



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 176 of 2011

MMJ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Naivasha C.M.CR.C.NO.366 of 2010 by Hon T.W.C. Wamae, Senior Principal Magistrate, dated 29th July, 2010)

JUDGMENT

The appellant has brought this appeal challenging his conviction and sentence to a term of 15 years for the offence of defilement of a girl, MWM, aged 15 years contrary to **Section 8(2)** of the **Sexual Offence Act** (ought to be (3)).

In the petition, the appellant appears to admit that he lived with the complainant, as a spouse, being ignorant that the law did not allow such a union and that he did not know the age of the complainant. The appellant also argues that the sentence was excessive.

In opposing the appeal, learned counsel for the respondent, submitted that there was overwhelming evidence that the appellant defiled the complainant; and that having known the complainant for three years, he cannot be heard to feign ignorance that he did not know her age.

It was the prosecution case that the complainant who lived with her grandmother, P.W.4, M., went to church on 7th February, 2010 and did not return. She was traced three days later in the complainant’s house.

In her evidence, the complainant explained to the trial court that the appellant had been her boyfriend since she was in standard 4; meaning that at the time of the appellant’s arrest, they had known each other for 2 years. She explained that on the day in question, she had gone to collect her sweater from the appellant’s house. She said:

“I went to accused’s house because I wanted to get married to him. Before going to accused’s house, I met accused while I was going to my aunt’s house. Accused said he wanted to marry me and I accepted. I slept with the accused and we had sex. Accused used a trust condom.....

I had sex with accused twice on different dates. We used a condom on both occasions. I stayed in accused’s house for three days.”

In his unsworn evidence, the appellant stated that when he was taken to his house after being arrested, he found the complainant in his house; that she even made tea for the appellant and those who has arrested him.

It follows from the foregoing that there is consensus that the complainant was found in the appellant's house. The appellant in his grounds of appeal has admitted that he intended to marry the complainant. In his submissions before me in this appeal, he explained further that although the complainant was his girlfriend, he did not know her age.

In the circumstances, bearing in mind the finding by the doctor that the hymen was broken as a result of penetration and there being evidence that the complainant was fifteen (15) years, I find that the appellant committed on the complainant an act that caused penetration with a child.

In terms of **Section 8(5)** of the **Sexual Offences Act**, it is a defence to a charge of defilement if it is proved that the child deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged offence and if the accused reasonably believed the child was infact over the age of 18 years. The accused person must, however, show that he/she took steps to ascertain the age of the complainant. The complainant was a pupil in standard six (6) at Maela Primary School. She had known the appellant for over 2 years, during which time she was still a pupil and no doubt, from her evidence, the appellant was fully aware of this fact. At no time did the complainant mislead the appellant as to her age. The appellant on the other hand did not take any steps to ascertain the complainant's age.

For those reasons, I come to the conclusion that the defence in **sub-sections (5) and (6)** were not available to the appellant.

Regarding the sentence, the complainant was 15 years and in terms of **Section 8(3)** of the **Sexual Offences Act**, the sentence ought to have been an imprisonment for a **“term of not less than twenty years.”**

The sentence of 15 years was irregular in view of the foregoing. The appeal is dismissed and the sentence is reviewed to twenty years.

Dated, Signed and Delivered at Nakuru this 2nd day of November, 2012.

W. OUKO
JUDGE