



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

HIGH COURT CRIMINAL APPEAL NO 38 OF 2016

(An appeal from the decision by Hon. N. Kariuki (RM) in H/Bay

CMCRC No. 1128 of 2013)

LABAN ONYANGO OKECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant (**LABAN ONYANGO OKECH**) was charged for the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No 3 of 2006, the particulars being that on diverse dates between the month of April 2013 and 20th September 2013 at **[particulars withheld]** in Homa Bay, he willfully and unlawfully caused his penis to penetrate into the vagina of **M.A.M.**, a child aged 15 years. He denied the offence but after a trial in which 4 witnesses testified on behalf of the prosecution, while the defence had 2 witnesses, the appellant was convicted and sentenced to serve 20 years imprisonment.

2. When **M.A.M.** testified in court on 27/02/2013, she informed the court that she was aged 16 years having been born in 1998 and she had first met the appellant in April 2013 when she visited her aunt at **[particulars withheld]**. She stayed at her aunt's place for 3 weeks during which period the appellant requested her to be his girlfriend and she obliged. She did not disclose to him her age or the fact that she was a student at a secondary school. It was her evidence that:-

3. "I did not visit him neither did I have sex with him"

4. At this juncture the prosecutor informed the court that **M.A.M.** had been compromised and requested that she be remanded at the police station-which request was granted. When the court reconvened on 06/03/2014, the prosecutor informed the court that **M.A.M.** was now willing to tell the truth. She then testified on 12/03/2014 and said that during her visit to her aunt's home, she visited the appellant whom she described as her boyfriend. They had sex on 4 occasions during which time the appellant used a condom. She informed the court that it was not her first time to have sex with a man. On 28/09/2013 she was arrested and escorted to Homa Bay Police station. Later on she was subjected to a medical examination but the Dr confirmed that she was neither pregnant nor infected with any sexually transmitted disease.

5. **M.A.M.**'s mother **P A M (PW2)** confirmed to the court that **M.A.M.** was born in 1998 and had been living with her aunt **J A**. However between April 2013-September 2013, her daughter lived with the appellant in **[particulars withheld]**. She learnt about this state of affairs from her brother-in-law one **O** and upon inquiring from her sister she was told **M.A.M.** had long disappeared from home. She later

reported the matter to the area chief and this led to the arrest of both MAM and the appellant. The area Assistant Chief (**BORN OUMA ONDIKO**) (PW3) stated that the area Chief informed him about a school girl who had mysteriously disappeared and requested him to try and trace her. He traced both **MA..M.** and the appellant at the latter's house and apprehended them. On cross examination he explained that he found the girl in a house within the compound of appellant's parents, and while seated inside the house he saw the appellant coming from the road-he conceded that the house could well belong to the appellant's brother.

6. **DR ALFRED ONANGA (PW4)** who examined MAM noted that her hymen was ruptured-an indication that she had been sexually active-however she had no sexually transmitted infections. He did not assess her age saying that although he was requested to carry out an age assessment, he found it difficult as he did not have the resources.

7. The investigating officer **PC NAOMI (PW5)** told the court that **M.A.M.** was 17 years at the time the offence was committed and that the Dr had said there was penetration

8. In his unsworn statement the appellant stated that he had differed with **M.A.M.'s** aunt over land and the latter had vowed to ensure he got arrested. This was also alluded to by his mother **J A (DW2)** who denied that **M.A.M.** ever lived with her son as husband and wife for two months. She also denied that **M.A.M.** was taken from her home by the Chief, saying he only arrested the appellant.

9. The trial magistrate noted that there was conflicting evidence regarding **M.A.M.'s** age, her own calculations satisfied her that at the time of testifying it appeared she was 15 years old. She further sought to rely on the case of **MOSES NATO RAPHAEL versus REPUBLIC [2015] eKLR where the Court of Appeal held that:-**

“As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age which is the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability”

10. The trial magistrate was of the view that the age disparity in the documents availed to the court would not prejudice the appellant in any way, and she held that **M.A.M.** was a minor. The defence offered was considered and rejected as being a mere denial saying **M.A.M.** had admitted to being the appellant's girlfriend.

11. The trial magistrate pointed out that since the history given was that **M.A.M.** had been sexually active, and given the history that she was cohabiting with the appellant, despite there being no medical evidence that the appellant was the sexual partner, she held that **M.A.M.'s** disappearance over a substantial period justified the court inferring that she was having sexual relations with the appellant.

12. In challenging the findings the appellant stated that the trial court failed to appreciate that the prosecution did not prove **M.A.M.'s** age, and ignored the medical expert's evidence that she was 17 years, instead substituting it with her own calculation of 15 years. He also lamented that he was denied a chance to cross-examine the complainant and that he was denied the opportunity to defend himself.

13. In his written submissions the appellant argued that **M.A.M.** was intimidated so as to give evidence in favour of the prosecution because she only changed her version of events after being remanded in custody.

14. In opposing the appeal, **MR. OLUOCH** submitted that the complainant's age was adequately proved by the birth certificate presented at the trial as well as the P3 form. The birth certificate which was produced as Exhibit 2 showed the date of birth as 01/03/1998. The P3 form produced as Ex 1 did not have an age assessment as the Dr said he had difficulties assessing her age.

15. As regards being given a chance to defend himself, the record clearly shows that the trial magistrate

explained to the appellant the provisions of section 2011 and the appellant elected to make his defence by way of unsworn testimony and he indicated to the court that he would call one witness. There is nothing to suggest that it is the trial magistrate who selected his mother to testify as a defence witness and that limb of his appeal has no leg to stand upon.

16. Did the trial court satisfactorily reconcile the contradictions regarding **M.A.M.**'s age. Whereas both **M.A.M.**'s mother said she was 16 years, the Dr did not put a finger to her age, saying he had difficulties in assessing the age. The investigating officer (**PW5**) gave her age as 17 years although she did not disclose the basis for this. What calculations did the trial magistrate use? I would infer that she simply considered the date of birth as given in the birth certificate visa the date of the incident which was in 2013 to conclude that she was 15 years old, but at the date of testifying in court which was in 2014 she was 16 years. That was in tandem with the particulars of the charge sheet and I do not detect any error by the trial court.

17. However there is one curious aspect of the trial regarding the evidence of **M.A.M.**- she had initially denied visiting the appellant or even engaging in sex with him although she admitted that he was her boyfriend. The prosecutor immediately informed the court that MAM had been compromised. Neither the court nor **M.A.M.** was shown the statement she had recorded with the police, and what aspect of her evidence differed from it. Indeed **M.A.M.** was not even invited to look at the statement, read through it and confirm or deny whether it was the one she had recorded and signed. In the absence of these steps then ordering for **M.A.M.** to be remanded in custody without first clarifying whether indeed she had given a different version of events to the police amounted to intimidation calculated at cowering her to sing the prosecution's tune. This was totally prejudicial to the appellant. Once this happened then there remained a loophole because:-

a) the mere fact that **M.A.M.** and the appellant were boyfriend and girlfriend did not necessarily mean that they had indulged in sex. Even the fact that the chief found her in a house within the homestead of the appellant's parents did not prove sexual engagement- indeed the chief on cross examination conceded that the house could well belong to the appellant's brother.

b) **M.A.M.** had admitted that she had been involved in other trysts before, so that the broken hymen did not prima facie prove that the appellant was the culprit.

18. It is on account of this limb that I hold that the appellant was grossly prejudiced and the conviction was not safe and is hereby quashed. Consequently the sentence is set aside and I order that the appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 2nd day of February, 2017 at Homa Bay

H.A. OMONDI

JUDGE