



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT LODWAR
CRIMINAL APPEAL NO. 9 OF 2018

JOSEPH BARAZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 19 of 2017

by the Senior Resident Magistrate - Hon. M.K. Mwangi

delivered on 22nd March, 2018 at Lodwar)

JUDGEMENT

- 1.** The Appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 5th day of December 2016 in Turkana Central Sub-county within Turkana County intentionally caused his penis to penetrate the vagina of **PA** a child aged seventeen (17) years.
- 2.** He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 5th day of December 2016 in Turkana Central Sub-county within Turkana County intentionally touched the vagina and breasts of **PA** a child aged seventeen (17) years.
- 3.** He was tried, convicted and sentenced to serve fifteen (15) years. Being dissatisfied with the conviction and sentence, he lodged this appeal and raised the following summarized grounds of appeal:-
 - a) The charge sheet was defective.*
 - b) The trial court did not take into account the fact that the complainant was his wife.*
 - c) The prosecution case was not proved beyond reasonable doubt.*
- 4.** When the appeal came up for hearing before me the Appellant who was not represented filed handwritten submissions which he relied upon while the Respondent through Mr. Mongare opposed the appeal and supported the conviction of the Appellant.

SUBMISSIONS

5. It was submitted by the Appellant that the parents of the complainant had voluntarily handed the same to him in marriage and that the complaint was only lodged due to his delay in paying dowry. It was submitted that there was no evidence tendered to prove that the complainant was school going. It was submitted that the offence of defilement was not proved by the prosecution and that the age of the complainant which is an essential element of the offence was not proved.

6. On behalf of the prosecution it was submitted that there was no defect in the charge sheet and that by stating that the complainant was his wife the Appellant admitted the act of defilement and therefore the case was proved beyond reasonable doubt.

7. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

PROCEEDINGS

8. The prosecution case as per the evidence on record is that **PW1 PA** aged seventeen (17) years at the time stated that the Appellant was her husband who married her in the year 2016. It was her evidence that she did not report to the police and that it is her father who reported. She confirmed that she was pregnant. She confirmed that the Appellant did not have sex with her by force as it was consensual. **PW2 GL** her father confirmed that he knew the Appellant who was a son of his tenant. It was his evidence that he wanted the Appellant to pay him and costs of his child who was in school. It was his evidence that he became aware of the complainant’s pregnancy when he received text message from her brother telling her to do an abortion.

9. **PW3 ANDREW EMORIA LOKONG** a clinical officer produced P3 form on behalf of **DR. BENARD KEMBOI** where the age of the complainant was assessed as sixteen (16) years. At the time of examination pregnancy was at thirteen (13) weeks. **PW4 PC PATRICK NYAOKE** testified that on behalf of the Investigating Officer and stated that the complainant reported to police and confirmed that on 5/12/2008 the Appellant took her to his house and defiled her repeatedly. She then went home and reported to her parents leading to the arrest of the Appellant.

10. When put on his defence the Appellant stated that in May 2016 he married the complainant and agreed to pay dowry of which he paid Kshs.20,000/= leaving a balance thereof. He further paid Kshs.10,000/= on 8/11/2016. Since he had not paid the balance on 8/2/2017 he was arrested and subsequently charged.

ANALYSIS AND DETERMINATION

11. This is yet another case where the court is called upon to make a determination in respect of sexual offence committed by two young people who at the back of their mind do not see that their action is outlawed by virtue of Sexual Offence Act which provides that a minor has no capacity to consent to a sexual act. The complainant was sixteen (16) years old at the time when they started engaging in outlawed sexual activity and 17.2 years at the time of trial. The age of the Appellant was not determined by the trial court but it is clear that both the Appellant and **PW2** believed that they were married and according to the Appellant’s defence at the trial this marriage was recognized by **PW2** the complainant’s father save that the Appellant did not fulfill his promises to pay full dowry.

12. PW2 in his evidence in chief had this to say:-

“I have not received anything in compensation from the accused since he was in remand. I wanted him to give me message by paying the costs he should pay me and costs my child was in school.” (sic).

I have always spoken to the complainant who says to have met and had sex with accused since September 2016. I am the one whom made a report.”

13. This to my mind corroborated the Appellant’s evidence in material particular and thereby bringing the Appellant’s defence under the provisions of **Section 8 (5) and (6) of the Sexual Offences Act number 3 of 2006** which provides as follows:-

“8(5) 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.

(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.”

14. Whereas in this matter the issue of age of the complainant was not in dispute the court did not determine whether in regarding themselves as husband and wife the Appellant and the complainant reasonably believed that they were adults.

15. This court has had an opportunity to wrestle with the issue of sexual offences involving minors in the case of **CMK v REPUBLIC CRIMINAL APPEAL NO. 27 OF 2013** Kisii reported in [2015] eKLR thus:-

“21. The Appellant has raised an issue which is very fundamental that is to say that both the subject and the Appellant were minors and therefore when an act has been outlawed by an operation of the law and has been engaged into consensually by the parties who ought to be punished for the same?

22. From the evidence of PW1 it is clear that she considered the Appellant her boyfriend and that before the material day she had gone to the Appellant’s house twice and had sex but she used to go back home. She further testified that on the material day they slept on one bed and had sex upto morning.

23. The question which the trial court failed to answer is as to who between the two minors penetrated the sexual organ of the other? . . .

26. Whereas the law outlaws sexual act with minors, where the offence involves the minors themselves it would be in the best interests of justice for the courts to look at the conduct of the parties including how the complaint is filed so as to protect the boy child too from discrimination.” (emphasis added).

16. Justice Omondi in **Constitutional Petition No. 1 of 2017 Homabay, POO (a minor) v Director of Public Prosecutions & another** [2017] eKLR answered my question herein above as follows:-

“29. Does a boy under 18 years have the legal capacity to consent to sex? Haven’t both children defiled themselves? Shouldn’t both then be charged or better still shouldn’t the Children’s Officer be involved and preferably a file for a child in need of care and protection ought to be

opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. ? I really think in this kind of situation should be re-examined in the criminal justice system. In the English case of R vs. G (Appellant) the Baroness Hale of Richmond in her opinion in the House of Lords stated that:-

“As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated may be the offender... Obviously ... there will be wide variations in the blameworthiness of the behaviour... Both prosecutors and sentencers will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate”

17. In this matter I find that the trial court did not take into account the Appellant’s defence and further failed to take into account the rights of the child conceived out of the illegal act between **PW1** and the Appellant and therefore the Appellant’s conviction was not safe. I would therefore allow the appeal herein and quash the conviction and set aside the sentence herein. The Appellant should be set free forthwith.

18. In the interest of justice in this matter the Education Officer in charge of Turkana Central Sub-county is hereby directed to facilitate the return of **PA** to school to enable her complete her education and the Appellant herein to report to the Children’s Officer in charge of the same sub-county to take parental responsibility of the child born out of the unlawful sexual act between him and the complainant.

19. The matter to be mentioned before the Deputy Registrar of this court on **28th March 2019** to receive the report from the said officers of compliance with the orders herein and for further orders as the need may be. The Appellant to attend.

20. A copy of the Judgement to be served upon the Deputy Registrar and the said officers for their action and it is so ordered.

Dated, delivered and signed at Lodwar this 7th day of March, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*