



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 43 OF 2018

MUSYA MBAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Principal Magistrate's Court Sexual Offence Case (S.O.A) No. 9 of 2016 by Hon. S. K. Ngii (SRM) on 18/5/17)

J U D G M E N T

1. Musya Mbai, the Appellant was arraigned before court having been charged with the offence of **defilement** and an alternative charge of committing an **indecent act** with a child. Having been taken through full trial, he was convicted of the main count and sentenced to **fifteen (15) years** imprisonment.

2. Aggrieved, he appealed on the grounds that; the charge sheet was defective; the trial magistrate erroneously applied the provisions of **Section 8(5)** of the **Sexual Offences Act** and the onus of proof was shifted to the defendant.

3. Facts of the case were that the complainant and the Appellant had consensual sex in her brother's house. As a result she conceived in **February, 2015**. When she informed him he gave her drugs to swallow so as to get rid of the foetus. She swallowed the medicine and developed complications. She was rushed to hospital and the abortion was successful. In **July, 2015**, she conceived and notified the Appellant who advised that she aborts. She was delivered of the child but the Appellant refused to take up parental responsibilities but promised to marry her. She reported the matter to the police who arrested and charged the Appellant.

4. When put on his defence the Appellant stated that the complainant is his wife having married her and they have a child. That during courtship she told him that she was an adult and when he sent an elder to her parents they neither objected nor claimed that she was underage.

5. The Appellant canvassed the appeal by way of written submissions. He urged that the complainant consented to the act of sexual intercourse. That he made efforts of making their relationship legal and they were only having problems that any married people would have. He cited the case of *Karisa Katana Ngoma vs Republic Criminal Appeal. No. 12 of 2014* where it was stated that ;-

“Where the victim has taken herself to the accused house to have sex with him her conduct cannot amount to that of someone who was lured into sex. The purposes of the law of defilement is to assist those who fall victims of the defilement by people who take advantage of the victim. It is not the intention of the law to punish the accused who engage in sex with young people who behave like adults. This conduct anticipated by the law of the defilement under section 8(5)”.

6. Secondly, he contended that he put up a strong defence which the prosecution should have rebutted by either calling the parents of the complainant or his parents. He prayed to be allowed to reunite with his wife.

7. In response, the State through learned Prosecuting Counsel, **Mr Mamba** opposed the appeal. He urged that when the charge was read to the Appellant he did not raise the issue of the charge sheet having been defective. That the Appellant did not raise the defence under **Section 8(5)** of the **Act** but the trial magistrate simply used it to warn himself of that fact before reaching his verdict and the onus of proof was not shifted to the Appellant as he testified and adduced in evidence her birth certificate and the fact of engaging in sexual intercourse.

8. This being the first Appellate court, I am duty bound to re-valuate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (see *Okeno -vs- Republic [973] E.A. 32*).

9. It is contended that the charge was defective. A charge can only be fatally defective if it does not allege essential ingredient (s) of the

offence (see *Sigilani v Republic [2004] KLR*). The accused herein was charged with defilement contrary to **Section 8(1)** as read with **8(4)** of the **Sexual Offences Act**. Particulars of the offence were that on diverse dates between the year **2013** the month of **March, 2016** at **[particulars withheld]** in **Mutomo location**, in **Mutomo Sub County** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **FM** a girl **aged 17 years**.

10. This was an offence known in law. The particulars of the offence as captured disclosed in an unambiguous manner the act that the appellant did which enabled him prepare for his defence. He cross-examined witnesses who testified and adduced evidence in his defence. In the premises the charge was not defective.

11. To prove the charge the prosecution was required to prove -

- i. Age of the complainant;
- ii. The act of penetration;
- iii. The perpetrator of the act.

12. It is not denied that there was a consensual sexual activity between the Appellant and the complainant and a child was sired out of the relationship.

13. To prove the age of the complainant the prosecution adduced in evidence a birth certificate **Serial No. [particulars withheld]**. She was born on the **17/7/1998** therefore at the time of engaging in the act stated as between **2013** and **2016** she was a minor. In her testimony the complainant stated that she used to meet the Appellant and have sex with him in **2014** and it was in **2015** that she conceived. In **2014** she was **sixteen (16) years** old. In his defence the Appellant alleged that when he married the complainant her parents did not claim that she was under age. He alleged further that when they met the complainant told him that she was an adult. The trial magistrate interpreted the assertion to mean that the complainant deceived the appellant into believing that she was an adult. The trial magistrate is faulted to have applied the provisions of **Section 8(5)** of the **Act** in that regard which provides thus:-

“It is a defence to a charge under this section if—

a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen 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 eighteen years.

14. It was alleged by the Appellant that the complainant told him that she was an adult. In her testimony the complainant stated that she joined **St. [particulars withheld]’s Secondary School in form one (1)** in **2015**. This meant that when they started engaging in coitus she was in primary school. Her evidence was not controverted by the accused when he cross examined her. He did not attempt to suggest to her that she deceived him. Indeed the evidential burden was upon him to prove that he reasonably believed that the complainant was an adult. He claimed that they cohabited after their families agreed but these remained mere allegations. There was no evidence whatsoever that the Appellant took any steps to determine the age of the complainant therefore such a defence was not available to him. Therefore the trial magistrate did not fall into error in rejecting the defence of deception. And, the complainant herein having been a minor was legally, incapable of consenting to the act of sexual intercourse.

15. The sentence imposed was the minimum prescribed sentence for the offence.

16. In the premises the appeal is devoid of merit. The **conviction** of the trial court is affirmed and so is the **sentence**. Therefore the **appeal** is **dismissed** in its entirety.

DATED, SIGNED and DELIVERED at KITUI this 9TH day of JANUARY, 2019.

L. N. MUTENDE

JUDGE