REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 49 (B) OF 2015

REPUBLIC.....APPELLANT

VERSUS

P. K.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 716 of 2012 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The respondent was charged with offence of defilement contrary to section 8 (1) of the sexual offences Act No. 3 of 2006. The particulars of the offence are that the respondent on the l.1. 2012 at [particulars withheld] village of Gede location within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of R. M. a girl aged 17 years.

The trial court acquitted the respondent. The state appealed against that decision. The grounds of appeal are that the trial court erred in law and fact by acquitting the respondent against the weight of evidence. That the prosecution was not given ample time to call the doctor without any reason. That the trial court erred in law by overlooking the alternative charge. That the trial court misapplied the law and thereby came to the wrong decision. Mr. Fedha, prosecution counsel, relied on the record and urged the court to allow the appeal. The respondent was not served with the appeal and did not participate.

This is a first appeal and the court is supposed to evaluate the evidence afresh and come to its own conclusion. I have read the record of the trial court. PW1 was the complainant. She was 17 years old and a student at [particulars withheld] primary school. On 1.1.2012 at about 8.00 pm she went to church with her two sisters, her two aunties and another relative. As the other people entered the church for a service that was scheduled for 10.00 pm, she remained outside. The respondent went there and held her hand and they went on a motor bike to a club. She stayed outside the club and the respondent went in shortly and came out. They went somewhere and had sex. She then returned to the church. On 7.5.2012 she was on her way to Gede alone when she met the respondent. They went to the forest and had sex. She later realized that she was pregnant. The matter was reported to the police and she was taken for age assessment and medical examination.

PW2 was the mother of PW1. She testified that on 13.9.2012 she was at home when her husband informed her that he had heard that PW1 was pregnant. She talked to PW1 who gave the name of the respondent. The following day they reported the matter at Watamu police station. She knew the respondent who was a student at Gede polytechnic.

PW3 Cpl. BORICE TONUI was based at Watamu police station on gender duties. She investigated the case which was reported on 18.9.2012. She talked to PW1 who told her that she was seduced by the respondent and she agreed. The two were neighbours. They went to a club in Gede but PW1 remained outside as she thought that people would recognize her and inform her parents. They then went to the home of one P.K where they had sex. She also had sex with the respondent on 7.5.2012 and later realized that she was pregnant. The respondent was arrested and charged with the offence.

In his sworn defence the respondent testified that he was a welder and electrician living in Watamu. He

denied having sex with PW1.

The trial court evaluated the evidence and concluded that the case was not proved beyond reasonable doubt. From the evidence on record it is established that PW1 and the respondent had a love relationship and met on some occasions to have sex. The problem arose when PW1 became pregnant. There is no evidence that PW1 was lured to the act by the respondent. It is clear that the meetings between PW1 and the respondent were pre-arranged. It is evident that PW1 opted not to enter the church after having gone there with her sisters and other relatives and went to have sex with the respondent. She knew what she was doing and was behaving just like an adult. After having sex she went back to the church. The evidence shows that there were overnight prayers to welcome the incoming year. This was somebody who knew what she was doing. The respondent was a student and the two were having a relationship. The trial court observed that the case was adjourned six times to enable the doctor testify but the doctor did not testify. I do find that the prosecution was accorded ample time to prove its case. There was no evidence that PW1 had delivered her child. The trial court was of the view that penetration had not been proved and acquitted the respondent.

Given the evidence on record, I do find that PW1 took herself like a mature girl. She went to church for overnight prayers with her sisters and aunties but sneaked out to have sex with the respondent. The circumstances of the case show that the respondent might have believed that PW1 was over eighteen years. They were lovers and had sex whenever the two agreed to have it. I find that the defence under section 8 (5) of the Sexual Offences Act comes to the rescue of the respondent. I do agree with the findings of the trial court that the prosecution did not prove its case beyond reasonable doubt.

In the end, I do find that the appeal by the state lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 9th day of March, 2017.

S.J. CHITEMBWE

JUDGE