REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 15 OF 2016

LODGERS TSOFA FACHO ……..…..... APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

JUDGEMENT

The appellant was charged with the offence of defilement of a girl Contrary to Section 8(1) (4) of the Sexual Offences Act number 3 of 2006. The particulars of the offence were that the appellant on diverse dates between February and 24th June 2014 at [particulars withheld] village, Malindi District within Kilifi County intentionally caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of N.K. a girl aged 17 years old.

The trial Court convicted the appellant and sentenced him to serve fifteen(15) years imprisonment. The grounds of appeal are that the charge sheet was defective, the evidence of the government analyst were not safe, that there was no evidence that the appellant was taken for medical examination and that the prosecution did not prove its case as the investigating officer did not testify.

Mr. Lugauje appeared for the appellant. Counsel submit that the prosecution did not prove that it was the appellant who penetrated the complainant. PW5, APC Samuel Ekuam was instructed by his boss to arrest two youths in connection with the crime. He managed to arrest the appellant but did not arrest one Seddin Katana. The complainant avoided mentioning the said Seddin Katana. It is submitted that the evidence of PW4 and PW6 was hearsay as they were only given the name of the appellant. Further, the evidence of the Government analyst is not helping as it refers to D R (the infant) yet the report indicates that the appellant is the biological father of one L R K. No blood samples of one l R were taken. Counsel submit that the appellant opted to remain silent. He had denied the charge and it was upon the prosecution to prove its case.

The state opposed the appeal. Mr. Fedha, Prosecution Counsel, submit that the complainant testified that she was defiled by the appellant. They had sex nine times. The complainant knew the appellant and she became pregnant. The DNA results show that the appellant is the biological father of the complainant's child. The trial Court was convinced by the evidence of the complainant. the complainant was a child and she needs to be protected from sexual exploitation.

This is a first appeal. This Court is supposed to evaluate the evidence adduced before the trial Court and make its own conclusion. The record of the trial Court shows that seven witnesses testified for the prosecution. PW1 IBRAHIM ABDULLAHI is a senior Clinician who was based at the Malindi Sub-County Hospital. He examined the complainant on 2.7.2014. The complainant was pregnant and her age

was assessed to be 17 years. Dr. Fauzid, a dentist assessed the complainant's age.

PW2 GEORGE LAWRENCE OGUDA is a government analyst based at the Mombasa Government Chemist. He received three samples namely blood of the complainant NK, Blood of Dennis Robert and blood of Lodgers Tsofa Facho (Appellant). His DNA tests found that Lodgers Tsofa was the biological father of L R K. The report was done on 15.4.2015.

PW3, NK, was the complainant. She testified on 2.7.2015 and told the Court that she was 18 years onld. She was a class 7 pupil at [particulars withheld] primary school. She told the trial court that she had sex with the appellant nine times. This was between August 2013 up to the year 2014. She was taken to Malindi hospital for examination. She had delivered by the time she testified. She did not tell the appellant that she had another lover.

PW4, J K W is the complainant's father. He testified that the complainant was 17 years old in 2014. He knew the appellant. In August 2014 he discovered that PW3 was pregnant. Blood samples were taken for DNA test. PW5 APC SAMUEL EKUAM was stationed at the Malindi administration police headquarters. In June 2014 he was instructed to arrest two youths from Kakoneni namely Lodgers Tsofa Facho and Seddin Katana. They managed to arrest the appellant but were not able to arrest Seddin Katana.The appellant was alleged to have impregnated a pupil.

PW6 S C was the head teacher of [particulars withheld] Primary school. He got information on 17.6.2014 that PW3 was pregnant. He interviewed PW3 but she denied. He referred the matter to the Chief. On 23.6.2014 pW3 disclosed that she was three(3) months pregnant. She mentioned the appellant. PW6 knew the appellant. He was a student at Jilore Youth Polytechnic.

PW7 P.C. ROBERT K. KINUTHIA was stationed at the Malindi Police station. He was instructed to investigate the case on 19.7.2014. He had the appellant charged with the offence.

The appellant was placed on his defence. He opted to remain silent.

The issue for determination by this Court is whether the prosecution proved its case beyond reasonable doubt. There is no doubt that the complainant had a Sexual relationship with the appellant. This was not a one off sexual relationship. According to the complainant, they had sex nine(9) times since August 2013.

The complainant's age was assessed on 2.7.2014. She was found to be about 17 years old. The complainant testified on 2.7.2015 and informed the Court that she was 18 years old. This was about one year later after her age was assessed. Age assessment does not give the exact age of the person whose age is assessed. What is given is an estimate.The complainant's age was estimated to be about 17 years old. Its not clear when she turned 18 years old. It is established that she became pregnant between August, 2013 and June, 2014. Its not stated when the complainant delivered her baby. From the evidence on record, it cannot be established with certainty that the complainant was under the age of 18 years by the time she had sex with the appellant.

Although Counsel for the appellant submit that the appellant is not concerned with the age of PW3, it is necessary for that age to be proved to the satisfaction of the Court.

There is also the issue concerning the age of the appellant.The appellant did not cross examine the witnesses. Apart from the complainant who was asked whether she had told the appellant she had another lover, none of the other witnesses were cross examined by the appellant. When the appellant was put on his defence he opted to remain silent. Upon conviction, the appellant was asked to mitigate and told the Court as follows:

> ***"I plead for leniency. I am 18 years old. I am not married. I am yet to obtain an identity card. This is my 18th year."***

The mitigation was done on 9.12.2015. According to the complainant, they started having sex in August, 2013. The appellant's age was assessed on 11.12.2015 and found to be over 18 years. According to PW6 the then headmaster of [particulars withheld] Primary school, the appellant was a student at Jilore Youth Polytechnic. It is therefore possible that between August 2013 and June, 2014, the appellant was under the age of 18 years. He told the Court that he had no identity card and had turned 18. The age assessment is an estimate. It is possible that by 11.12.2015 the appellant was above 18 years old. There is no certainty that when he had sex with the complainant he was above 18 years old.

I have seen the report on DNA analysis in the record of appeal. It is dated 10.10.2015 and not 15.4.2015 as per the evidence of PW2. The report also refers to S G (alledged father) K K (mother) and A (child). I believe there was confusion in the keeping of the record of the trial Court. The DNA report is not related to the case. Other than the above observations, the record shows that blood samples were taken on 19.3.2015. The investigating officer did not testify as to how the samples were taken to the Government chemist. His evidence is quite brief and does not expand on how investigations were conducted.

The evidence of the complainant is that she had sexual relationship with the appellant. The appellant had promised to marry her. It is clear to me that the two were lovers and intended to get married. They had sex nine (9) times. When PW6 asked the complainant whether she was pregnant, she initially refused. The complainant knew what she was doing. Assuming she was below 18 years old and could not give her consent to sex, the way she behaved proves that she was sexually active. She was not threatened or lured into sex by the appellant. The complainant behaved like an adult.Both the complainant and the appellant were students. They engaged in sex at their youthful age with a promise to get married. It would be imprudent to have the appellant spend 15 years in jail yet the evidence show that there is a high probability that he was below 18 years when he started having sex with the complainant. PW2 examined the complainant on 2.7.2014.The P3 form does not state how old was the pregnancy when PW1 examined PW3 on 2.7.2014. according to PW3, the complainant told them that she was three months pregnant. This was on 23.6.2014. It is therefore possible that PW3 became pregnant in around February or March 2014. It is equally possible that by that time, both the complainant and the appellant were below or above the age of 18 years old. They were lovers and intended to marry.

The ordinary ingredients for the offence of defilement are proof that the victim was below the age of 18 years, positive identification of the accused and proof that the accused indeed penetrated the victims genital organs. The Sexual Offences Act provides a defence Under Section 8(5). Apart from the above ingredients, the Court has to evaluate the circumstance of the entire case against the behavior of the victim. If the circumstance establish that the victim was behaving like an adult, then the accused ought to be acquitted depending on the circumstances of each case. At times the victims are lured by the perpetrators of the crime and in the process are made to behave like adults. However, where the alleged victim was the one who, despite her young age, pursued the accused and had sex together severally, such circumstances ought to be considered in line with the provisions of Section 8(5) of the Sexual Offences Act. Trial Courts should not wait for the accused to tell them that he thought the victim was over 18 years old. Accused persons have their constitutional right to remain silent during the proceedings Under Article 50(I) of the constitution. It is upon the prosecution in such borderline cases to establish that the victim did not behave like an adult while prosecuting its case.

In the current case, the evidence shows that the appellant and PW3 had sex nine times between August 2013 and June 2014. PW3 was already talking of getting married and I believe she was nursing that promise in her mind when she agreed to have sex with the appellant. Whoever states that he or she is ready to get married exhibits feelings of adulthood. It is only adults who get married. Under our laws, one has to be above 18 years old for him or her to get married. The complainant informed the trial Court that the appellant had promised to marry her. These were people who were committed to that relationship. It is only the pregnancy which disrupted that arrangements otherwise there was the likelihood of the two getting married.

Given the circumstances of the case, I do find that PW3 behaved like an adult. Her evidence is quite brief and it does not show that the appellant lured her into the relationship. She did not even tell the Court that it was the first time to have sex when she met the appellant. She was reluctant to tell her teachers about

her relationship with the appellant. She knew that she was pregnant but opted to remain silent. Her exact age has not been determined. It is possible that she was under 18 in 2013 but it is equally possible that she was over 18 in 2014. The appellant's age is equally not exactly determined. He too could have been under 18 years in 2014. The fact that he was over 18 years in December 2015 does not exclude the idea that he could have been below 18 years in 2014. He was a Youth Polytechnic student.

Taking the circumstances of the case into account, it is my finding that the prosecution did not prove its case beyond reasonable doubt. PW1 behaved like an adult and was ready to get married to the appellant. The exact age of both the appellant and the complainant between August 2013 and June 2014 is not clear. It is doubtful that the appellant was over 18 years during that period. Since both of them had a cordial relationship, it cannot be concluded that it is the appellant who lured PW3 into sex. It would be unfair for the appellant to serve 15 years in jail given the circumstances of his case.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and Signed at Marsabit this …… day of ……. 2017

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 21ST day of JUNE, 2017

WELDON KORIR

JUDGE