REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 177 OF 2011

SIMON KAMAU GACUNGWA..... APPELLANT

VERSUS

REPUBLIC .....STATE

(Appeal from the Ruling of the Chief Magistrate's Court at Nakuru Hon. E. Tanui –Resident Magistrate delivered on the 13th July, 2011 in CMCR Case No. 253 of 2010)

JUDGMENT

The appellant **SIMON KAMAU GACUNGWA** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned in the trial court on 18/10/2010 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"Between the 1st day of October, 2010 and the 16th day of October, 2010, n Mirangine District within Central Province intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of P N C a child aged 13 years which caused penetration".***

The appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006** and lastly the appellant faced a second count of **SUBJECTING A CHILD TO EARLY MARRIAGE CONTRARY TO SECTION 14 as read with SECTION 20 OF THE CHILDREN ACT, 2001**.

The particulars of this second count were that

> ***"Between the 1st day of October, 2010 and the 16th day of October, 2010 in Mirangine District within Nyandarua County intentionally and unlawfully cohabited with P N C a child aged 13 years, as husband and wife, thereby subjecting her to early marriage".***

The appellant pleaded **'Not Guilty'** to all the charges and his trial commenced in the lower court on 8/12/2010. The prosecution led by **INSPECTOR MAKORI** called a total of five (5) witnesses in support of their case.

The complainant **P N C**, testified as **PW1** and she told the court that on a date she did not recall she bathed in the evening and then went to watch video's at a video hall run by the appellant. After she had finished watching the appellant asked her to go and stay with him in his home. The complainant consented and went with the appellant to his house. They slept together in the same bed and engaged in sexual intercourse.

PW2 A W C was the mother of the complainant. She told the court that on 1/10/2010 she went to visit a neighbor who was unwell. When **PW2** returned home she found that her daughter was not at home. The child was missing for an entire week.

On 7/10/2010 **PW2** received information that the complainant had been seen at the appellant's house. **PW2** went with one **'Damaris'** to the house of the appellant where they found the child. Upon being questioned the complainant insisted that she was married to the appellant. **PW2** called in the village elder and the child's uncle **PW3 J K**. They tried to get the complainant to return home but the couple insisted that they were man and wife.

The matter was then reported to the police who raided the appellant's house and rescued the complainant. The complainant was taken to hospital where she was examined. The appellant was eventually charged with the above offences.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to make a sworn defence in which he denied the charges. The appellant called two witnesses in support of this defence. On 13/7/2011 the learned trial magistrate delivered his judgment in which he convicted the appellant in the first count of Defilement and thereafter he sentenced the appellant to serve twenty (20) years imprisonment. The trial court however acquitted the appellant of the second charge.

Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented by counsel during the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed and served on the office of the DPP. **MR. CHIGITI** learned State Counsel opposed the appeal.

This being a first appeal this court is required to re-examine and re-evaluate the prosecution evidence and to draw its own conclusions of the same [see **AJODE Vs REPUBLIC [2004]2 KLR 83**]. Likewise in the case of **MWANGI Vs REPUBLIC [2004] 2 KLR 28** the Court of Appeal held that

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions***
>
> ***3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions, only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses".***

In such a case of defilement the prosecution is under a duty to prove beyond reasonable doubt the following

1. The fact of defilement

2. The identity of the perpetrator

3. The age of the complainant

I will consider first the question of whether the age of the complainant has been proved. In the case of **ALFAYO GOMBE OKELLO [2010]eKLR** , the Court of Appeal in discussing the question of age on defilement cases stated thus

> ***"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt".***

In her evidence the complainant stated that she was 13 years old. **PW2** the complainant's mother told the court that the child was born on 9th January, 1997. **PW2** produced as an exhibit a copy of the complainants Immunization Card **P exb. 1** which confirmed her date of birth. In the case of **RICHARD WAHOME CHEGE Vs REPUBLIC [2014]eKLR,** the court held that

> ***"What better evidence can one get than that of the mother who gave birth"***

The evidence of **PW2** coupled with the Immunization Card which is a government issued document, is sufficient proof of the complainant's age. Having been born in January, 1997, the complainant was aged 13½ years in October. 2010 when this incident occurred and I do so find

On the question of defilement the prosecution must tender proof to show that penetration did actually occur.

In her evidence the complainant told the court that she had gone to the video hall run by the appellant to watch video's. The appellant then invited her to go with him to his house. The complainant willingly and voluntarily accompanied the appellant to his house. She says that they spent the night together and engaged in sexual intercourse. From that day the complainant never returned back to her family home. She continued to reside with the appellant in his house.

PW2 the complainant's mother confirms that her daughter went missing from the family home from1/10/2010. On 7/10/2010 acting on a tip off from neighbours **PW2** went to the appellant's house and found her daughter residing there. **PW3** was an uncle to the complainant. He confirms that he was alerted by **PW2** that the child had gone missing from their home **PW3** says he too went to the appellant's house and found the child living there.

PW4 DR. SAMUEL ONCHERE was the doctor who examined the complainant on 19/12/2010. Although no injuries were noted on the complainant's body or genitals, her hymen was found to be missing. The fact of the missing hymen is clear proof that penetration had occurred. The absence of bruises and/or injuries on the complainant is not surprising given that, she was examined almost ten days after the incident and also given that the complainant was by her own account a willing participant in the sexual activity with the appellant.

From the evidence available I am satisfied that the fact of defilement has been proved beyond reasonable doubt.

The next question is the identity of the defiler. The complainant told the court that it was the appellant who had defiled her. The appellant was a man well known to the child as he ran a video hall near her home. The appellant spent several days living with the appellant in his house. She had ample time and opportunity to see him well. There would be no possibility of a mistaken identity.

The appellant in his defence concedes that the complainant was found in his house. This was a situation where the complainant voluntarily left her family home to live with the appellant and declared herself to be married to him. **PW2** and **PW3** both confirm that when they sought to persuade the child to return

home with them and go back to school she adamantly refused. Indeed the two defence witnesses called by the appellant who were his parents confirm that their son told them that he and the complainant were married.

It is clear from the evidence that the appellant and the complainant were friends and they both decided to enter into a relationship and to live together as a couple. Indeed in her testimony the complainant says

> ***"We had sex together. We were lovers and friends"***

In his defence the appellant said

> ***"I comforted and told her that I could marry her and take her as my wife….."***

The appellant goes on to state that he lived with the complainant whilst trying to raise money to pay her dowry.

From the evidence on record there can be no doubt whatsoever that it was the appellant who defiled the complainant.

The fact that the complainant went to the appellant's house of her own accord and the fact that she apparently consented to the sexual activity between them is not a defence to the charge of Defilement. A child being a person below the age of 18 years has no capacity in law to consent to sexual intercourse. Any consent she may purport to give is of no consequence and cannot amount to a defence to the charge. The appellant's parents in their evidence suggested that the child's mother reported the matter to police because they were unable to raise money to pay her a dowry. It cannot be a defence to the charge of Defilement that the appellant fully intended to marry the complainant. A child of 13 years cannot in law be married thus this defence is not available to the appellant.

The appellant in his defence also suggested that he did not know that the complainant was a minor. He claims that the thought she was an adult. I do not accept this claim as it was made belatedly. The complainant did not ever tell the appellant that she was over 18 years. The appellant admits under cross examination

> ***"I do not know the complainant age. I did not find out she was not a child she looked like an adult. We did not talk about her age……"***

This claim by the appellant that the complainant looked like an adult is contradicted by his own witnesses. **PW2 SIMON GACHUNGWA** who is the father of the appellant in his cross-examination stated

> ***"The complainant was about 15 years old. I know she was a child….."***

Likewise **DW3 JULIA NYAMBURA** the appellant's mother in her evidence said

> ***"I saw the complainant we have stayed with her in my house. She was not mature for marriage".***

Thus it was abundantly clear to the appellant's own witnesses that the complainant was a minor. The appellant cannot have been the only one to think that she was an adult. The appellant himself gave his age as 22 years. He was an adult and mature. Why would the appellant decide to cohabit with and marry a girl without first establishing her age or whether she was still in school? I do not find this defence to be believable.

The evidence clearly proves that the appellant defiled the complainant with full knowledge that she was a minor. The charge of defilement was proved to the standard required in law. His conviction was sound and I do uphold the same.

Section 8(3) of the Sexual Offences Act, 2006 provides for a mandatory minimum sentence of twenty (20) years upon a conviction for defilement of a child aged between twelve and fifteen years. The sentence imposed upon the appellant was lawful and I do confirm that sentence.

Finally this appeal fails and is hereby dismissed in it's entirely.

Dated and Delivered in Nakuru this 5th day of May, 2017

Appellant in person

Mr. Chigiti for DPP

Maureen A. Odero

Judge