



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 59 OF 2017

BETWEEN

WARU MATWETWE THOMAS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki – PM dated 15th December 2016 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 1448 of 2010)

JUDGMENT

1. The appellant, **WARU MATWETWE THOMAS**, was charged, convicted and sentenced to 15 years imprisonment for the offence of defilement contrary to **section 8(1)** and **(4)** of the **Sexual Offences Act**, (‘the Act’). The particulars were that on 14th day December 2010 at Keroka township in Masaba District within Nyanza Province, he intentionally and unlawfully his penis to penetrate the vagina of CM, a girl aged 16 years.

2. The appellant attacked the conviction on the grounds set out in the petition of appeal filed on 3rd November 2017 and the written submissions. The thrust of his case was that the prosecution failed to prove its case beyond reasonable doubt and that the evidence was contradictory, unreliable and was not corroborated and that his defence was not considered.

3. The complainant, PW 1, testified that she knew the appellant as he used to be her father’s tenant. PW 1 recalled that after she closed school on 23rd November 2010, she met the appellant when she was at her uncle’s place at Ogembo. She described in detail how she stayed with the appellant for several days and how the appellant proceeded to have sexual intercourse with her. She also detailed how the appellant expressed his wish to marry her as his second wife. Since she had disappeared from home, she heard that police were looking for her. A friend assisted her to report to Keroka Police Station. When her father was informed he came to collect her and they proceeded with the police to arrest the appellant at his home.

4. The complainant’s father, PW 2, testified that the appellant had been his tenant. He also told the court that PW 1 was born in 1994. He recalled that after PW 1 had closed school on 23rd November 2010, she had proceeded to her uncle’s home then disappeared. He frantically looked for her until he was called to come to Keroka Police Station where PW 1. He denied he was aware of any courtship between the appellant and his daughter.

5. When called upon to make his defence, the appellant elected to give sworn testimony as follows;

I am Mr. Matwetwe Waru Thomas. I reside at Ogembo. I know the charge against me. I know complainant herein, who was my friend and whom I was courting. We were only testing our relationship before marriage. This was having sex. We did at our several occasions. Complainant never informed me that she was in school. We planned our marriage. We loved each other. I was arrested while at Keroka in 2010. I only wanted to marry the complainant and establish a family. I was friends with the complainant for two years. I know one Oseko who is my brother. I was not married then. I married later. That is all.

6. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. “Penetration” under **section 2** of the Act means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

7. The testimony of PW 1 was detailed and clear that she and the appellant had sexual intercourse on several occasions. The appellant admitted as much and contended that it was courtship. The prosecution also proved by production of the birth certificate that PW 1 was aged

16 years. Consequently, the offence of defilement was duly proved by the prosecution.

8. As the trial magistrate pointed out, the only defence available to the appellant was under **section 5** and **6** of the **Act** which provides as follows:

5. It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused 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 accused reasonably believed that the child was over the age of eighteen years.

6. 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.

9. The appellant had known PW 1 prior to the incident as he was a tenant of PW 2. There is no evidence that PW 1 deceived him. The evidence is clear that it is the appellant who wanted her to be his second wife and he took it upon himself to lure her to his home to the extent of keeping her away from her parents. He cannot rely of the defence under **section 8(5)** of the **Act** since he did not even take any steps to ascertain PW 1's age.

10. Since PW 1 age was 16, the sentence imposed was the minimum provided under **section 8(4)** of the **Act**. It is affirmed.

11. I dismiss the appeal.

DATED and DELIVERED at KISII on this 1st day of NOVEMBER 2018

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.