REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 60 OF 2018

WAMBUA MUVENGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A. Mayamba (SRM) in the Senior Magistrate's Court at Makueni Sexual Offence Case No.47 of 2018, delivered on 4th September, 2018)

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 being that on the diverse dates between 23rd June 2018 and 18th July 2018 in Makueni County, intentionally caused his penis to penetrate the vagina of PNK a child aged 16 years.

2. In the alternative he was charged of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016.

> Particulars being that on the diverse dates between 23rd June June 2018 and 18th July 2018 in Makueni County, intentionally touched the vagina of PNK a child aged 16 years with his penis.

3. He pleaded not guilty and matter went into full trial. He was found guilty and was convicted and sentenced to serve 15 years imprisonment.

4. Being aggrieved by the above verdict he lodged instant appeal and set out 5 grounds of appeal. During hearing he filed amended grounds of appeal combined with the submissions.

5. He now narrowed his appeal to 3 grounds:-

> ***(i) That the prosecution failed in entirety to prove one of the key ingredients of the offence i.e. penetration by the appellant.***
>
> ***(ii) That the court needs to make a holding that the case for the prosecution was not proved against appellant 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 Sexual Offences Act No. 3 of 2006 was therefore spelt out in evidence.***
>
> ***(iii) 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 prove was not discharged as required by law.***

6. The parties agreed to canvass appeal via submissions. Only appellant filed the same. Prosecution opposed appeal and relied on record of appeal as per recorded evidence.

Appellant's Submissions:

7. The appellant submits that, It is his contention that the real issue to be determined in this ground is not whether or not there was penetration but rather whether the minor was in a position to consent or otherwise rather than the picture being drawn by the prosecution. Proceedings **page 5** ***"we boarded a vehicle together upto Masaku."*** This is a clear indication that the complainant was not coerced into anything.

8. The appellant contend that, the above inferences of facts show that PW1 acknowledges that indeed she was in a relationship with the appellant and not only that she took steps to go with the appellant finally elope. Finally they reached a decision and decided she packs her bag, head to the appellant's home where he had her as his wife ***'which she did not object'***.

9. They stayed as husband and wife until their short lived union was intercepted. The above facts are consistent with someone who knew what they were doing and in fact made it very clear that she wanted to be the appellant's wife.

10. In that regard, PW5, the doctor who examined the minor testified – see pg 10 of 17 of the proceedings thereof at lines 20-21 thus, ***"on her lab test, the girl was pregnant. Other lab test was normal".***

11. It is appellant's contention that even if the trial court were to albeit but rely on the above evidence, the individual circumstances of the facts do not link the appellant with the penetration since upon examination of the complainant's genitalia was very normal; there were no injuries consistent with forceful penetration.

12. He submits that, the trial court greatly erred in holding that because PW1 and the appellant had been in relationship then this was enough prove of penetration but his was as a serious misdirection as it automatically shut out any defences that might be applied by the appellant under section 8(5) and (6) of the Sexual Offences Act. He relied on case of ***Cr. Appeal No. 273 of 2010, Duncan Mwai Gichuchi vs Republic [2015],*** the **High Court** at **Nyeri, Mativo J** held that penetration in terms of section 8(1) as read with section 8(3) could not be established as against the appellant person because among other things there was no forceful penetration as the girl had freely carried clothes from her home, an indication that she was going to stay with him and consequently she was not forced to enter into the marriage or even to sleep with the appellant because as put in her own words she was living with the appellant as husband and wife.

13. It is argued that, the complainant freely chose to agree to elope with the appellant and this is shown by her packing her clothes and running away with him to Kola. She lived in his house as his wife and accepted it without any protest whatsoever.

14. He contends that the court should be convinced that in the instant facts not only was penetration proved by the available medical evidence but also that the real issue of concern is not whether there was indeed penetration but rather whether PW1 consented to the act and the facts have been positive to that effect and the appellant herein need not suffer for no wrong doing.

15. He submits that he was denied of statutory defence under section 8(1) as read with (5) and (6) of the Sexual Offences Act No. 3 of 2006, it is submitted that the statutory defence has well being brought out in evidence and the appellant is entitled to the same. It is clear and evident that the complainant willfully took upon herself to the matter in question.

16. He submitted that, the victim's actions can then be said to have been deceptive to the appellant into believing that getting married to him is what she wanted.

17. He submitted that he is entitled to the benefit of doubt in relation to the complainant's conduct which shows that he was reasonably deceived in relation to her age. He relies on ***Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR.***

The Duty of the First Appellate Court:

18. I am guided by the Court of Appeal case of ***Okeno vs Republic (1972) E.A.32*** where the Court set out the duties of a first appellate court thus:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) E.A. 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 finding and conclusion; 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) E.A. 434)."**

Prosecution's Case:

21. PW1 stated that she was a student at St. Stephen School in Form 2. It was her testimony that on the 23rd June 2018, her parents were not around when appellant came to their house. He informed her that he had rented a house in Kola and asked her to pack her clothes so that they could go to the place.

22. It was her testimony that appellant hired a motor cycle for her which took her to the stage. They boarded a vehicle together upto Masaku where they boarded another vehicle which took them to Kola and they went to the house of the appellant. She stated that appellant asked her to hide her name and refer to herself as Vivian. It was her testimony that appellant used to leave her as he went away but could return as he called her his wife.

23. She stated that appellant made per pregnant which made her not to go to school. It was her testimony that she stayed in that house for about 3 weeks. She went to the hospital and was confirmed to have been pregnant.

24. She stated that she was born on the 18/9/2002. It was her testimony that she had her P3 form filled upon being taken to the hospital by the police. It was her testimony that she was staying with appellant herein as a wife.

25. PW2 stated that he received intelligence report that there was someone staying with a girl who was somehow young and had been locked inside a house. It was his testimony that the person was staying with the young girl inside a rental house known as Utooni Development Project. He alerted his Assistant Chiefs and they went to Kola market at around 4 pm.

26. He proceeded to the house and was led by the caretaker to the house in question which was near the toilet. He knocked on the door and a man opened the same and was joined by a young girl. They arrested both as the girl confirmed that she was a student.

27. It was his testimony that appellant was confirming to them that he had married the girl on the 1/1/2017. He also stated that the appellant informed them that he was a pastor and gave them his work card in which he was named as Apostle Amos Wambua Muvengei.

28. He also stated that the appellant was 39 years of age as per his identify card whereas the girl was born in the year 2002. It was his testimony that the girl was born in the year 2002. It was his testimony that the girl at first cheated them that she was called Vivian but he later realized she lied. He handed them over to the police after recording his statement.

29. PW3 was with PW2 when they arrested appellant who was in a company of the complainant in a house within Kola market. It was also his testimony that the girl was appearing young and also more as student. It was also his testimony that appellant was claiming to be a pastor. The complainant was also 16 years old.

30. PW4 stated that on the 23/6/2018, he had gone to take care of his goats when he found his daughter missing. It was his testimony that his daughter was 16 years old and was a student of [particulars withheld]in Form 2.

31. He reported the disappearance at Kitui Police Station and was later informed that she had been found in Kola market with appellant person who is known to him being married to his niece. He also confirmed that his daughter was pregnant.

32. PW5 examined the complainant herein whom she found pregnant. It was his testimony that the complainant informed him that she had been defiled by a person known to her.

33. He also examined the appellant on his genitals but nothing significant was noted. He tendered the outpatient card for the complainant as Pex 2, outpatient card for the appellant as Pex 3, P3 form as Pex 4, and PRC form as Pex 5. He also tendered the birth certificate as Pex 1 confirming that the complainant had been defiled.

34. PW6 carried out investigations and preferred the current charges as against appellant person. It was his testimony that the complainant and the appellant herein were brought to the station having been arrested by the Area Chief.

35. It was his testimony that appellant had purported to marry the complainant who was 16 years. He stated that at the time of the report, the complainant was pregnant. He took both the appellant person and the complainant to the hospital. He also visited the house in which the two were staying.

36. Inside that house, he recovered the mobile phone for both the complainant and the appellant. Inside the house, he also recovered treatment book for the complainant. He stated that he also recovered fee payment receipt for the school the complainant was enrolled in.

37. It was further his testimony that the complainant confided in him over the appellant who had asked her to disguise herself as Vivian Mwendo Joshua. He tendered the sky phone as Pex 5, while Nokia phone as Pex 6, treatment note from Kola Health Centre as Pex 7 and a blue purse as Pex 8.

Defence Case:

38. DW1 stated that on the 17th June 2018 at around 9 pm, he was called by a pastor from Wote who wanted his help to pray for his sick child. He left the following day to Wote and prayed for 30 minutes and the child was healed. He continued to preach for other people before leaving for Kitui. He alighted at Mukuyuni and continued to preach for about 15 minutes.

39. He again boarded another vehicle to Kola and alighted to continue preaching and praying for people. It was his testimony that he saw three people who came and arrested him without informing him of his offence. The police took his mobile phone and was informed that he would be arraigned in court where charges would be read of which he denied. He urged the court to consider both sides.

Issues:

40. After going through the evidence on record and submissions tendered, I find the issues are; **whether the prosecution case was proved beyond reasonable doubt? And whether defence of complainant misleading appellant that she was an adult was available and/or the defence under section 8(1) as read with (5) and (6) of the Sexual Offences Act No. 3 of 2006e was available ?**

Analysis and Determination:

41. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.

42. On PW1 prove of age, it was established through oral testimony, birth certificate, P3 form among other details. In the instant case, the complainant stated that she was 16 years of age. The birth certificate indicated that the complainant was born on the 18/9/2002 which makes

her 16 years.

43. In the examination by the medical officer, her age is indicated as 16 years old. The defence did not raise any issue as to the age of the complainant which further raised no dispute as to the age of the latter. Thus, at the diverse dates between 23rd June 2018 and 18th July 2018, the complainant was aged 16 years which brought her within the ambit of section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

44. ***On whether the girl was had carnal knowledge of:***

> **Blacks' Law Dictionary (9th Edition 2004) at 241** defines carnal knowledge as *"carnal knowledge, archaic, sexual intercourse, esp. with an underage female – sometimes shortened to knowledge. [Cases: Incest 6; Rape 7 C.J.S; Incest S5; Rape S 17]*
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> **"The ancient term for the act itself was 'carnal knowledge' and this is found in some of the recent cases and statutes. The phrase 'sexual intercourse,' more common today apart from legal literature, it also found in recent cases and statutes. Either term, when the reference is to rape, is sometimes coupled with the word 'ravish.' And unlawful intercourse with a girl under the age of consent is often characterized as 'carnal knowledge and abuse.' *Rollin M. Perkins & Ronald N. Boyce, Criminal Law 201 (3d ed.1982)*."**

45. It was the prosecution's case that the complainant was had carnal knowledge of. In proof of this fact, they relied on the oral testimony of PW1 who stated that indeed the appellant had ***"married her"*** and that they were staying as husband and wife as at the time of his arrest. It was also her testimony that she was pregnant as at the time of arrest.

46. In cross examination of this evidence, appellant wanted to know when they left Kitui and whether he was the one who had asked her not to talk to her father. He was not challenging the fact this witness was stating clearly that they purported to have been in a marriage and had been made pregnant.

47. The prosecution also tendered medical evidence in P3 form as Pex 3 and treatment notes as Pex 2 all from Kilungu Hospital. Further to that the investigation officer who visited the house of which it was claimed that the two shared and seized another treatment note from Kola Health Centre which he tendered as Pex 7. All this medical evidence noted that indeed the complainant was pregnant, which confirmed that the hymen was absent. PW5 who was the medical officer opined that the findings were a prima facie evidence of defilement owing to the age of the complainant.

48. In cross examination of this witness, appellant wanted a confirmation as to whether the complainant was pregnant or not and whether he was also examined. He was not disputing that the complainant before the court was pregnant or that her hymen was absent. He was also not disputing the fact on carnal knowledge save for his culpability.

49. Therefore the trial court was convinced that indeed the prosecution had established beyond reasonable doubt that the complainant was penetrated through her genitals at the age of 16.This court concur that there was evidence to support that conclusion.

50. PW1 stated that they were with appellant at the time of arrest. It was also her testimony that appellant herein had "**married**" her and that they were living together as husband and wife. It was also her testimony that they came with appellant from Kitui who had rented the house where they were arrested from. The defence did not dispute this claim at all in cross examination of this witness. It makes this evidence to be credible. The demeanour of this complainant was also that of someone who is truthful.

51. PW4 stated that the complainant was her daughter and the appellant herein was also married to his niece. It was his testimony that her daughter disappeared on the 23/6/2018 from Kitui. He reported her disappearance until her rescue. In this piece of evidence, it was being confirmed that indeed the complainant and the appellant were people who were known to each other and hailed from the same place being Kitui. In cross examination of this witness, appellant did not dispute being people related through consanguinity. It therefore rules out any mistaken identity.

52. PW2 and 3 all stated that they arrested appellant herein in the house together with the complainant herein. It was their testimony that the complainant had been staying in a rental house within Kola market and the neighbours suspected that she was a young girl. They proceeded to the house under the guidance of the caretaker whereby they managed to seize the complainant and the appellant from that house.

53. In cross examination of PW2, appellant wanted to know when he received the information about the child who was suspected to have been a school girl. In cross examination of this witness he focused on the issue of the time when the report was made and the eventual arrest. Clearly the evidence by PW2 and 3 was not challenged by the defence at all more precisely the contention of having been arrested in the same house with the complainant herein in a rented house.

54. PW6 stated that the complainant herein was rescued and brought to the station together with the appellant herein. It was also his testimony that appellant had been living with the girl as a husband. In cross examination of the witness, appellant wanted to know where Vivian Mwende went to, as that was the girl he was with and not PN.

55. PW1 in her testimony had indicated that appellant had asked her to disguise herself as Vivian Mwende Joshua. The evidence by the complainant was never challenged by the appellant and so to turn around and claim that he knew Vivian and not Patricia was more an afterthought.

56. DW1 on his part claimed that he was called by a fellow pastor to go and pray for his sick child in Wote town. It was his testimony that he was called on the 17/6/2018 and left the following day. He prayed for the child and after 30 minutes, the child was well. He left Wote

town to Kitui town. He preached at Mukuyuni for about 15 minutes, before arriving at Kola.

57. He continued to preach at Kola when he saw three people who arrested him and later these charges were preferred against him. I have also analysed this defence herein, and noted that this witness claimed to have been arrested on 18/6/2018 and charged after. He was not candid since he was arrested on the 18/7/2018 and charged on the 19/7/2018, it just shows that he was lying.

58. DW1 did not expressly deny that he was with the complainant and also that he had made the latter pregnant. The evidence by the prosecution was expressly stated that the latter herein had purported to marry the complainant, a fact that he did not object to in his defence, which compounds the issue of defilement as indicated herein.

59. The Appellant did not deny having engaged in sex with the complainant on several instances as they lived as husband and wife. What he seems to raise in appeal is the defence contemplated in **Section 8(5) and (6) of the Sexual Offences Act**. If properly proved that is a complete defence in law. The said sub-sections provide as follows: -

> **"8 (5) It is a defence to a charge under this section if: -**
>
> **(a) it is proved that such child, deceived the appellant 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 appellant reasonably believed that child was over the age of eighteen years**
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> **(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the appellant person took to ascertain the age of the complainant."** *(emphasis added)*.

60. From the above provisions, it can be seen that whenever an appellant person opts to rely on the said defence then the evidential burden of proof shifts to that appellant person to satisfy the conditions attached to that defence. It therefore remains the duty of an appellant person to demonstrate that: -

> ***(a) That it was the child who deceived the appellant person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;***
>
> ***(b) That the appellant person reasonably believed that the child was over the age of eighteen years; and***
>
> ***(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the appellant person was reasonable.***

61. The appellant person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child.

62. There was no evidence by defence that there had been any prior deception by the complainant on the Appellant that the complainant was an adult.

63. As I come to the end of this analysis I must point out that the Appellant did not raise the defence he raised on appeal during the hearing before the trial court. The law is very clear. Unless the Appellant sought leave and was allowed to adduce additional evidence on appeal, the line of argument he adopted on appeal is purely for rejection.

64. It is trite law that, an appellant person who wishes to take advantage of the defence in Section 8(5) and (6) of the Sexual Offences Act must lay such a basis during the trial. When such a serious defence is raised later, more so on appeal that denies the prosecution the opportunity to interrogate the same by way of cross-examining the appellant person and the other witnesses and that visits an injustice to the victim.

65. Further an Appellant who raises such a defence for the first time on appeal, or an appellant person who raises it for the first time when placed on defence, runs the risk of the defence being treated as an afterthought and the defence may not be of much assistance to such a party.

66. Consequently, the Appellant would thereafter not be reasonably expected to hide under the allegation that he did not know that the complainant was a minor. That being so, the defence is not available to the Appellant. I find that the Appellant was rightly found guilty of defilement and convicted. Thus the appeal fails and court makes the following orders;

(i) ***Appeal is dismissed, conviction is affirmed and sentence confirmed.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE