



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 8 OF 2017

RSC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 507 of 2014 of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma (Mrs.), RM)

JUDGEMENT

1. The Appellant, RSC, is serving fifteen years imprisonment following his conviction for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 (S.O.A). The particulars of the offence disclosed that on 13th September, 2014 at around 14.00 hours (details redacted) within Kilifi County the Appellant intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of ZMN a child aged 16 years.
2. The Appellant was faced with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the S.O.A. There is no need to state the particulars of this count as the Appellant was only found guilty and convicted of the main charge.
3. The Appellant being aggrieved by both conviction and sentence has appealed to this court on the grounds that the charge was not proved and his defence was not considered by the trial court. The Respondent opposed the appeal.
4. The appeal was argued through written submissions. The submissions together with the evidence that was adduced at the trial will inform the outcome of this appeal.
5. In order to obtain a conviction in a case of defilement, the prosecution must establish penetration of the victim's genital organ by the genital organ of another person, the fact that the victim is a child and the identity of the perpetrator. For clarity, a child is a human being aged below 18 years as defined by Section 2 of the Children Act, 2001. Each of the three elements must be proved beyond reasonable doubt. Failure to prove any of the ingredients should lead to the acquittal of the accused person.
6. As is required of this court as a first appellate court, I must review the evidence adduced at the trial in order to satisfy myself that the trial magistrate arrived at the correct decision.
7. ZMN testified as PW1 and told the court that in 2014 she was a form one student at [particulars withheld] Secondary School while the Appellant who was her boyfriend was in form four at [Particulars Withheld] Secondary School. They met during a sports day at [Particulars Withheld] Secondary School. On 13th September, 2014 she visited the Appellant in his rental house and they had sex. In the evening she went back home and her mother questioned her. She started feeling dizzy and nauseous. She also missed her monthly periods.
8. She did not tell anybody about her tribulations but instead prepared an herbal concoction and took it so as to procure an abortion. Her evidence was that she had the abortion on 22nd November, 2014 which was one month after she had sex with the Appellant. She bled as a result of the abortion and her mother called police officers who came and took her to Jaribuni AP Camp where she found the Appellant. She was taken to Bamba Hospital for treatment. She identified the Appellant in court as her boyfriend. She also identified an age assessment report, a P3 form and a post rape care form that were filled for her. She stated that she was 18 years old at the time she testified.
9. On cross-examination, the complainant stated that she had not informed the Appellant about the pregnancy as she did not want to stress him as he was sitting his exams. She also testified that she initiated the affair. Further that she had been held in police custody for three days.
10. PW2 MMN the father of the complainant told the court that on 23rd November, 2014 he received a call from the mother of the Appellant that the complainant was sick. Further enquiry revealed that the complainant had gone to the home of the Appellant the previous day. He

telephoned the police who went and arrested the Appellant. He also learned that his daughter had procured an abortion. He stated that his daughter was going to turn 18 years in August, 2016. He also stated that he could not recall the date of birth of his daughter although he had her birth certificate.

11. Cross-examined, PW2 insisted that the complainant and the Appellant were both arrested from the Appellant's home.

12. PW3 Dr. Hassan Bachu told the court that when the complainant was examined she was bleeding from her birth canal. Although tests carried out confirmed she was pregnant, she had lost the pregnancy. The history given was that the complainant had consensual sexual intercourse with her boyfriend. The age of the complainant was indicated as 17 years in the P3 form. He produced the P3 form as an exhibit. He stated that a post rape care form, which he identified in court, was used to fill the P3 form.

13. PW4 Police Constable Peter Odhiambo told the court that the investigating officer was Police Constable Maureen Otieno. He produced an age assessment report and stated that the complainant was aged 18 years on 25th September, 2015 when she was examined.

14. In his defence the Appellant who testified as DW1 denied having sexual contact with the complainant. He, however, admitted knowing her.

15. JS the mother of the Appellant testified as DW2 and RS the sister of the Appellant testified as DW3. They told the court that the complainant went to their home on 23rd November, 2014. As DW2 was going to report the matter to the village elder after learning that the complainant was being looked for, police officers arrived and arrested the complainant and the Appellant.

16. In order to arrive at my decision in this matter, I must review the evidence in its entirety. Counsel for the Appellant submitted that there was contradiction in the evidence adduced as to the age of the complainant. He identified the contradictions by pointing to the evidence of the witnesses and the documents that were produced as exhibits.

17. The complainant and her father told the court that the complainant was 18 years or thereabouts on 11th July, 2016 when they testified in court. This means she was 16 years on 13th September, 2014 when the defilement allegedly took place. Their evidence therefore supported the particulars of the charge which gave the age of the complainant at the time the offence was committed as 16 years.

18. The evidence of the medical officer was slightly different. PW3 told the court that the complainant was 17 years at the time of the alleged offence. PW4 produced an age assessment report which indicated that the complainant was 18 years on 25th September, 2015 when her age was assessed. This evidence would therefore tally with the statement in the P3 form that the complainant was 17 years at the time of the alleged offence.

19. Counsel for the Appellant however referred to the post rape care form (PRC) and submitted that the form showed that the complainant was an adult at the time she had a sexual encounter with the Appellant.

20. I have perused a copy of the PRC filled for the complainant and her estimated age is indicated as 19 years. The date of examination is indicated as 27th November, 2014 which is about two months after the said sexual engagement. Although the PRC which is a carbon copy of the original is not clear on the day and month the complainant was born, the year of birth appears to be 1996 thereby putting the age of the complainant at about 18 years in 2014 when the crime was allegedly committed.

21. It is noted that the information captured in the P3 form and the PRC in regard to the age of a victim of sexual violation is normally gotten from the victim or guardian or the parent. In the circumstances of the case therefore the evidence that was adduced showed that the complainant's age at the time of the incident could either be 16, 17, 18 or 19 years.

22. The record shows that the Appellant was arrested on 23rd November, 2014 and taken to court on 24th November, 2014. No explanation was offered as to why the complainant was taken for age assessment on 25th September, 2015 almost one year later. Indeed the fact that the complainant was taken for age assessment is in itself a matter of grave concern when one considers that PW2, the father of the complainant told the court that he had a birth certificate for the complainant. No explanation was given as to why the birth certificate was not produced as exhibit considering that a birth certificate is the primary document for proving the age of a person.

23. The failure to produce the birth certificate without any explanation being offered coupled with the procurement of an age assessment report about one year after the Appellant was charged can only lead to the conclusion that there was something that was being hidden from the court.

24. Even the documents placed before the court were contradictory as to the age of the complainant. Prove of age is indeed a key element in the prosecution of a charge of defilement.

25. Considering that the complainant gave contradictory evidence on her age, it becomes clear that she was not a credible witness. Her claim that she had sexual intercourse with the Appellant on 13th September, 2014 consequently becomes doubtful. The fact that the complainant was found at the home of the Appellant two months later does not in any manner support her claim that she had sex with the Appellant.

26. The medical evidence did indeed confirm that the complainant terminated a pregnancy but considering the established lack of credibility on the part of the complainant, it is difficult to say with any certainty that the Appellant and not somebody else was responsible for the pregnancy.

27. At the end of the day, it is clear that the evidence on the age of the complainant was contradictory. It showed that the complainant could

have been an adult by the time she had sexual intercourse with the Appellant. The S.O.A does not prohibit consensual sexual intercourse between adults. In the circumstances of this case the Appellant was out of reach of Section 11 of the S.O.A and he ought to have been given the benefit of doubt by the trial court.

28. For the reasons already stated, this appeal has merit and it succeeds. The Appellant's conviction is quashed and the sentence set aside. The consequence is that the Appellant is set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 6th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT