REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 144 OF 2015

WAMBUA MUNYWOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. D.G. KARANI (Principal Magistrate) in Kithimani Principal Magistrate's Court Criminal Case No. 23 of 2014 (S.O.) delivered on 18th May, 2015)

JUDGEMENT

1. The Appellant herein **WAMBUA MUNYWOKI** had been charged with an offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 before the Principal Magistrate's Court at Kithimani. He was subsequently convicted and sentenced to serve fifteen (15) years imprisonment.

2. Being aggrieved with the said conviction and sentence, he raised the following grounds of appeal namely:-

> ***(i) That the learned trial magistrate erred in matters of law and fact by failing to find that the alleged victim was carrying herself as an adult.***
>
> ***(ii) That the learned trial magistrate erred in matters of law and fact by failing to find that the alleged victim was 18 years old at the time of the alleged offence thus providing him with the defence under the provisions of Section 8(5) of the Sexual offences Act.***
>
> ***(iii) That the learned trial magistrate erred in matters of law and fact by proceeding to convict the Appellant despite the fact that he and the complainant had an intimate relationship prior to the alleged incident.***
>
> ***(iv) That the learned trial magistrate erred in matters of law and fact by failing to find that no force was used against the complainant.***

3. This being a first appeal this court is obligated to evaluate the evidence afresh and come to its own independent conclusion but bearing in mind that it neither had the opportunity to hear nor observe the witnesses testifying (see **OKENO *Vs* REPUBLIC** [1972] EA 32).

4. The Appellant herein had faced a main charge of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No.3 of 2006 with the particulars being that on the 9th day of August, 2014 at [particulars withheld] village in Masinga Sub – County within Machakos County intentionally and unlawfully caused his genital organ (penis) to penetrate the vagina of *M.M.* a child aged 17 years. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 with the particulars being that on the 9th day of August, 2014 at [particulars withheld] village in Masinga Sub- County within Machakos County intentionally touched the vagina of *M.M.* with his penis against her will.

5. *M.M.* (PW.1) was the complainant and who stated that on the 9/8/2014 at about 4.00 p.m. she was herding the family cows in the bush when her mother found her in company of the Appellant engaging in sexual intercourse and managed to scare off the Appellant. She stated that she had had sexual intercourse with the Appellant on three other occasions. She further stated that the Appellant had earlier requested her to be his girlfriend and that she had agreed to the request. She was later escorted to Masinga Sub-County Hospital where she was examined and Post Rape Care Form and P.3 form filled. She confirmed on cross examination that she did not scream during the sexual encounter.

6. V N W (PW.2) was the mother to the complainant and who confirmed that the complainant had been born on the 4/12/1996 as per the child immunization card which she produced as exhibit No.4. She stated that she arrived home only to find the cows unattended and on failing to locate the complainant, she decided to look for her in the bushes and stumbled on her having sex with the Appellant. She stated

that she pulled the Appellant who was atop the complainant and hit him on the face with a stick and who took off from the scene. She later escorted both the complainant and the Appellant to Masinga Police station from where they were referred to Masinga Sub-County Hospital. She identified the post rape care form and P.3 form and maintained that she had caught the Appellant in the act and that she had no grudge against him.

7. Morris Mutisya (PW.3) was the member of community policing and stated that he escorted the Appellant to Masinga police station.

8. No. 62212 corporal Paul Nduati (PW.4) was based at Masinga Police Patrol Base and the investigating officer who stated that he escorted the Appellant and Complainant to Masinga Sub-County Hospital for examination and later recorded statements and then charged the Appellant with the offence. He further claimed that the Appellant claimed that the complainant had been his girlfriend.

9. Edwin Mutembei (PW.5) was the Clinical Officer based at Masinga Sub-County Hospital. He stated that he examined the Complainant and confirmed that she had been defiled. He produced the Post Rape Care Form and P.3 form. He noted that the Complainant's hymen had been torn but that she had not been a virgin.

10. The trial court later established that the Appellant had a case to answer and was promptly placed on his defence. He gave an unsworn statement that on the material date he woke up and went about his usual chores only to be arrested at Ikatini Market and escorted to Matuu and Masinga police stations from where he was charged.

11. Parties agreed to canvass the Appeal by way of written submissions. It was submitted by the Appellant that the Complainant had been his girlfriend who was aged 18 years old and who had admitted before the trial court that she had agreed to engage in sex with him. The Appellant further submitted that the complainant engaged in the sexual intercourse and enjoyed it until they were caught in the act by her mother and as such he should be accorded the benefit of doubt under Section 8(5) of the Sexual offences Act as he believed the complainant to be an adult and who had willingly removed her underpant and agreed to the Sexual intercourse with him.

Mr. Machogu learned Counsel for the Respondent submitted that the Appellant cannot seek refuge under Section 8(5) of the Sexual Offences Act as he did not demonstrate the steps he took to ascertain the Complainant's age. Learned Counsel further submitted the Appellant did not rely on the defence under Section 8(5) of the Sexual offences Act during his defence evidence and has only raised the same at the appeal stage and which is an afterthought. It was finally submitted that the complainant's age having been established to be 17 years at the time of the defilement as per the child immunization card, then she was still a minor and incapable of consenting to the sexual intercourse.

12. I have considered the submissions of the Appellant and the Respondent as well as the evidence adduced before the trial court. It is not in doubt that there was a sexual encounter between the Appellant and the complainant on the material date and that there was penetration of the Complainant's vagina by the Appellant. Indeed the complainant's mother found the two lovebirds in the act and forcefully removed the Appellant who was then atop the complainant. The Clinical Officer upon examination of the complainant, confirmed that she had been defiled. The issues for determination are as follows:-

(i) Whether the complainant's age was established.

(ii) Whether Section 8(5) of the Sexual offences Act is applicable to the Appellant's circumstances.

(iii) Whether the Respondent's case had been proved against the Appellant beyond the required standard of proof.

13. As regards the first issue, it is noted from the child immunization card that the Complainant was born on 4/12/1996 and therefore at the time of the incident on 9/8/2014, she was about 17 years and 8 months old and was therefore four months short of turning 18 years. As the complainant had not turned the age of 18 years, then I find she was still a minor for all intents and purposes pursuant to the provisions of Section 2 of the Children's Act No.8 of 2001. The Complainant being a minor as aforesaid could not legally give consent to the sexual intercourse. Even though the Complainant in her testimony claimed to be 18 years of age, I find the same to be not correct since her mother who produced the child immunization card categorically stated that she had been born on 4/12/1996 and at the time of the incident she had not yet attained 18 years of age. The mother of the complainant was best placed to confirm the exact date she gave birth to the complainant and this was corroborated by the child immunization card. The complainant stated before the trial court that she was then 18 years old and which could explain the reason she had agreed to be a wife to the Appellant but it was obvious that her real age was known only by her mother and backed by the child immunization card. The age of 18 years fronted by the complainant during her testimony must have been meant to shield the Appellant who was her boyfriend. I find the complainant's age of 17 years was properly established by the prosecution.

14. As regards the second issue, it is noted that the Appellant has really pitched tent under Section 8 (5) of the Sexual Offences Act No.3 of 2006 on the ground that the complainant had agreed to be his girlfriend and that they had had sexual intercourse in the past and further that the complainant had enjoyed the relationship and behaved in a manner likely to suggest that she was an adult.

Section 8(5) of the sexual offences Act provides as follows:-

> ***"It is defence to a charge under this Section it is proved that such child deceived the accused person that he or she was over the age of eighteen years at the time of the alleged commission of the offence and the accused reasonably believed that the child was over the age of eighteen years."***

Section 8(6) of the said Act provides that the belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances including any steps the accused person took to ascertain the age of the complainant.

Learned Counsel for the Respondent submitted that the Appellant in his defence evidence did not state the steps he had taken to ascertain the

age of the complainant and has only raised it in this appeal which should be treated as an afterthought. Indeed the Appellant did not raise such a defence under Section 8(5) of the Sexual Offences Act in his defence evidence. However, the said Section 8(5) of the Act alludes to all circumstances surrounding the commission of the offence. The Appellant now seeks this court to consider those circumstances even if he had not raised them in the trial court. This then calls for a perusal of the complainant's testimony and any other relevant witnesses so as to establish whether such circumstances exist and came to the fore during the trial.

The Complainant in her testimony indicated that she was then 18 years old and that the Appellant had requested her to be his girlfriend and she had agreed. She went on to state that they had engaged in sexual intercourse on previous occasions and on the material date, she had willingly removed her underwear and had sex with the Appellant. The evidence of the Member of Community Policing Morris Mutisya (PW.3) confirmed that he had earlier deliberated on a manner of sexual relationship involving the Appellant and the complainant and had it settled then. Again the Clinical Officer Edwin Mutembei (PW.5) while examining the Complainant learnt from her that the Appellant had promised to marry her. This is captured in the P.3 form produced as Exhibit No.3. Even though the Appellant did not raise a defence under Section 8(5) of the Sexual offences Act in his defence evidence, I find that the above circumstances must be taken into account. These circumstances obviously must have left no doubt in the mind of the Appellant that he was dealing with a girl whose age must have been eighteen years old. In fact it transpired that the Appellant had proposed to marry the complainant who had dropped out of school in class seven. The Appellant therefore ought to have been given the benefit of doubt by the trial court. Suffice to add that the complainant was just about to turn 18 years of age at the time of the incident. From the evidence of the complainant, it is clear that her conduct towards the Appellant was that of a future or prospective wife as she saw the Appellant as a husband to be. She did not report to her parents about her previous escapades with the Appellant and it seems it was just bad luck that her mother stumbled upon the two lovebirds in flagrant delicto making it out in the bush and which precipitated into this case. In the circumstances I find that the provision of Section 8(5) of the Sexual Offences Act qualified as a good defence in favour of the Appellant and was applicable to the Appellant's circumstances.

15. As regards the last issue, and in view of the above observations, I find that the prosecution's case had not been proved against the Appellant beyond any reasonable doubt. The provisions of Section 8(5) of the Sexual Offences Act did afford the Appellant some benefit of doubt and hence he should have been granted that benefit of doubt by being granted an acquittal under the circumstances by the trial court.

16. In the result it is the finding of this court that the Appellant's appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The Appellant is hereby ordered released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at **Machakos** this **18th** day of **September 2018.**

D. K. KEMEI

JUDGE

In the presence of:-

Wambua Munywoki - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant