REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 16 OF 2019

ALEX MUNGUTI MUTISYA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. B. M. Ekhubi – SRM Thika dated and delivered on the 6th day of February 2019 in the original Thika Chief Magistrate's Court Criminal Case No. 2098 of 2015}

JUDGEMENT

The appellant who is serving twenty (20) years imprisonment for Defilement preferred this appeal against the conviction as well as the sentence. The appeal is premised on the amended grounds filed together with the written submissions upon which he relied at the hearing of the appeal. Those grounds are: -

> **"1. THAT, the Hon. Trial magistrate erred in matters of law and fact by not finding that the test for operation of statutory defence under Section 8 (5) of the Sexual Offences Act No. 3 of 2006 was satisfied and therefore the guilt of the appellant was effectively defeated.**
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> **2. THAT, the Hon. Trial magistrate erred in matters of law and fact by not fully considering the mitigating factors of the matter while convicting, including the parents' consent of taking bride price, to the obvious conclusion that the 20 years minimum statutory sentence, which was harsh and inappropriate under the individual circumstances of the case.**
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> **3. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that penetration by the accused person was not proved to the requisite threshold.**
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> **4. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that the prosecution's evidence was so inconsistent and contradictory and thus could not sustain conviction.**
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> **5. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to adhere to the statutory framework of sentencing as under section 169 of the Criminal Procedure Code.**
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> **6. THAT, in default of acquittal, I apply to invoke Section 333 (2) of the C.P.C and have the time spent in legal custody considered in the calculation of the sentence."**

The appeal is vehemently opposed. The same proceeded partly by way of written submissions and orally in court. as I have stated the appellant relied on written submissions but at the hearing he submitted that his plea to have the case restarted was not heeded by the succeeding Magistrate.

Prosecution Counsel acting for the State responded to the appellant's written submissions orally and urged this court to uphold the conviction and sentence. On the issue of **Section 200 (3) of the Criminal Procedure Code** raised by the appellant, Counsel argued that the application was rejected following opposition by the prosecution on the ground that the complainant had died. Counsel urged that **Section 34 of the Evidence Act** permitted the court to use evidence from previous proceedings.

I have considered the submissions by both sides fully and as the first appellate court I have also analysed and evaluated the evidence before the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses give evidence **(see Okeno v Republic [1972] EA 32).**

In his defence at the trial, in his written submissions and orally at the hearing of this appeal, the appellant admitted to having sex with the complainant and making her pregnant. In the last paragraph of the written submissions he urges this court to consider the plight of the child

born of the union between him and the complainant. Penetration was therefore undoubtedly proved. It was also proved beyond reasonable doubt that at the material time the complainant was thirteen years old. The complainant stated that at the time she was giving evidence she was fourteen years old. Pw1 – the doctor who examined and filled her P3 Form stated she was thirteen years old at the time of examination. The fact that she was a child was therefore proved beyond reasonable doubt.

As for identification, that issue in my view would not arise the appellant having admitted that he lived with the complainant and had sexual intercourse with her and that he was the father of her child. The only issue for determination is whether the defence under **Section 8 (5) of the Sexual Offences Act** applies to the appellant. The **Section** states: -

> **(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."**

It is the appellant's case that he met the complainant at a club after which he took her to his house. The next day he called his aunts who visited the complainant's family which agreed he could marry her after negotiations. He contends that firstly she would not have been at a club if she was a child and secondly her relatives would not have agreed to his marrying her.

I am not persuaded that this brings the appellant into the ambit of the defence under **Section 8 (5) of the Sexual Offences Act**. In my view the defence would only avail if the child deceived the appellant into believing she was over eighteen years old. Indeed, **Sub-section 6 requires the person asserting he was deceived to prove the circumstances including any steps he took to ascertain the age of the complainant**. It is my finding that stating that he met the complainant outside a club is not proof that she was an adult. The appellant did not tell the court what the complainant did that caused him to be deceived she was an adult. A child could also be found outside a club. As for the allegation that he also believed she was an adult because her people allowed him to marry her that too would not bring him under the defence. He had already defiled her and what followed is therefore neither here nor there. She was herself a child who could not give consent and whatever ***"consent"*** her relatives gave would only make them accomplices to the crime and nothing else. He did not allege that she told him she was over the age of eighteen years and he did not state that he took any steps to ascertain she was an adult. The **"statutory"** defence does not therefore avail to him. it is not lost to this court that the appellant raised this defence in an unsworn statement which could not be tested through cross examination to ascertain its credibility or veracity. His contention that **Section 200 (3) of the Criminal Procedure Code** was never complied with though it was raised in the initial petition of appeal was not raised in the amended petition meaning he did not wish to rely on it. My finding therefore is that it is only raised in the submissions as an afterthought and this court can safely ignore it. **The appeal on conviction must therefore fail.**

On the sentence, the appellant was sentenced to twenty (20) years imprisonment. Whereas the court noted that he was a first offender its hands were tied by the mandatory minimum sentence. However, I am satisfied that even though the court's hands are no longer feterred by that mandatory minimum sentence, it is still the most just in the circumstances of this case. The sentence is accordingly upheld and the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE