



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 91 OF 2014

(From Original Conviction and Sentence in Criminal Case No. 598 of 2011 of the Senior Resident Magistrate's Court at Voi – Hon. Nyakundi - SRM)

J MAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

The Appellant was Convicted and Sentenced to ten (10) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars are that:-

“On the 27th day of August, 2011 at [Particulars withheld] village in Taita Taveta County he unlawfully caused his penis to penetrate the vagina of M M a girl aged seventeen (17) years old”.

Having been dissatisfied with the decision of the learned trial magistrate the appellant has preferred this appeal on the grounds inter alia.

The learned trial magistrate erred in holding that the appellant continued to have sex with a minor even in the absence of such evidence.

Secondly, that he erred by making a finding that Accused subsequent actions had invalidated his defence.

In his Judgment (at page 3 line 17) the learned trial magistrate observes,

“Though the Accused person committed an offence falling within the definition of section 8 of the sexual offences Act the Court could have been satisfied from the explanation given by the Accused person that the Complainant had deceived him and made him believe that she was nineteen (19) years old. When she was in fact a minor. That could have meant that the offence committed by the Accused person prior to the 28th August, 2011 when he thought she was of majority age could have been excused under the provisions of section

8(5) and (6) of the Sexual offences Act.

However, the Accused person continued to engage in sex with the Complainant even after he was informed that she was below the legally acceptable age to have sex. The Court warned the Accused person to desist from engaging in sex with the Complainant after it was established that she was of minority age. The Accused ignored the warning and continued to cohabit with the Complainant.

The charge which was before the Court was that on the 27th day of August, 2011 the Accused unlawfully caused his penis to penetrate the vagina of M M a girl aged seventeen (17) years old. The charge as framed gives a specific date and does not include, **“on diverse dates”**, including those the trial magistrate's alludes to when he observes that the Accused had continued to cohabit with the Complainant even after he was warned that she was a minor.

I have perused the record of proceedings and nowhere is it shown that the Accused had been warned by the trial magistrate to stop cohabiting with the Complainant. Nowhere is it shown that any of the prosecution Witnesses had testified to the effect that even after being informed that the Complainant was aged seventeen (17) years old the Accused had proceeded to cohabit with her apart from his unsworn statement wherein he stated that he had tried to part with her but it was not possible and he was still living with her.

Section 8(5) of the Sexual offences Act provides,

“It is a defence to a charge under this section if-

(a) It is proved that such child, deceived the Accused person into believing that he or she was over the age of eighteen (18) years at the time of the alleged Commission of the offence, and

(b) The Accused reasonably believed that the child was over the age of eighteen (18) years”.

In her evidence in Chief the Complainant (at page 9 line 5) had this to say,

“I live with the Accused person J M. I am married to him. I left school long ago. I am the Complainant in this case. We had sex for the first time on 28th July, 2010 at his house at Sikujua I had previously had sex with two other men before him”.

During cross -examination by the Accused she told the Court,

“I told you that I was eighteen (18) years old. By then I had stopped schooling. I am now nineteen (19) years old”.

From the above, its abundantly clear that at the time the alleged offence the Complainant was no virgin according to her evidence. Further that its herself who had told the Accused that she was aged eighteen (18) years. The Accused had no reason to doubt this. The defence allowed by section 8(5) of the Sexual offences Act was available to him. It was incorrect for the trial magistrate to hold that the defence was not available to the Accused as a result of subsequent acts. These subsequent acts did not form any charges before the Court. The Accused was charged with only one Count which had a specific date of 27th August, 2011.

For the trial magistrate to base the Conviction of the Accused on subsequent acts of defilement, further and proper charges would have to be framed giving specific or diverse dates and the necessary particulars including the age of the Complainant at the time of the commission of the alleged offences.

The upshot is that the Conviction was not safe and this appeal has merit. I accordingly allow the

appeal, quash the Conviction and set aside the Sentence. The appellant is set at liberty unless otherwise lawfully held.

Judgment dated and signed this 10th day of February, 2015.

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M. MUYA

JUDGE

10TH FEBRUARY, 2015

In open Court in the presence of:-

Mr. Mwanyale holding brief Obura for the appellant

Miss Nandi for the states

Musundi Court clerk