



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL CASE NO. 81 OF 2013

(From the original conviction and sentence in criminal case no. 431 of 2011 of the Principal Magistrate's court at Kilifi before Hon. A. M. Obura – SRM)

J YAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The Appellant was charged with the offence of Defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. He was convicted and sentenced to serve twenty years imprisonment. The grounds of appeal are that the trial magistrate did not properly consider the evidence, that the trial court did not take into account the submissions and evidence made by the appellant, that the trial court admitted documentary evidence which ought not to have been admitted, the prosecution did not prove its case and that the trial court did not consider all the circumstances leading to the commission of the offence.

Mr. Odhiambo, Counsel for the appellant in his written submissions contended the age of the complainant was not properly ascertained. The P3 form contradicts the birth certificate that was produced. Whereas the complainant alleged to have been defiled on the 4th November, 2008 the evidence showed that the offence occurred on 24th November, 2008. The defence evidence disproved the prosecution case but was not considered. The appellant was made to believe that the complainant was above eighteen years old.

Miss Kitilit, Counsel for the State opposed the appeal and contended that the case was proved beyond reasonable doubt. The complainant was fifteen years old at the time she was defiled having been born in 1993 as per the birth certificate. Between November, 2008 and May, 2011 the Complainant lived with the appellant and they used to have sexual intercourse. The trial magistrate considered the defence evidence and found that the prosecution had proved its case.

I have gone through the proceedings herein. The case was fully heard by R. K. Ondiek who heard all the prosecution witnesses but was transferred before the defence case was heard. The case was heard a fresh by A. M. Obura, Principal Magistrate. PW1, M M testified that in 2008 she was about sixteen years old. On the 4th November, 2008 at about 10.00am she met the appellant who asked to marry her. The appellant was a stranger to her and told him to see her parents. At that time she was a class seven pupil at [particulars withheld] school. The appellant took her on a motor bike and showed her his house. She went back home and collected her clothes and went back to the appellant's house at [particulars withheld]. They lived together for three years and used to have sex. She became pregnant but had a

miscarriage. She became pregnant again and delivered in 2009. She went to Kilifi District Hospital for clinic. She became pregnant again and one time when she was at Kilifi District Hospital for clinic she met her mother as her mother works at the hospital. She told her mother that she was staying at [particulars withheld] and she took her mother's phone number. Upon reaching home she gave the appellant her mother's contact and the appellant got annoyed and decided to take them to [particulars withheld] at his rural home.

It is PW1's evidence that the appellant used to leave her at home as he went to work. He would not allow her to go to hospital but would buy medicine. When she was at Kilifi District Hospital she told her mother that she was confined in the house and was not allowed to go out. The police were informed and her mother managed to arrest the appellant. She had no mobile phone. The appellant gave her the name of F instead of her usual of M. She was taken to hospital and issued with a P3 form. The first child was delivered on 20th August, 2009 while the second was delivered on 29th August, 2010.

PW2, J N is the mother of PW1. She is a subordinate staff at Kilifi District hospital and lives at [particulars withheld] in Kilifi. It was her evidence that on the 4th November, 2008 PW1 went missing. PW1 was fifteen years old and a class seven pupil at [particulars withheld] Primary school. She reported the matter to the chief at Mtondia. She waited for three years until late April, 2011 when her colleague informed her that her child was outside the Kilifi District Hospital. She talked to her daughter who informed her that she was living at [particulars withheld]. She asked for her mobile number but PW1 showed her a clinical card which had a mobile number written. She told PW1 to go and tell the man she was living with to call her. She later called the number and the man told her it was a wrong number. The man later called her and when she mentioned the name of M she was told that he was living with F. Later PW1 sent her a message indicating that she was not allowed to go out. After some time PW1 went home with her baby and a bag containing her clothes. She reported the matter to the police and the appellant was arrested.

PW3, DR. MARIAM is a medical officer how was based at Kilifi District Hospital. It is her evidence that PW1 was 17 years old and reported her history of defilement which occurred on 4th November 2008. PW1 had no injuries and her hymen was torn. She filled the P3 form. PW4, CORPORAL DORCAS KAGURONIA was based at Kilifi Police Station. The matter was reported at the station on the 19th May, 2011. At that time the Appellant had been arrested and was in the cells. She investigated the case and charged the appellant. By that time the complainant had given birth to two children.

The Appellant was put on his defence and gave unsworn testimony. He stated that he lives at [particulars withheld] in Kilifi and is a caretaker at a farm. On the 24th November, 2008 he went to the beach at Kilifi Bay Hotel where there was a musician performing. He went to swim and there were many people at the beach. Suddenly a lady screamed saying that an animal had pinched her foot. He helped her and removed several thorns from her foot. The lady started asking him many questions and she told him that she was called F J. She said she was a Maasai who had converted to Islam and was a student at [particulars withheld] University. She told him that she was twenty years old and was also in the fashion industry. It is his evidence that he observed her physique and noted that she was an adult of above twenty years. The lady had other girls from the community and he was surprised when lady asked him whether he could be her lover. They parted ways and he remained with four other girls. Later in the evening while at his house he heard his door being knocked and when he opened he saw two ladies whom he knew well. The ladies told him that they had brought him a guest. On checking he found the same lady he had met during the day. He allowed her inside and she told him that she had lied to him about her friends at [particulars withheld] University. She told him that she had nowhere to go and she wanted to stay at his house. The schools had closed and she did not appear to be a student. She was apprehensive of being taken to the police for assistance. He allowed her to stay with him and she became pregnant. She started clinic sessions and delivered a baby. Sometimes in May 2011 she sent him for fish and when he came back he found that she was missing but her clothes were intact. On the 19th May, 2011 he saw her in a pick-up vehicle with two women and two men. He later realized that one of the women was the mother of the lady and the other two men were police officers. One of the officers was Sergeant Murage. He was taken to the police and charged with the offence. It is his evidence that he was persuaded that

PW1 had no relatives in Kilifi and she was above 18 years old.

From the evidence on record, it is established that PW1 lived with the Appellant from around November, 2008 up to May, 2011. This is a period of two years and six months. It is also established that during that period they had two children. The main issues for determination are whether the complainant was defiled, the age of the complainant and whether the appellant believed that PW1 was an adult. According to PW1 the appellant was a stranger to her. He took her to his house on a motor bike. She went back home on the same motorbike while the appellant was at his house. She then went back to the appellant's house where she lived for the period of 2 ½ years. It is not clear why the complainant could not have escaped for all that period. The evidence shows that when PW1 went to Kilifi hospital for her clinic she indicated in her clinic card that she was 18 years. She alleged that it was the appellant who told her to say so but admitted that when she indicated the age she was with the doctor alone. It is also clear from the prosecution evidence that PW2 who is the mother of PW1 was working at Kilifi District Hospital where PW1 used to attend clinic. It is not clear to me as to why the complainant could not have told the doctor that she was being defiled whenever she attended the clinics. It is equally not clear as to why PW1 did not ask about her mother at the hospital whenever she went to the clinic. During cross-examination the complainant was cross-examined on her statement to the police and she admitted that her mother used to call her when she was living with the appellant to go to assist her in farming. She also admitted that her mother used to call her asking her to return home and help her. Although she claimed that she had no phone it is not clear as to how she used to communicate with her mother if the appellant was denying her the use of the phone.

The evidence shows that at one time PW1 was taken to Kaloleni by the appellant and she stayed there for some time. She later went back to the Appellant's house. At that time she had met her mother and she had her mother's phone number. Why didn't she ask for a phone and call her mother. There is no evidence that she was escorted by the appellant's relative back to the appellant's house. She could have escaped on her way home even if she had young children. The next question is why PW2 met her daughter on the 8th April, 2011 at Kilifi District Hospital and allowed her to go back where she was living yet she had been looking for her daughter for over two years. She did not bother to go with her daughter up to [particulars withheld] where her daughter was living.

Given all the above information, I do find that there was no confinement of PW1 by the Appellant. It could be true that the appellant was living with PW1 but it was not against her wish. She had all the opportunities to run away as she told the court that she would be left at home whenever the appellant went to work. I am equally satisfied that even Pw2, the mother of PW1, knew about her daughter's whereabouts. If the complainant allegedly escaped in May 2011 as she could have done so in 2009 if indeed she was being confined against her wish.

With regard to the age of the complainant, a birth certificate was produced showing that she was born on 20th October, 1993. In essence the birth certificate establishes that PW1 was 15 years in November, 2008. She had just completed her fifteenth year. There is no doubt on the authenticity of the birth certificate. I have seen the document and the same was registered on 8th November, 1993 which is less than one month after birth. It was issued on the 30th March 1994. The certificate shows that PW1 was born at Nazareth Hospital in Kiambu district. According to the appellant, he met the complainant on 24th November, 2008. The appellant told him that she was twenty years old. From her physique the appellant concluded that PW1 was an adult. When she was testifying PW1 did not tell the court that she was sex for the first time. There is no evidence that when she went to deliver at the hospital at Kilifi there were any complications. It is her evidence that she was allegedly assaulted by the appellant and she had a miscarriage. It is clear that the complainant used to visit hospital and the doctors never detected any abnormality related to the fact that she was a young pregnant woman. I am satisfied from the evidence on record although I never saw the witness that PW1 appeared to be an adult. Although the appellant did not testify under oath, he gave a long and detailed testimony which was dismissed as an afterthought. There is no evidence that the appellant lured PW1 to his house. PW1 was not living far away from Kilifi. Bofa is within Kilifi and is a walking distance to Kilifi District Hospital. At the age of fifteen the complainant could have simply walked to the hospital where her mother was working and report the

incident. Even though the Sexual Offences Act provides that a child under the age of 18 cannot give her consent for sexual intercourse, I do find that it is PW1 who made the appellant believe that she was over 18 years old. The trial magistrate considered the defence under Section 8(5) and concluded that the appellant did not do enough to find out whether the complainant was over 18 years. There is no document that was produced from school to show that PW1 was a student. PW1 delivered in August, 2009. This was less than one year after they had met. She again delivered another child in 2010. There was no attempt to escape and yet there was evidence that she used to talk to her mother on phone.

The upshot is that the appeal is merited and the same is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered and dated at Malindi this **9th** day of **March, 2015**.

Said J. Chitembwe

JUDGE