REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 17 OF 2019

MGELE TSUMA NYAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Maundu, Senior Principal Magistrate,

delivered on 15th November, 2016 in Kwale Chief Magistrate's Court Criminal Case No. 273 of 2013).

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(3) (sic) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between the month of December, 2011 and February, 2013 at [Particulars withheld] village in Kwale County in Coast Region, intentionally caused his penis to penetrate the vagina of FRM [name withheld] a child aged 16 years.

2. The Prosecution called 5 witnesses in support of its case. The Trial Court convicted the appellant in accordance with the provisions of Section 8(4) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment.

3. He was dissatisfied with the decision of the Trial Court and on 28th January, 2018 he filed a petition and grounds of appeal. He amended the grounds of appeal on 11th December, 2019, with leave of the court. The issues raised in his amended grounds of appeal are that the charge leveled against him did not disclose any offence known in law, that the Trial Court should have considered that the complainant (PW1) acted like an adult and her evidence should not have been put into consideration.

4. The appellant also raised the issue that the source of his arrest was not established and that his defence was not considered, yet it was reliable. He challenged the sentence of 15 years imprisonment, which is the minimum sentence under Section 8(4) of the Sexual Offences Act.

5. In his written submissions, the appellant stated that the charge leveled against him was defective as it did not contain the word *"unlawfully"* as the particulars of the charge partly read that he *"intentionally caused his penis to penetrate the vagina of ……."*. The appellant asserted that the charge did not contain proper information of the particulars of the offence, as required by law. In so submitting, he referred to the provisions of Section 134 of the Criminal Procedure Code. He submitted that because of the defect in the charge, the conviction against him should be quashed and the sentence set aside.

6. The appellant stated that his relationship with PW1 was not a secret affair because she had lived with him for 2 years. He also stated that her parents had agreed to receive dowry from him. The appellant was of the view that PW1's parents should have been arrested and charged as well, for allowing their daughter to be sexually abused.

7. The appellant submitted that PW1 behaved like an adult and that was the reason why he agreed to become her husband. He also stated that she escaped from her home and went to live with him. He relied on the provisions of Section 8(5) of the Sexual Offences Act, which state that it is a defence to a charge of defilement if it is proved that a child deceived an accused person into believing that she was over 18 years old at the time of the alleged commission of the offence; and that the accused person reasonably believed that the child was above the age of eighteen years.

8. He stated that his source of arrest was not established as the people who arrested him were not called to testify. He relied on the case of **John Kenga v Republic**, Criminal Appeal No. 1226 of 1984, where the appellant was acquitted due to the failure by the prosecution to avail the persons who had arrested him.

9. The appellant herein contended that his mitigation was never considered and that he was sentenced to 15 years imprisonment which is the minimum sentence under the provisions of Section 8(4) of the Sexual Offences Act. He stated that the said Section uses the term *"is liable to"*, which gives a Judicial Officer discretion in the exercise his powers in sentencing. He cited the decisions in **Kichanjele s/o N. Damungu v Republic** [1941] 8 EACA 64 and **Opoya v Uganda** [1967] EA at p. 754, to show that the court can impose a lesser sentence than that provided for, where the term *"is liable to"* has been used in penal laws.

10. The appellant pointed out that a child was born out of his relationship with PW1 and prayed for his appeal to be allowed so that he can take care of the said child. He relied on the case of **Hamisi Masudi Gambere v Republic** [2019] eKLR, where the Judge reduced a sentence of 15 years imprisonment to 11 years, in circumstances where the appellant therein, had sired a child with the complainant. The appellant submitted that in the said case, the Judge reduced the sentence to enable the appellant to serve time and return to society to take care of his child.

11. The Office of the Director of Public Prosecutions (ODPP) through Ms Mwangeka, Prosecution Counsel, filed written submissions on 12th February, 2020. She submitted that for a charge to be deemed as fatally defective, the court has to consider if the charge as drafted discloses in sufficient detail a statement of the specific offence or offences which the accused person was charged with, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. She also said that the evidence adduced at trial must support the charge as laid out. It was submitted that the defect in the charge was curable under Section 382 of the Criminal Procedure Code.

12. On the issue of PW1 having behaved like an adult, Ms Mwangeka stated that she was 16 years old and was a school going child. It was stated that PW1 lived with the appellant against her mother's wishes. It was submitted that the appellant never claimed that PW1 deceived him into believing that she was an adult.

13. The Prosecution Counsel indicated that as a result of the cohabitation between PW1 and the appellant, the former conceived. The child born out of the union was confirmed through DNA to have been sired by the appellant.

14. Ms Mwangeka submitted that the evidence against the appellant was overwhelming and that he was properly convicted. It was submitted that the sentence of 15 years imprisonment was neither harsh nor excessive as it is the minimum sentence under the provisions of Section 8(4) of the Sexual Offences Act. She prayed for the appeal to be dismissed.

15. In his response to the submissions made by Ms Mwangeka, the appellant reiterated that the sentence a court can impose under Section 8(4) of the Sexual Offences Act is discretionary. He cited the case of **Evans Wanjala Wanyonyi v Republic** [2019] eKLR where a sentence of 20 years imprisonment was reduced to 10 years, in a case where the complainant was 14 years old. He also relied on the case of **Mwandaza Jonda v Republic** High Court Criminal Appeal No. 142 of 2018 (Mombasa), where the sentence of 20 years was reduced to 10 years imprisonment, where the complainant was 15 years old.

16. The appellant cited the provisions of Section 333(2) of the Criminal Procedure Code and prayed for this court to take into account the period he spent in remand during the hearing of his case and before he was sentenced by the lower court.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT.

17. The evidence adduced before the lower court was by the victim FRM [name withheld], who testified as PW1. She was a 17 year old class 8 school drop- out. She stated that she knew the appellant and that she had lived with him as his wife for a period of 2 years. She indicated that during the said period of time, they had sex. She testified that the police arrested them and she was medically examined. She was issued with a P3 form. She stated that she was born on 16th December, 1997 and had a birth certificate to support the said fact. She further stated that she was 6 months pregnant at the time she was testifying in the lower court and that the appellant had admitted that he was the father of her unborn child. It was her evidence that for 2 years, her parents knew where she was but they never went for her.

18. PW2 was Cornelius Machage, a Clinical Officer at Kwale District Hospital. His evidence was that he examined PW1 on 23rd February, 2013 and found that she was about 12 weeks pregnant. He further stated that the appellant was also examined and found to have some infections. He produced the P3 forms for PW1 and the appellant and the prescriptions he issued them with, for medicine.

19. PW3, MP [name withheld], was PW1's mother. She testified that in the year 2011 as PW1 was waiting for her exam results, she disappeared from home. After some time, the appellant's parents went to alert her that PW1 was with the appellant and that he had married her.

20. It was PW3's evidence that she sent her sons to go for PW1 and they took her back home but after a month, she went back to the appellant. PW3 again sent for PW1 but after the exam results were out, she went back to the appellant. PW3 stated that the matter was reported to Tiribe Police Station, which led to both PW1 and the appellant being arrested. On PW1 being medically examined, she was found to be 3 months pregnant and she later gave birth. PW3 stated that PW1 was 16 years old at the time the offence was committed.

21. No. 50942, Acting Inspector George Maina of Kwale Police Station was the Investigating Officer in this case. He stated that on 22nd February, 2013 the appellant was taken to the said police station by Administration Police Officers from Tiribe. He was in the company of PW1 and her mother. PW4 recorded a statement from PW1 who explained that she became friends with the appellant in August, 2011. He further stated that PW3's statement was also recorded and it indicated the appellant eloped with PW1 after she completed class 8 and she was traced to his place at Mavumoni village.

22. The Investigating Officer indicated that PW1 was 16 years old and on being medically examined she was found to be 3 months pregnant. He produced her birth certificate which showed that she was born in the year 1997.

23. On 29th February, 2016 George Lawrence Guddah (sic) testified and produced the Government Analyst Report on the paternity of the child borne by PW1. The Trial Magistrate by then, C.M. Maundu, SPM, later realized that the prosecution had closed its case on 4th February, 2014 when the case was being heard by Hon. E.K. Usui, Ag. SPM. The appellant then absconded from court and the case was not heard for about 1 year and 8 months.

24. On 9th October, 2015 after the appellant was arrested and arraigned in court, Hon. C.M. Maundu, SPM, explained to the appellant his rights under the provisions of Section 200 of the Criminal Procedure Code. The appellant indicated that he wanted his case to proceed from where it had stopped. The prosecutor informed the court that the remaining witnesses were the doctor and the Investigating Officer. The prosecution thereafter indicated it had 2 more witnesses to call. He applied for a DNA examination to be done on the appellant and the child borne by PW1. When Hon. C.M. Maundu SPM, realized that the prosecution had closed its case before he took over the hearing of the case, he expunged the evidence of PW5 from record as the prosecution never applied to reopen its case before the evidence of the Government Analyst was taken.

25. The appellant gave unsworn evidence and stated that he met PW1 on 2nd December, 2011 when she was hawking mandazi and beans and he *"tuned"* her and she agreed. He went to his home with her. He stated that the following day he sent his 2 uncles to PW1's parents where they talked and agreed (sic). They were given a date to go and pay dowry. The appellant further stated that before the date they had agreed on, PW3 telephoned and told him not to take dowry as she had differed with her brother-in-law over the dowry. The appellant indicated that on that date, PW1's uncle went for PW1 and took her to their home but PW3 refused to take her back and asked her uncle to stay with her. That she did so for 1 month but her other uncle took her to him and asked him to stay with his wife and that he would talk with his brother about the dowry.

26. The appellant stated that he lived with his wife from December, 2011 to 2013 when police officers went and asked him why he had married a little girl. He further said that he and PW1 were taken to Tiribe Police Post and then to Kwale Police Station, where they were locked in the cells. They were then taken to Kwale District Hospital the following day and PW1 was found to be 3 months pregnant.

27. The appellant, called Mohamed Chiti Jeffa as his witness. He stated that when the appellant married a school going girl, her parents went to him as the head of the family. He told them that they should talk but they said they wanted their child to go back to school. He stated that PW1 went back to her parents but refused to go back to school. That PW1's uncle told her to look for bride price but he had difficulties raising the dowry. That when he delayed, the brother to PW1 took the police and arrested the appellant. That they said that he had lied to them because they had taken about 1 year to take dowry.

28. The issues for determination are:-

(i) If the appellant defiled PW1;

(ii) If the charge was defective;

(iii) If the failure to call the persons who arrested the appellant weakened the case for the prosecution;

(iv) If the appellant's defence was considered; and

(v) If the sentence meted out to the appellant is harsh or excessive.

If the appellant defiled PW 1.

29. PW1 had just finished her KCPE and was waiting for her exam results when the appellant approached her and took her to his house. According to PW1 and the appellant, they started living together as wife and husband, respectively. There is no doubt that the 2 engaged in sexual intercourse as a result of which PW1 became pregnant and a child was born out of the relationship. The evidence on record discloses that PW1 was a minor aged 16 years. The P3 form for the appellant indicates that at the time he was examined at Kwale District Hospital, his approximate age was 28 years as reflected on Section C of the said form. On the same day, PW1 was examined and her hymen was found to be absent. PW2's evidence was that laboratory results confirmed that PW1 was pregnant. PW2 stated that the age of the pregnancy was 3 months.

30. PW3 said it was against her wish for her daughter (PW1) to cohabit with the appellant. The birth certificate produced showed that she was born on 16th December, 1997. The Investigating Officer stated that PW1 reported that she started having sex with the appellant in August, 2011. The appellant said he started cohabitating with PW1 in December, 2011. The two lived together up to February, 2013 when he was arrested. At that time PW1 was 17 years old. She was therefore a minor and had no capacity to give consent for sexual intercourse to take place with the appellant.

31. The offence of defilement was proved beyond reasonable doubt by the evidence of PW1 and PW3. Their evidence was corroborated by the medical evidence adduced by PW2, the Clinical Officer. PW1 was 12 weeks pregnant at the time she was medically examined by PW2 on 23rd February, 2013. The said pregnancy was as a result of defilement. The appellant admitted in his defence that he lived with PW1 for 2 years and he regarded her as his wife. The appellant at 28 years of age was an adult and should have known better than to approach a minor for a sexual relationship. The law does not recognize that he was married to PW1. Since she was a minor, she did not have capacity to enter into marriage with the appellant and any sexual intercourse that took place between them amounted to defilement.

32. It is this court's finding that the submission made by the appellant with regard to the provisions of Section 8(5) of the Sexual Offences Act is not applicable in this case as he did not raise it before the Trial Court. His statement that PW1 was his wife does not satisfy the criteria set out in the said provisions of the law.

If the charge was defective.

33. The appellant claimed that the charge against him was defective due to the omission the word *"unlawfully"* in the particulars of the charge. Although the said word was omitted from the charge, the act of him having sex with a minor could not have been a lawful act.

34. In the case of **Bernard Ombuna v Republic** [2019] eKLR, the court stated thus on the issue of a defective charge:-

> ***"In a nutshell, the test of whether a charge sheet is defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

35. The appellant in this case knew that he was arrested for marrying a young girl who had not reached adulthood. He said as much in his defence. As the trial begun in the lower court, he well understood the charge which he was facing. The charge was read out to him in a language he understood and he was given an opportunity to cross-examine witnesses. When put on his defence, the appellant gave a lengthy defence and he called a witness. His witness said that the appellant married an underage girl.

36. It is this court's finding that the omission of the words *"unlawfully"* from the particulars of the charge in no way prejudiced the appellant. The said omission was curable under the provisions of Section 382 of the Criminal Procedure Code.

If the failure to call the persons who arrested the appellant weakened the case for the prosecution.

37. The appellant raised the issue that the persons who arrested him did not testify. The nature of the evidence on record did not require the Administration Police Officers who arrested him to be called as witnesses to testify. It was clear that the appellant was cohabitating with a minor and he admitted it in his defence. The persons who arrested him would have given no value addition to the case for the prosecution. I hold that it was not necessary for them to testify. Further, the provisions of Section 143 of the Evidence Act provides that no particular number of witnesses shall be required to prove a particular fact, unless otherwise provided by law.

If the appellant's defence was considered.

38. The appellant submitted that his defence was not considered. This court's finding is that the Trial Court considered the appellant's defence and stated as follows:-

> *"The accused person did not claim that the complainant deceived him into believing that she was over 18 years. Secondly, he did not allege that he believed that she was over 18 years old."*

39. It is apparent from the above that the appellant's defence was taken into account but rightly rejected. His claim that PW1's mother supported the relationship was contradicted by his witness.

If the sentence meted out to the appellant is harsh or excessive.

40. In considering if the sentence imposed on the appellant can be said to be either harsh or excessive, the appellant in his submissions said he wanted to be released so that he could go home and take care of his child. In his defence he said that PW1 got married elsewhere. It cannot therefore be said that she is waiting by the wings for him to be released from custody so that he can take care of his child. As at the time PW3 testified in court, she said PW1's child who was 3 months old then was living with her. This court's view is that the child born out of PW1's relationship with the appellant has been in good hands since the year 2013. His defence that he needs to take care of his child is immaterial to this court as the birth of a child is not always the logical consequence of each case of defilement. The appellant will have the opportunity to see his child if he so wishes, after serving sentence. He was a 28 year old man and should have kept off PW1 who was only 14 years old at the time he approached her and started having a sexual relationship with her.

41. The appellant was sentenced to 15 years imprisonment which is the minimum sentence under the provisions of Section 8(4) of the Sexual Offences Act. The evidence is clear that when he started living with PW1, she was 14 years old as it was on 2nd December, 2011 and her date of birth was 16th December, 1997. PW1 stated that she started having sex with the appellant in August, 2011 before she went to live with him. The appellant therefore defiled PW1 for a period of 2 years and 2 months. This court holds that the punishment meted out to him was commensurate with the number of years he lived with PW1 and defiled her.

42. It is this court's finding that the sentence of 15 years imprisonment is neither harsh nor excessive. The appellant was released on cash bail in the lower court before he absconded from court. His cash bail was forfeited to the state after he was arrested slightly more than 1 year after he absconded. His bail was then cancelled. The appellant was therefore not in remand throughout the hearing of the lower court case. This court notes that he brought the cancellation of his bail upon himself. In the said circumstances, his sentence shall be effective from 15th November, 2016 when he was sentenced by the lower court. The appeal herein is dismissed in its entirety.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of July, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi for the DPP

Ms. Peris Maina - Court Assistant