



(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 670 OF 2006 OF THE CHIEF MAGISTRATE COURT AT KILIFI BEFORE C. O. OBULUTSA -SRM)

SHEBAN MOHAMED MKOBAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Sheban Mohammed Mkoba (the appellant) was convicted on a charge of defilement of a girl under the age of 16 years contrary to section 8(1) s read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 (twenty) years imprisonment.

The prosecution called a total of six witnesses in support of its case, while appellant who had denied the charge was the defence witness with four other witnesses where prosecution based its case on particulars that on diverse dates between August and November 2006 in Kilifi District, willfully and unlawfully had carnal knowledge of P.A.N, a girl under the age of 16 years and impregnated her.

P.A.N told the trial court how she befriended the appellant in the year 2006 – they had met in M while she was going to school. He seduced her and she went to his house where he asked her to have sex they indulged and they did so twice. In September 2006, she discovered that she was pregnant and he advised her to have an abortion, which she declined to carry out. He then asked her to go to his home in Mazeras and be his wife – she obliged and joined his wife there while appellant returned to M – eventually her mother found out where she was and appellant was arrested – the matter was discussed with appellant and his parents said the case was finalized and he was ordered to pay a fine. Appellant returned with complainant to Mazeras and officers returned a second time and arrested the appellant; then he was charged.

PW2 M.N (PW1’s mother) realized one morning that her daughter went to school but did not return. She was eventually found with appellant. The complainant was ordered by the District Officer to return to school whilst appellant was ordered to pay a fine to PW2- PW2 declined to take the money.

The girl was supposed to accompany her mother back, instead she disappeared with appellant, so the matter was reported to police. PW2’s disappearance from school was confirmed by

N. N.Z who worked at M Secondary School.

Dr. Nassor Faza (PW1) who examined the girl noted that she was twenty (20) weeks pregnant and age assessment showed she was 15 years.

In his sworn defence, the appellant confirmed that complainant was known to him as she was residing with him – they met in August 2006, stayed together and she conceived by September 2006. she wanted to abort, but he declined and she requested to be taken away, so appellant took her to her home.

Later discussions were held between the complainant’s relatives with a view to taking complainant “as

their girl” but her mother declined and demanded for Kshs. 51,720/- which appellant, did not have. (Appellant said he didn’t know complainant was a student). PW3 then took kshs. 3000/- which the appellant had, and an agreement was prepared to the effect that the balance was to be paid on 15th. PW2 then left for Mazeras with the appellant, but thereafter he was arrested and charged. He produced the agreement as D.Ex.1

On cross-examination Appellant confirmed he had befriended the complainant who had told him she was 19 years old and she never disclosed that she was a student.

His defence witnesses Said Mohammed confirmed being in the group that discussed about appellant’s liaison with P.A.N at the District Officer’s office. He explained that since the girl was pregnant, they were advised to reconcile and the girl’s relatives demanded for Ksh. 51,740/- and an agreement was drawn regarding how the payments would be made.

On cross-examination DW2 said he did not know the girl’s age. This evidence is repeated by DW3 T.M who took part in the discussion and H.K (DW4) an uncle to the complainant and who is the one who recorded the agreement produced as D.Ex1.

E.M (DW5) a brother to the complainant also confirms the agreement about payment and that appellant informed them he had married complainant.

Incidentally a total of Ksh. 6000/- was paid by appellant’s relatives and he said the investigating officer took it. The investigating officer Inspector Ben of K D.O’s office confirmed that appellant gave out Ksh. 6000/- but said it was given out as transport for the girl who was to go back to school. He denied seeing any agreement.

In his judgment, the learned trial magistrate found that the appellant and complainant were known to each other and that the appellant admitted to living with her as his wife for 1½ months and that as a result of their union, appellant confirmed that complainant conceived. He also noted that according to P.A.N (the complainant) the appellant had carnal knowledge with her against her will. The doctor examined her and found that she was 15 years old and five months pregnant and found that P.A.N qualified to be considered as a child under the Children’s Act as she was under 18 years.

He also considered the appellant’s explanation that complainant had in fact told him that she was 19 years old and said

“The accused claimed that she told him she was 19 years that would not stand. He knew she was a student and that should have put him on alert”

Appellant was dissatisfied with these findings on grounds that:

- (1) The police contravened section 72(3) (b) of the Constitution of Kenya.
- (2) The OB number does not tally with PW5: evidence rendering the charge defective.
- (3) The trial commenced in the absence of the appellant
- (4) The plea of not guilty was not signed contrary to section 197 Criminal Procedure Code.
- (5) PW2 did not produce the p3 form as exhibit and the P3 form was inconclusive as it was not supported by treatment notes
- (6) The age assessment was not produced in court as exhibit.
- (7) The defence statement was not considered along side prosecution’s evidence

(8) The sentence was harsh and excessive.

Appellant filed written submissions wherein he pointed out that he was arrested on 22-11-06 and taken to court on 27-11-06 and this violated his rights under the Constitution and therefore he ought to be acquitted.

Appellant also argued that when plea was taken, his presence was not recorded did so this occasioned a mistrial of the entire suit and even after his plea was entered the trial magistrate did not append his signature and that this too rendered the trial a nullity.

He also submitted that PW2 did not produce the p3 form and that although the doctor produced it, this was insignificant. He also points out, that there is no certainty as regards complainant's age as she said she had informed the doctor that she was 15 years old, then again, she said she told the doctor that she was 16 years old and that this was not considered against the backdrop of appellant's defence that complainants had told him she was 19 years of age.

Counsel for the State Mr. Ogoti, conceded to the appeal saying that if one goes through the proceedings, what is proved is the pregnancy as per the evidence of Dr. Faza who determined that the pregnancy was 20 weeks. Mr. Ogoti submitted that there was no conclusive evidence as to when she was defiled or who was responsible for the defilement.

Mr. Ogoti also pointed out that there was contradiction regarding the dates because PW3 (the girl's mother) said that on 5th October 2006 she was informed that PW1 had gone to school on 1st October 2006 and not returned. Then on cross-examination she stated that complainant disappeared on 1st September and was found on 5th September. This then is to be considered against the background of evidence by PW4 (Nancy) who worked at the school complainant attended and who said that in third term complainant only went to school up to 23rd September 2006 that the complainant's mother went to school looking for her. He stated that the dates were contradictory. It is Mr. Ogoti's contention that no test was ever carried out to determine the link between the appellant and the pregnancy and there was nothing to prove that appellant is the one who defiled her. A look at the charge sheet confirms that appellant was arrested on 22-11-06 and taken to court on 27-11-06, which certainly went beyond the 24 hour period recognized by the Constitution, both prosecution and the State have so far offered no explanation. There are numerous court decisions on this, resting with the findings in the celebrated case of **Albanus Mwasia Mutua V R CRA No. 120 of 2004**, and I need not say more. The appellant's rights were indeed violated and he is entitled to compensation as provided under section 72(6) of the Constitution.

From the handwritten court record, the appellant's presence is not recorded at plea but this is redeemed by the fact that the trial proceeded and witnesses were called cross-examined and even in his defence, appellant still denied the charge. Surely the cross-examination was not carried out by an imaginary being.

The plea as entered was duly signed in the original handwritten record. I am not very clear what appellant contests about the P3 form, the maker of that document was Dr. Nassor (PW1) who filled and signed the P3 form - so he was the proper person to produce the same as recognized under provisions of the Evidence Act.

What about the issue of the complainant's age? – the doctor assessed her age as 15 years and that is what she also told the court in her evidence in chief. However on cross-examination she said she had told the doctor that she was 16 years. Now according to appellant she had told him she was 19 years. He does not deny taking her to live with him as his wife and that she conceived while with him – he seemed to acknowledge responsibility as he even went to negotiate certain payments and returned with her to his home. Was there anything at the time to suggest to him that she was under 16 years?

Under section 8(5) of the Sexual Offences Act.

“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 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 years.”

According to both appellant and complainant, they used to meet in M and they became friends (meaning lovers). In fact according to her, he had been seducing her and he requested her for sex and they had sex twice, then she conceived in September.

From that evidence there is nothing to suggest that during their meeting PW2 was either in school uniform, carried books, or conducted herself in a manner to suggest that she was 15 years old and not 19 years old. Why do I believe this claim that she told him she was 19 years ‘ because in her own admission, she had initially told the doctor she was 16 years. She carried her clothes and bag to his house and confirmed that appellant did not force her to go to his house – again there is nothing to suggest that among the contents of the bag were school uniform so as to send alarm bells ringing in appellant’s mind that he was perhaps dealing with a girl under 16 or even 18 years and so the appellant’s defence that he was not aware that the girl was a student is not shaken, nor did he realize that she was not 19 years as she had stated. I wonder what section 8(6) has in mind about an individual taking reasonable steps to establish the age, this provision doesn’t seem to take a realistic view of our social relations in boy meet-girl situations especially with raging hormones, if a girl tells a man she is 19 years, then the perception is that she is an adult and if she is willing to move in and live with him in matrimonial bliss, then informing the parents is not an obligation.

I wonder whether the drafters of this provision took into account the physical appearance that our young girls seem to have transformed into so that 15-25 year old girls no longer appear to be in full bloom, with definite physical appearance – they all appear like computer produced individuals with very petite physique – so just exactly how was this supposed reasonableness expected to be exercised. My finding is that appellant had a very good defence under section 8(5) of the Act of course the contradictions in terms of dates referred to, do not help the prosecution case at all, indeed the learned trial magistrate never attempted to resolve the contradiction. The appeal is merited and I allow it.

The conviction is quashed and sentence set aside.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 3rd day of **June 2009** at Malindi.

H. A. Omondi

JUDGE