REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 8 OF 2017

I Z W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction in criminal case No.924"B" of 2014 of the

Chief Magistrate's Court at Busia by Hon. H.N Ndung'u, Chief Magistrate

and sentence by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

I Z W, the appellant herein, was convicted for the offence of defilement contrary to section 8(1) (3) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between 8th and 14th April 2014 at **[particulars withheld]** sub location of **BUTULA** District in **BUSIA** County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.M**,** a child aged 17 years.

He was sentenced to serve twenty years imprisonment. He has appealed against both conviction and sentence.

The appellant was represented by Mr. Calistus Nyegenye, learned counsel. He raised four grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by relying on contradictory evidence.

2. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of evidence that had not proved the offence.

3. That the learned trial magistrate erred in law and in fact by disregarding the appellant's defence.

4. That the learned trial magistrate erred in law and in fact by disregarding the appellant's mitigation.

The state opposed the appeal through Mr. Obiri, the learned counsel.

The facts of the prosecution case were briefly as follows:

Between 8th and 14th April 2014, the appellant and the complainant herein had sexual liaison that culminated in the complainant becoming pregnant. She later gave birth to a child.

The appellant contended that they were friends with the complainant. He did not deny impregnating her.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The charge was erroneously drafted. It ought to have read contrary to **"...section 8(1) as read with section 8(3) ...**"

From the record, the appellant understood the charge before pleading to it. He subsequently participated fully in the trial. I make a finding that he was not prejudiced in any way and the defect is curable under section 382 of the Criminal Procedure Code.

All the grounds touching on the issue of prove of the offence do not have a basis. The appellant did admit that when the complainant was thrown out of her home, she turned to him, and added that was how she became pregnant.

The complainant was born on 28th November 1996 whereas the appellant was born on 11th April 1996. The appellant was senior to the complainant by seven months. Strictly speaking these two were age mates except that the appellant attained the age of majority seven months earlier than the complainant.

At the time of the offence, the appellant was still a minor. The charge states that the offence was committed between 8th and 14th April 2014. Only three days of the alleged offence fall on the period of his age of majority. Since it was not established when this offence was committed, then he ought to have been given the benefits of doubts and the trial court make a finding that he committed the offence while he was a minor.

Section 189 of the Children Act, CAP. 141 laws of Kenya provides as follows:

> ***The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.***

The learned trial magistrate ought to have found him guilty of the offence. It was not proper for her to convict him. I am therefore making an order for substitution of the conviction with a finding of guilty. Equally, he ought not to have been sentenced. The sentencing magistrate ought to have made an order upon the finding of guilty.

I have already observed that both the complainant and the appellant were age mates. In the interest of justice, the appellant having committed the offence while a minor, the proper penalty would have been a non custodial order. I therefore substitute the sentence of twenty years imprisonment with a probation order for a period of three years. To that extent the appeal succeeds. The appellant to be released from the prison forthwith.

DELIVERED and **SIGNED** at **BUSIA this 11th day** of **July, 2017**

KIARIE WAWERU KIARIE

JUDGE