the confrontation with PW2, then he would have discovered she was a child incapable of consenting to a sexual relationship. It is my finding that given the circumstances the defence mounted by the appellant does not avail and the trial court did not err in convicting him. I am also satisfied that the sentence imposed was just in the circumstances. The appeal has no merit and it is dismissed in its entirety.

**Signed, dated and delivered in Nyamira this 16<sup>th</sup> day of July 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement delivered virtually via Microsoft Teams**