REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 16 OF 2018

JOSEPHAT MWATU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The appellant was charged with offence of defilement contrary to Section 8 (1) (3) Sexual Offence Act number 3 of 2016.

2. Particulars being that on 07/07/2015 at [particulars withheld] Village, Kiboko Location, Kilungu Sub-county, Makueni County, intentionally caused his penis to penetrate the vagina of RM, a child aged 16 years.

3. Alternative charge committing indecent act with a child contrary to Section 11(1) Sexual Offences Act No. 3/2006.

4. Particulars being that on the same date and place, Applicant touched the vagina of RM a child aged 16 years.

5. The Appellant pleaded not guilty and the matter went into full trial.

6. The Appellant was found guilty and was convicted and sentenced to serve 15 years imprisonment.

7. Being aggrieved by the aforesaid decision, the Appellant lodged instant appeal setting out four (4) grounds, but he submitted only three (3) of them. Namely;

1. The evidence did not meet the criminal standards of proof.

2. The court shifted the burden of proof to the Appellant.

3. The court mislead itself on the applicable law.

8. The parties agreed to canvass appeal via submissions but only the Appellant filed and served the same.

THE APPELLANT'S SUBMISSIONS

9. That the learned trial magistrate erred in law and fact in convicting the Appellant when the evidence did not meet the criminal standard of proof.

10. The standard of proof in criminal cases is beyond reasonable doubts. We submit that the prosecution did not discharge that duty.

11. The Appellant was charged with defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

12. Under Section 8 (1) it reads;

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

13. Under section 8 (3) it reads*;*

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

14. Under section (5) it reads;

> ***"It is a defence to charge under this section if; a) It is proved that such a child, deceived the appellant person into believing that he or she way over the age of eighteen years at the time of the alleged commission of the offence and……."***

15. According to the evidence of PW2 the Complainant the Appellant went to their home and seduced her. When the Appellant insisted, she gave in and they had sex.

16. Upon cross-examination by the Appellant, she said ***"I am the one who entered your box and we went to have sex with you. I didn't say you forced me to have sex."***

17. This is the scenario which confronted Justice S. J Chitembwe in the case of **Omus Kirugi Chivatsi –Vs- Republic (2017) eKLR** when he said;

> ***"Although the offence of defilement is proved whenever penetration, age and identity of the defiler is established there is need to analyze the circumstances of the case so as to exclude the presence of the condition provided for under Section 8(5) of the Sexual Offences Act. Where the alleged victim was not complaining but enjoying the relationship, depending on the circumstances of the case, the appellant should be accorded the benefit of doubt."***

18. The Complainant in this case admitted that she was not forced by the Appellant, she allowed him to have sex. Indeed according to PW3 she said that when she opened the door where both the Appellant had been locked, ***"they denied having sex."***

19. The Complainant herself denied having sex with the Appellant which means she was covering up or defending the Appellant.

20. It was testified in court using a birth certificate that the Complainant was aged 16 years at the time of the offence. She must have misled the Appellant by her conduct of belief that she was over 18 years of age and capable of having sexual relations.

21. These are the circumstances envisaged in Section 8 (6) which states;

> ***"The belief referred to in sub-section 5(b) is to be determined having regard to all circumstances, including steps the appellant person took to ascertain the age of the complainant."***

22. It was the duty of the trial court to determine *"all the circumstances"* which is a defence on the part of the Appellant which assessing whether the prosecution had proved its case beyond reasonable doubts without ascertaining those circumstances in their entirety, thus it is submitted that the standard of proof beyond reasonable doubts was not met.

23. The learned Trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant.

24. The evidence tendered in the trial court pointed to a sexual liason between the Appellant and the Complainant devoid of any threat, force or intimidation. In other words the Appellant was not a defiler. In the words of the Trial Magistrate.

25. On cross examination, she stated that she is the one who (entered box) acquiesced to his demands. She was not forced to have sex.

26. Having made that observation, the trial court nevertheless felt that it was the duty of the Appellant to prove that he did not defile the Complainant.

27. In the case of **Martin Chero –Vs- Republic (2016) eKLR** Justice S. J. Chitembwe observed;

> ***"It is clear to me that although PW1 was behaving like a full grown up woman who was already engaging and enjoying sex with men. She seems not to have been complaining about the incident."***

28. The conduct of the Complainant is pivotal and hence the Appellant's act was substantially contributed by the conduct of the Complainant and hence once those circumstances were established in court, the benefit of doubt ought to have been given to the Appellant.

29. The learned Trial Magistrate erred in law and fact by misleading himself on the law applicable. The trial court did not apply the defenses in law envisaged under Section 5 and 6 of the Act.

30. These are the circumstances which mitigate guilt of the Appellant and had the court analyzed the facts and the law and applied the law as per the above section, it would have arrived at a different conclusion and acquitted the Appellant.

31. It is urged the court to allow the appeal, quash the conviction and set aside the sentence.

RESPONDENT'S SUBMISSIONS

32. Mr. Orinda ODPP submitted that the case was of defilement and they opposed the appeal. That it was the first appeal thus court has to re-evaluate evidence. The witnesses called were five.

33. PW5 was the investigating officer. PW4 on medical evidence. On page 7, Eric noted there was defilement. P3 form was produced (medical evidence.)

34. PW3 stated age of victim vide page 5. PW2 was witness who found Appellant and victim inside door. PW1 and PW2 corroborated each other.

35. Appellant was well known by PW1 and PW2. Identity was not an issue. The trial court had no problem on finding Appellant guilty and convicting Appellant.

36. Evidence on record proved Appellant committed offence. Mr. Orinda urged court to find appeal lacking merit and ought to be dismissed.

37. The defence was considered by Trial Magistrate and dismissed on the face of over whelming prosecution evidence. It was a mere denial.

THE DUTY OF THE FIRST APPELLATE COURT

PROSECUTION CASE

38. The duty of a first Appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

39. I will now proceed to scrutinize the tendered evidence.

40. PW1 MM stated that RM was her daughter. On 07/01/2015, she was called by her mother and was told her mother found M in the house with a man and she locked them inside.

41. She went there and the mother opened the house and the appellant and RM came out. They denied having sex.

42. She took both to Kilome Police Station then to hospital and it was confirmed they had sex. There was no cross examination from the Appellant.

43. PW2 RM stated that on 07/07/2015, she was at her grandmother's house. Appellant passed by and requested for pliers. He then asked for drinking water.

44. As she prepared Appellant closed the door and started to seduce her. He insisted and she allowed him to have sex with her. They had sex in the sitting room at her grandmother's house. He raised her skirt and removed her panties.

45. He then removed his penis and inserted it inside her vagina. He ejaculated once. Then the grandmother locked them inside the house.

46. The grandmother called her sister and Appellant's father. The father came and Appellant was allowed to go she was taken to Kilome Police station then to the hospital.

47. On cross examination she stated that she is the one who (entered box) acquiesced to his demands. She was not forced to have sex.

48. PW3 AKM stated that on 07/07/2015, she was at the shamba when she saw the Appellant at her door. She had left R.M. in the house so she went to investigate.

49. She found her door locked from the inside. She then locked the two inside. Appellant called his father and he went to the scene.

50. She called PW1 Mueni and they opened the door and Appellant's father took the appellant away.

51. The Appellant later disappeared and was only arrested last year. There was no cross-examination by the Appellant.

52. PW4 Doctor Eric Kasyamani, that on 17/07/2015 he filled a P3 form for one R.M. she had a history of being defiled. He examined her and found fresh wound on her private parts. He concluded that the child had been defiled. He produced the treatment notes and P3 form as evidence.

53. On cross-examination he stated that a wound that is 72 hours is termed as fresh wound. That he did not use the section of the P3 form showing which weapon she used. That the clothes RM wore were not bloodied. That he could not tell whether the Appellant caused the

injuries.

54. PW5 Sergeant Grace Njenga stated that on 11th July, 2015, this case was minuted to her. One RM complained that she was defiled by the Appellant at her grandmother's homestead. He asked for pliers.

55. Then Appellant closed the door and forced her to have sex with her. It was on 07/07/2015. She recorded statements and took R.M. to hospital.

56. She visited Appellant's home and did not find him. She knew the appellant. Appellant then disappeared. When he thought things had cooled off he resurfaced. She later arrested the Appellant along the road on 06/02/2016.

57. The Complainant knew the person who defiled her. That the Complainant was born on 04/02/1998.

58. She produced her birth certificate as proof of her age. On cross-examination she stated that she knew accuse and his place.

DEFENCE

59. The Appellant gave sworn defence. He stated that on 07/07/2015, on that date he took a passenger to Uvete. Then took another one to Kasikeu from Kitaingo. He then ferried him back to Uvete market at 4.00 p.m. and bought "*muguka*".

60. They chewed the herbs up to 8.00 p.m. then took his customer back to Kitaingo and went home and slept. On 18th December, 2015 he went to report of his involvement in an accident at Uvete Kilome road.

61. On 8th February, 2016, he was headed to Nunguni when he found Ms. Grace. Ms. Grace arrested him and took him to the police station and charged him.

62. On cross examination by Mr. Wangia prosecution counsel, he stated that he had no documents to prove the accident on 18/12/2015. That he has never disappeared at all and that the customer he was carrying died and he didn't know anybody at Kasikeu.

ISSUES, ANALYSIS AND DETERMINATION

63. After going through materials before the court, I find the only is; **whether the case was proved beyond reasonable doubt?**

64. Under the Section 2 of the Sexual Offences Act for the offence of defilement to be complete the element of penetration as defined by the section must be complete.

65. The other element is the proof of the age of the Complainant because the penalties provided for depend on the age of the offender.

66. Consent is never an element of prove under Section 8 of the Sexual Offences Act.

Section 8 (1) reads:-

"Any person who commits an offence of defilement with a child is guilty of an offence termed defilement".

Section 2 states:-

"A child has the definition or meaning assigned to it under the Children's Act."

67. The children's Act defines Section 2 defines a child as anyone under the age of 18 years.

68. I have examined the evidence adduced by all the witnesses before court and I have also perused the record including exhibits produced. I note that the Trial Magistrate observed their demeanor in court and all were truthful to court and were credible.

69. The trial court also considered the Appellant's alibi. However, the Appellant was observed to be lying to court. It is apparent to me and trial court that the alibi was raised only at the defence stage.

70. I also observed that the Appellant did not cross examine PW1 and PW3. This meant that their evidence was not rebutted at the cross examination.

71. The trial court also examined the demeanor of the Appellant and found him to be lying though he did not need to prove or disprove his alibi the moment this court discovered he could be lying then it has serious doubts about the alibi.

72. The trial court found that, the alibi was unbelievable and an afterthought. Thus was penetration proved? The answer is yes. The Complainant RM narrated to court vividly how it happened.

73. At cross examination, she stated that appellant put her in a box and she agreed. Penetration was proved by the P3 form produced in court.

74. Age was proved by the production of the birth certificate by the investigating officer. It showed that the R.M. was born on 04/12/1998. The offence happened on 07/07/2015.

75. Thus the R.M. was below 18 years and actually 16 years of age at the time of the offence thus it is proved she was a child. The identity of the Appellant was not in dispute.

76. The defence submits that PW2 must have misled the Appellant by her conduct of belief that she was over 18 years of age and capable of having sexual relations. The defence relies of on provisions of Section 8 (6) which states;

> ***"The belief referred to in sub-section 5(b) is to be determined having regard to all circumstances, including steps the appellant person took to ascertain the age of the complainant."***

77. It is contended that, it was the duty of the trial court to determine "all the circumstances" which is a defence on the part of the Appellant which assessing whether the prosecution had proved its case beyond reasonable doubts without ascertaining those circumstances in their entirety, thus it is submitted that the standard of proof beyond reasonable doubts was not met.

78. It is argued that the learned Trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant.

79. The evidence tendered in the trial court pointed to a sexual liaison between the Appellant and the Complainant devoid of any threat, force or intimidation. In other words the Appellant was not a defiler. In the words of the Trial Magistrate.

80. On cross examination, she stated that she is the one who (entered box) acquiesced to his demands. She was not forced to have sex.

81. Having made that observation, the trial court nevertheless felt that it was the duty of the Appellant to prove that he did not defile the Complainant.

82. The defence relies on the case of **Martin Chero –Vs- Republic (2016) eKLR where** Justice S. J. Chitembwe observed;

> ***"It is clear to me that although PW1 was behaving like a full grown up woman who was already engaging and enjoying sex with men. She seems not to have been complaining about the incident."***

83. It is further argued that the conduct of the Complainant is pivotal and hence the Appellant's act was substantially contributed by the conduct of the Complainant and hence once those circumstances were established in court, the benefit of doubt ought to have been given to the Appellant.

84. The Appellant never raised the defence contemplated by section 8(5) and (6) SOA nor did he attempt to show steps he took to ascertain the age of the Complainant. His defence was denial.

85. By arguing that since PW2 did consent to the sexual intercourse the charge should fail on that grounds alone, it would be contrary to the provisions of Section 8 (1) which reads:-

> ***"Any person who commits an offence of defilement with a child is guilty of an offence termed defilement".***

86. The provisions above do not include absence of the consent as an ingredient of the offence. A child under 18 years has no capacity to consent to have sex.

87. Thus the court finds no merit in appeal and makes the following orders;

> **i. Appeal is dismissed, conviction affirmed.**
>
> **ii. However sentence is adjusted to ran from 08/02/2016 being the day he was arrested.**

SIGNED, DELIVERED THIS 10TH DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE