REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 149 OF 2012

(From original conviction and sentence in Criminal Case No. 8 of 2009 of the Chief Magistrate's Court at Machakos, Hon. S. M. Mungai – SPM)

YERCKIE MARCK PHERSOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Yerckie Marck Phersor was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006. The particulars of offence state that the Appellant on the 19th day of March 2009 in Machakos-District within Eastern Province intentionally and unlawfully had carnal knowledge of JAM a girl aged 15 years.

2. In the alternative the Appellant was charged with indecent act with a juvenile contrary to Section 11(1) of the Sexual Offences Act 2006. The particulars of offence state that the Appellant on the 19th day of March, 2009 in Machakos District within Eastern Province, indecently and unlawfully assaulted JAM by touching her private parts namely vagina.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that on the material day at about 5.00 p.m., the complainant, PW1 JA a 15 year old Std 6 pupil was on her way from school when she met the Appellant at the road. After the Appellant talked to the complainant, the complainant went home and changed into her home clothes then went to the house of the Appellant. The complainant spent the night with the Appellant. They had sex twice that night. The Appellant left the complainant in the house and was away for three days. When the Appellant returned to the house they had sex again until morning. The Appellant promised to marry the complainant and they started living together.

5. In the meantime the complainant's father reported the complainant's disappearance at Athi-River police station. The father's efforts to trace the complainant lead to the house of the Appellant where the complainant was found and taken home. The Appellant was arrested and was subsequently charged.

6. In his defence the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that he hailed from Kisumu in Asembo. That at the material time he was operating a *"mandazi"* selling business in Athi River area. He denied the offence and blamed the same on business rivalry with the complainant's father as they were in the same kind of business. The Appellant stated that he was at home making *"mandazi"* when he was arrested on allegations of having abducted the complainant. The Appellant was then escorted to the police station. The complainant was also taken to the police station where she was beaten in order to implicate the complainant. The Appellant thereafter ended up in court where he denied the offence.

7. The Appellant was convicted in the alternative count of indecent act with a *"juvenile"*. The Appellant was sentenced to ten years imprisonment.

8. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

(a) That the conviction was based on contradictory and uncorroborated evidence.

(b) That the conviction was against the weight of the evidence.

(c) That the trial magistrate fell into error by dismissing the defence case.

(d) That the burden of proof was shifted to the Appellant.

9. During the hearing of the appeal, the Appellant relied on written submissions. The said submissions essentially expound the grounds of appeal.

10. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

11. The complainant's evidence reflects that she stayed with the Appellant for a few days. During the said period, the two had sexual intercourse severally. The complainant described herself as a 15 year old std 6 pupil when she testified two months after the material date. The complainant knew the Appellant and there is no possibility of mistaken identity.

12. The complainant's father, PW3 LMM gave the complainant's date of birth as 13th June, 1995. He gave evidence on how the complainant disappeared from home leaving her school uniforms and books at home. His evidence was that he found the complainant at the Appellant's house and had the Appellant arrested. His evidence corroborates the complainant's evidence that she was staying in the house of the Appellant.

13. Both the complainant and her father gave her age as 15 *(fifteen)* years at the material time. It is also the evidence of the complainant and her father that the complainant was a primary school student at the material time. Although no documents e.g. birth certificate, baptismal card or school admission papers were produced, other modes of proof of age are available when the case is not necessarily a borderline case (*See for example* **FLAPPYTON MUTUKU vs R (2012) eKLR).**

14. Proof of the victim's age is critical in sexual offences involving minors. The issue has been a subject of many decisions and in some cases conclusive evidence of age has been rather elusive. I am however persuaded to take the route taken by other judges who have found themselves in similar circumstances like the case herein where no documents have been produced to prove the complainant's age.

15. In **ZABLON ONGONYO MATOKE vs R., HCCRA Kisii No. 168 of 2012,** Hon. Justice Sitati relied on the case of **FRANCIS vs UGANDA CA CR. APP. No. 2 of 2000** where it was held:

"Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian and by observation and common sense ..."

16. Similar sentiments were followed in **FAUSTINE MGHANGA v R (2012) eKLR** where Nzioka J cited **MANGUNYU v R** where Hon. Justice W. Ouko cited **IE COLLINGWOOD'S CRIMINAL LAW OF EAST AND CENTRAL AFRICA (LUNDO: SWEET AND MAXWELL) 1967 ED** page 123 where it was observed as follows:

"Age may be proved by birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth."

17. The complainant's evidence that she was fifteen years old and a primary school pupil was corroborated by the evidence of her father (PW2). The complainant's age is not that of a borderline case. In the circumstances of this case, I am satisfied that the complainant's age was proved to the required standard. This view is fortified by the fact that during the defence the Appellant did not question the age of the complainant as offered before the court. *See for example* **Stephen Nguli Mulili v Republic [2014] eKLR** where the Court of Appeal also stated as follows:

"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."

18. PW3 Sgt. Francis Kimari gave evidence that confirmed that the matter was reported at Athi River police station and investigations carried out.

19. Although the Appellant termed this case as a frame up by the complainant due to business rivalry, it is noted that the complainant's father in his evidence stated that he was a water peddler. No issues of *"mandazi"* business rivalry arose when the complainant's father testified. The complainant had no reason to tell lies against the Appellant when she appeared in court and gave evidence against the Appellant.

20. The trial magistrate who saw the witnesses testify and observed their demeanor believed the complainant. After evaluating the evidence on record, I find no reasons to differ with the finding of the trial magistrate.

21. With the foregoing, I find no merits in the appeal and dismiss the same.

……

B. THURANIRA JADEN

Dated and **delivered** at Machakos this 18th day of June, **2015**

……

B. THURANIRA JADEN

JUDGE