



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 14 OF 2016**

**DENNIS NGWAA NZIOKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence by Hon I.M. Kahuya (SRM) in Machakos Chief Magistrate's Court Criminal Case Number 27 of 2015 delivered on 10<sup>th</sup> March 2016)*

**JUDGEMENT**

1. The Appellant herein, Denis Ngwaa Nzioka, was charged with two counts. Count one was in respect of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The alternative charge was for the offence of committing an indecent act with a child contrary to Section 11(1) of the said Act.
2. He was sentenced to serve twenty (20) years' imprisonment for the main count.
3. The particulars of the charges were as follows:-

**COUNT I**

**“On diverse dates between 8<sup>th</sup> September, 2015 and 10<sup>th</sup> September, 2015 in Mbooni West district within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of ANM a child aged 14 years.”**

**ALTERNATIVE CHARGE**

**“On diverse dates between 8<sup>th</sup> September, 2015 and 10<sup>th</sup> September, 2015 in Mbooni West district within Makueni County, intentionally and unlawfully touched the vagina of ANM a child aged 14 years with his penis.”**

4. Being dissatisfied with the said judgment, the Appellant filed his Petition of Appeal and later amended the same raising the following grounds:-
  1. **THAT the prosecution failed in entirety to prove one of the key ingredients of the offence i.e. penetration by the accused person.**
  2. **THAT this court needs to make a holding that the case for the prosecution was not proved against him as the conduct of the complainant was consistent with that of an adult. The statutory defence as contained under Section 8(1) as read with (5) and (6) of the SOA was therefore spelt out in evidence.**
  3. **THAT the whole of the prosecution's case is riddled with material contradictions which not only impeach on the credibility of witnesses but also goes to show that the burden of proof was not discharged as required by law.**
5. The appeal was canvassed by way of written submissions.
6. The appellant submitted on each of the grounds raised in the appeal. On the first ground of penetration, the appellant submitted that according to the medical report upon examination of the complainant, no spermatozoa was found; no injuries hence he concluded that there was no evidence of penetration or sexual activity. He submitted that the trial magistrate erred in finding that there was penetration and added

that the complainant chose freely to elope with the appellant and thus there was consensual sex between them. On the 2<sup>nd</sup> ground of the statutory defence, the appellant cited the provisions of Section 8 (5) and (6) of the Sexual Offences Act that provide as follows:

**“(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.”**

7. The appellant submitted that according to the evidence, she deceived him that she wanted to be married to him and she also engaged in sex freely with the appellant and behaved like an adult woman which amounts to a defence as per the abovementioned section. The appellant submitted that the complainant’s conduct could have easily deceived a man; he relied on the decision in **Martin Charo v R (2016) eKLR** that observed that the behaviour of the complainant meant that the court ought to treat her as an adult. He submitted that he is entitled to a statutory defence as per the abovementioned provisions.

8. On the issue of contradictions, the appellant submitted that the medical report contradicts the averment that the complainant was sexually assaulted and does not support the prosecution’s case. He cited the case of **Arthur Mshila Manga v R (2016) eKLR** where the court observed that the medical evidence on record did not establish that the complainant was defiled because other than absence of a hymen, there was no opinion that the complainant had been defiled. He concluded that the prosecution did not meet the threshold that was required to convict him. He prayed that the conviction be quashed and the sentence set aside.

9. In reply, counsel for the prosecution in his submissions framed two issues for determination. Firstly, whether the ingredient of penetration was properly proved and secondly, whether the trial court failed to consider the statutory defence of the appellant during trial. On the 1<sup>st</sup> issue, counsel submitted that according to the evidence of the complainant, she eloped with the appellant and stayed with him for a week and they had sex before being accosted and arrested by the police. He submitted that according to the definition of penetration under Section 2 of the Sexual Offences Act, the medical report that of an examination that was conducted on the complainant showed that her hymen was missing and this is indicative of penetration. Hence the ingredient was properly proven and it follows that this ground of appeal fails.

10. On the 2<sup>nd</sup> issue of a statutory defence, counsel submitted that the defence under Section 8(6) is not absolute and required to be proven; according to the evidence on record the appellant was aware of the age of the complainant (15 years) at the time he eloped with her. Further that the statutory defence was not raised at the trial stage but was raised at the appeal stage and therefore the same is an afterthought as that defence is not available and this ground of appeal lacks merit. Counsel concluded that the evidence tendered was credible, consistent, corroborated and the appeal ought to be dismissed and the conviction and sentence of the trial court ought to be upheld.

11. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

12. In support of the prosecution case, there were 7 witnesses lined up. Pw1 was the complainant, ANM. She testified that she was aged 15 years and had just completed her KCPE. She testified that the appellant was her boyfriend and that on 3.9.15 she went to meet the appellant and after shopping they went to his grandmother’s house where she was introduced as his wife. According to her testimony, she stayed with the appellant for a week and had sex with him thrice, and on 11.9.15 police officers came and took her to Machakos Police Station and later she was taken to Machakos Level 5 hospital for treatment. She recorded her statement on 13.9.15. She tendered the PRC form and treatment notes in evidence.

13. Pw2 was JM who testified that the complainant was his niece aged 15 years having done her KCPE in 2015. He testified that on 3.9.15 he received information that the complainant had disappeared and got information that the appellant was in a relationship with her and suspected that the two had eloped. He then reported the matter to the police on 6.9.15 and who aided in visiting the home where the appellant was living in where they were able to capture the appellant on 11.9.15. The appellant was taken to the police station on 12.9.2015. He later recorded his statement.

14. Pw3 was MW who testified that after receiving a report that the complainant had vanished, she accompanied the group that arrested the appellant on 11.9.2015 where he was found together with the complainant.

15. Pw4 was Dr John Mutunga who testified about a medical examination that was conducted on the complainant wherein he observed no injuries on her private parts, no spermatozoa but however her hymen was torn. He filled out the PRC form and the P3 form that were produced as exhibits together with the treatment notes.

16. Pw5 was No. 208779 APC Ndolo who was the arresting officer. He testified that he received a report to the effect that the complainant had eloped with a farm boy and after receiving information on 10.9.15 that the appellant had been spotted, he swung into action and managed to arrest the appellant on 11.9.15. He testified that he was led to the house of the appellant by a former employer of the appellant.

17. Pw6 was No. 242717 APC Muthui who was in the company of Pw5 when a report was received that the complainant had eloped with a farm boy. He testified that after receiving reliable information on 11.9.15 that the appellant had been spotted at his grandmother's place, he swung into action and arrested the appellant whom he found waiting for supper that was being prepared by the complainant.

18. Pw7 was No. 89006 Corporal Kawira who testified that she was at the gender desk at Machakos Police Station charged with investigation of the instant matter that was before the trial court. She testified that she had the witness statements recorded and took the complainant for age assessment and the same proved that she was 15 years. She used the report whilst compiling evidence in the case and produced the said age assessment report as an exhibit.

19. The trial court found that the appellant had a case to answer and he was put on his defence. After Section 211 of the Criminal Procedure Code was read out to the appellant, he opted to give sworn evidence. He testified that he was a farm boy and that on the material day he met a 15 year old girl who was stranded and went with her to Kibwezi where he was arrested and taken to the police station. He denied committing the offence as he acted as a good Samaritan on 8.9.15 when he met the complainant at the stage. On cross-examination, he testified that he did not sleep with the complainant and that the case was being fabricated against him.

20. Having looked at the evidence on record, the grounds of appeal and Appellant's and Respondent's written Submissions, the issues for determination are:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

**b. Whether or not the appellant had satisfied the court that the defence under Section 8 (5) and (6) is available to him.**

**c. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant.**

21. The Appellant seems to have no qualms about the other two elements of the offence as encapsulated under Section 8(1) and (3) of the Sexual Offences Act, to wit that she was aged 15 years and that he was positively identified. He challenged the evidence on penetration. The evidence that is on record that is consistent is from the complainant who confirmed that she had sexual intercourse with the appellant. The appellant was in court and did not counter the said evidence save for denial of commission of the offence. Therefore it can safely be concluded that it was true. The sequence of events as recounted by the prosecution witnesses point to the fact that the appellant was together with the complainant and at the time of arrest they were found together. The medical evidence that was adduced by Pw4 plus the exhibits left no doubt that there had been penetration of the complainant's sexual organ by the appellant as provided for under Section 2 of the Sexual Offences Act that provides that penetration means insertion of a genital organ of a person into the genital organ of another person. Because there is evidence of a torn hymen, the only irresistible conclusion is that it was occasioned by a male organ because according to the complainant, she had sexual intercourse on three occasions while at the house of the appellant. This court agrees with the finding of the trial court and concludes that penetration was proven and therefore this ground of appeal raised by the appellant fails.

22. Having said so, the appellant has challenged the decision of the Learned Trial Magistrate for allegedly failing to consider the statutory defence under Section 8(5) and (6) of the Sexual Offences Act. A perusal of the proceedings reveals that no such defence was raised at the trial and therefore the said ground is a non-starter. Even if for argument's sake I were to consider the said defence, the evidence of the appellant was to the effect that he met a 15 year old girl who was stranded and went with her to Kibwezi. This means that he was aware that the complainant was aged 15 years and the appellant's attempt in raising such defence on appeal is not helpful to him for the reason that he was fully aware that he was dealing with a minor yet he already knew the age as 15 years.

23. In that regard, while this court carefully considered the cases of **Martin Charo v R (2016) eKLR inter alia** that were relied upon by the Appellant and found the same to have been distinguishable from the facts of this case as they related to instances where the evidence given by the accused person and his witnesses pointed towards establishment of the said defence. This is not what happened in the instant case. Therefore I find that the cited case is not applicable to the matter before the court.

24. The Appellant raised the issue of contradictions in evidence as a ground of appeal. However he has not demonstrated to the court what he considers as contradictory evidence. Hence the court is not in a position to agree that there were any contradictions in the evidence. This ground was a mere red herring whose intention was to deviate the focus of this court from determining the real issues in dispute. In any event the appellant himself confirmed having met the complainant who reiterated that she accompanied him to his house and had sexual intercourse. Further, the witnesses found the two lovebirds inside the appellant's house from where they were arrested.

25. Having analysed the oral and documentary evidence that was adduced by the Prosecution witnesses, this court is satisfied that the Learned Trial Magistrate arrived at the correct decision when she found and held that the Prosecution had proved its case beyond reasonable doubt. The appeal on conviction lacks merit and the same is hereby dismissed.

26. As regards the sentence, it is undisputed that the complainant was aged 15 years at the time of commission of the offence and this essentially means that the provisions of Section 8(3) shall apply with full force and the mandatory sentence of 20 years as provided for in the section is within the limits of the law. The appeal against sentence equally fails.

27. For the foregoing reasons, it is the finding of this court that the appeal lacks merit. The same is hereby dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

**Dated, Signed and Delivered at Machakos this 12<sup>th</sup> day of June, 2019.**

**D.K. KEMEI**

**JUDGE**