



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 18 OF 2019

VINCENT TENGEYA AKOMBE.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira

dated and delivered on the 30th day of April 2019 in the original Nyamira

Chief Magistrate’s Court Sexual Offence No. 20 of 2018}

JUDGMENT

The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. He pleaded not guilty to the charge but after hearing and considering evidence from four prosecution witnesses and evaluating it against the defence, the trial court found the appellant guilty and sentenced him to imprisonment for eight (8) years. He was aggrieved by that conviction and sentence so he preferred this appeal. The appeal which was filed through the firm of C. R. Sagwa & Company Advocates is premised on grounds that:-

- “1. The Learned Trial Magistrate erred in law and fact in failing to take into account that the complainant had behaved like an adult.**
- 2. The Learned Trial Magistrate erred in law and fact in failing to consider that the Appellant was aged 17 years at the time of the alleged offence.**
- 3. The Appellant’s rights to a fair trial were infringed.”**

When Counsel appeared before me for directions they agreed to canvass the appeal by way of written submissions but only those of the appellant were received.

Counsel for the appellant canvassed the three grounds of appeal separately. Referring to the testimony of the complainant that the appellant was her boyfriend, Counsel submitted that the circumstances of this case are that the complainant behaved like an adult and that there is no evidence that the appellant had a way of knowing she was below eighteen years. Counsel contended that her testimony was inconsistent with a minor and this court should find the appellant falls within the defence provided under **Section 8(b) of the Act**.

In respect to ground 2, Counsel asserted that the appellant was seventeen when he committed this offence. Counsel drew this court’s attention to the statement of the trial Magistrate during sentencing that the appellant was eighteen years old. Counsel invited this court to make a finding that as the appellant was therefore a child legally incapable of consenting to sex charging him alone amounted to discrimination. Counsel argued that both the appellant and the complainant needed protection against sexual activities noting that none of them complained. Counsel further submitted that the appellant’s right to prompt access to legal and other appropriate assistances was violated. Counsel stated that despite finding the appellant was a child the trial Magistrate commenced the trial without affording him legal representation hence violating his right. Counsel further submitted that the appellant’s rights were further violated by incarcerating him in an adult prison. In conclusion, Counsel submitted that the above violations are incapable of being redressed by an order for retrial but by allowing this appeal, quashing the conviction and setting the sentence aside.

My duty as the first appellate court goes beyond merely considering the submissions into analysing and evaluating the evidence so as to come to an independent decision while bearing in mind that I did not see or hear the witnesses giving evidence. Be that as it may, it is apparent from the grounds of appeal and Counsels arguments that the appellant is not challenging the merits of the conviction. I shall not

therefore delve into that save to state that the charge against the appellant was proved beyond reasonable doubt. This because although he denied he knew the complainant, his own mother's evidence, a witness in his defence, offered corroboration to the complainant's testimony that the two of them were living together. On the defence under **Section 8(5)** of the **Sexual Offences Act** the law is clear. The onus to prove that the child deceived the appellant into believing she was over eighteen years and that he reasonably believed her, lies on him. The appellant did not discharge that burden. The submission by his Advocate that he needed not to take any steps to ascertain the age of the complainant flies in the face of the very law that created that defence. The conduct on trial is never the conduct of the child but that of the person who engages in sex with the child. It is that conduct that is proscribed by the law hence the necessity for the appellant to establish that he falls within the defence.

On the ground that he was discriminated against and that his right to a fair trial was violated I find that was not the case. It is correct that in the course of the trial the court ordered an age assessment in respect of the appellant. What the appellant did not disclose to his Counsel however is that when his age was assessed it turned out that he was above eighteen years. That report informed the trial Magistrate's decision to transfer the appellant from Manga Children Remand to Kisii Main Prison. The report which is undated states: -

“RE: AGE ASSESSMENT

VINCENT TENGEYA

The above was presentation (sic) to our dental clinic for age assessment. On oral examination The (sic) third have erupted which erupts at the age of 18. We concluded that the molar (sic) above person is over 18 years.

Thanks in advance

Signed.”

The report emanated from Nyamira County Referral Hospital and it brings the issue of the age of the appellant to closure. He was certainly not a child when he committed the offence or during the trial and it is my finding that his rights were not violated either through charging him or incarcerating him before or during the trial. In the upshot I find the appeal has no merit and it is dismissed in its entirety.

Signed, dated and delivered in Nyamira this 7th day of November 2019.

E. N. MAINA

JUDGE