IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 107 OF 2016

BETWEEN

SAMMY CHACHA CHACHA …….…… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Migori ***(A. C. Mrima, J)*** *dated* ***25th February, 2016***

in

HCCRA NO. 59 OF 2015)

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JUDGMENT OF THE COURT

In this second appeal, the appellant **Sammy Chacha Chacha**, who was unrepresented by counsel, challenges the decision of the High Court at Migori (A. C. Mrima, J.) by which his first appeal was dismissed on 25th February, 2016. That appeal was against the conviction and sentence of 20 years imprisonment imposed on the appellant by the Acting Senior Resident Magistrate at Kehancha. It was for the offence of defilement contrary to **section 8(1)** as read with **8(3)** of the **Sexual Offences Act** in that the appellant had on 12th September, 2014 at [particulars withheld] Village in Kuria East District of Kuria County, intentionally caused his penis to penetrate the vagina of **'SBC'** a child aged 15 years.

That there was sexual intercourse between SBC and the appellant is not in dispute and the appellant readily admitted it. His consistent position and his contention before this Court is that he was entitled to an acquittal on the basis that SBC deceived him into not only believing that she was over 18 years, at 19 years old, but into marrying her, so that what he had with her was marital sex, not statutory rape. He maintained that SBC and he lived together as a couple for six weeks. The main thrust of his appeal, as captured in his self-crafted memorandum of appeal and written submissions, is that the learned Judge erred by upholding the conviction and sentence yet he had a defence under **Section 8(5)** and **(6)** of the **Sexual Offences Act**. Indeed, this whole appeal turns on the availability and efficacy of that defence to the appellant.

The prosecution case was that on 12th September, 2014 the appellant went to the home of SBC in the company of another young man. They found her mother **LBN (PW2)** at home and spoke to her for a while. She then told SBC that the duo were her visitors and then left for church leaving them behind. When PW2 returned, she did not find SBC who apparently had left with the appellant and his friend to the appellant's home. There, they were received and supper was served by the wife of the appellant's bother. Afterwards, SBC and the appellant retired to bed. Her testimony on what transpired was as follows;

> ***"He told me to undress. I undressed and remained totally naked. He also undressed. He removed all his clothes. He inserted his male genital organ into my female genital organ i.e. vagina. I was lying on my back. He was on top of me. After we finished we slept. I stayed on with Sammy Chacha until 18.10.2014 when police officers from Ntimaru came for me. During the days I stayed with him we had sex many times but not every day."***

From the testimony of PW2, the appellant had in the previous month made various visits to her home seeking SBC's hand in marriage. According to her, she warned the appellant not to interfere with her daughter as she was still under age but *"he kept showing up for the next few weeks"* before the day SBC and the appellant left for his house. And afterwards PW2 went to the appellant's parents' home. She found SBC there but she refused to leave the appellant and return to her mother's home. It is then that PW2 reported the matter to SBC's school

which gave her a letter to the police who later went and apprehended both SBC and the appellant. Under cross-examination by the appellant, PW 2 is recorded as having stated as follows;

> ***"I have told the truth. It is not true that I demanded cattle as dowry and you failed to raise it. Yes I told my village elder and also my Asst. Chief of the disappearance planned and agreed that you take my daughter. You impregnated her and she had a miscarriage. Her life was put in danger because of that pregnancy. Yes, I brought her clothes to your home. This was because I received a tip off that you were planning to elope with her to Mombasa. I therefore had pretend I was not going to take any action. It was not because I endorsed the union."***

Moses Ginono (PW3), the clinical officer called by the prosecution was based at Kehancha District Hospital. He testified that SBC *"gave a history of having been defiled by a person who was living with her as his wife"* and established that *"she was aged between 15 and 16 years"* and was 1 month pregnant. She later lost that pregnancy through a miscarriage, from the testimony of PW2.

When placed on his defence, the appellant stated that he met SBC in August, 2014 and that;

> ***"I seduced her and she agreed to be my wife. I went to see her mother. I communicated my interest. She agreed. She told me that she would contact her son who is based in Mombasa. After about one month, she called me. She told me she was ready. I went and she gave me her daughter. I left with her. However, I was still to pay dowry. She and her son came to my father and demanded dowry. He gave them a date when he would honour their demand. They went away. They went and decided that they would not be paid. I was arrested together with S at home. That is all."***

The issue of SBC's age was introduced by the prosecutor during his cross-examination of the appellant whose testimony was as follows;

> ***"The complainant and I are not related. Yes, I lived with S as my wife for one (1) month and two (2) weeks. Yes, I asked her age. She told me that she was 19 years old. I also asked her mother. Her mother told me that she was 18 years old. I asked about school, they said that she as not schooling. I slept with her as my wife."*** (Our emphasis)

The trial magistrate in his judgment indicated that on the material day SBC *"packed a bag and sneaked out of home"* and so left for the appellant's home. Regarding the appellant's defence, however, he faulted him for not cross-examining SBC and her mother about SBC's age before including as follows;

> ***"It is therefore my view that saying that he thought she was of age was an afterthought. His defence is an admission that he engaged in a sexual relationship with SBC in full knowledge that she was a minor."***

The learned magistrate did not seem to have addressed the specific question, germane to the determination of this appeal, of whether the defence mounted by the appellant satisfied the provisions of **sections 8(5)** and **(6)** of the **Sexual Offences Act**. The said provisions are as follows;

> ***"8(5). 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 child was over the age of eighteen years***
>
> ***(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."*** (Emphasis added)

From the appellant's cross-examination which we have already set out herein, he did ask SBC about her age and she told him that she was 19 years old. As we have observed, it is the prosecution that introduced the question of whether he asked SBC about her age. After the appellant gave the answer he gave, which clearly indicated that she had expressly deceived him into believing that she was over the age of 18 years, it would have been for the prosecution to disprove that deception. As to whether the appellant reasonably believed that the appellant was over the age of 18 years, it was his testimony that he asked SBC's mother PW2, who informed him that she was 18 years old and that she was not schooling (sic).

Whereas the learned Judge properly appreciated and directed himself that a deception by the child that she is over 18 years old reasonably believed is a complete defence to a charge such as faced the appellant, we respectfully are of the view that the manner in which he dealt with the question of whether the appellant was in fact deceived was less than satisfactory. This is how the Judge reasoned;

> ***"28. I will start by asking this question: Why was the appellant so particular about PW1's age? The inevitable answer must be that the appellant was well aware of the legal position relating to sexual engagements with those under the age of 18 years and possibly doubted if PW1 was of age. That therefore explains why the appellant asked both PW1 and PW2 about PW's age. But even with such broader knowledge of the legal expectations, the appellant seemed to have been satisfied with the said responses and did nothing more to that. he then went on to elope with PW1.***
>
> ***29. …***

30. Taking the said interventions by the appellant against the dictates of the law, this court is not convinced that the appellant acted reasonably in ascertaining the age of PW1. The appellant being possessed of such legal knowledge was reasonably expected to do more in ascertaining the age of PW1.

31. A simple age assessment would have cleared that doubt. Alternatively the appellant would have led any other evidence which tend to show that he was made to reasonably believe that PW1 was not a minor. For instance the appellant would have led evidence on the conduct and lifestyle of PW1 in demonstrating that the such conduct and lifestyle was not commensurate with a minor."

From that excerpt of the judgment, it is clear the learned Judge accepted the appellant's account that SBC did tell him that she was 19 years old and that in a subsequent conversation with her mother, PW2, the latter told the appellant that SBC was 18 years old. Rather than accept that those two statements coupled with the lie that she was not schooling were sufficient to avail the appellant the statutory defence, the learned Judge took the view that the appellant needed to do more to ascertain the age of SBC. He even suggested that the appellant should have conducted or caused to be conducted age assessment on her. We think, with respect, that this was a baffling requirement suggested by the learned Judge. There was nothing placed before court by the prosecution to show that it was unreasonable for the appellant to believe both SBC and her mother.

The facts appear to be that the appellant repeatedly visited SBC's home on courtship trips with her mother's full knowledge. In fact, on the day in question when she eloped with him, it is her mother who told SBC that the appellant and his friend were her visitors before leaving them alone with SBC and going off to church. The appellant's testimony is that she *"gave"* SBC to him on the day. When she returned and did not find SBC at home, PW2 knew exactly where she had gone and it would seem it is only after more than a month that the authorities were informed. In between, it is clear it was the appellant's evidence that there were dowry negotiations and it would seem it is only when payment was not made immediately that PW2 made the report. PW2 denied that dowry negotiations took place but admitted to having visited the appellant's home and on requesting SBC to leave with her, SBC refused. SBC's own testimony was that for the 6 weeks she lived with the appellant as husband and wife and had sexual intercourse repeatedly.

There is no indication from the judgment of the learned Judge as to the standard of proof he expected the appellant to discharge in order to benefit from the defence provided for in **section 8(5)** and **(6),** which was a crucial non-direction. Had he appreciated that the appellant's burden was to be discharged on a balance of probabilities, he would have come to the conclusion that the appellant was more likely than not to have been deceived by the appellant's express lie about her age. Moreover, the general conduct of both SBC and her mother PW2 was such as to cause the appellant to reasonably believe, on a balance of probabilities that the appellant was over the age of 18 years.

We think that had the learned Judge recalled that in a criminal trial the burden of proof ultimately and always rests with the prosecution to prove its case beyond reasonable doubts, he would have avoided the approach that appears to have placed too heavy a burden on the appellant to prove his statutory defence.

Opposing this appeal, **Mr. Sirtuy**, the learned Principal Prosecution Counsel was of the view that as a second appeal is by law limited to matters of law only, and SBC having been 15 years of age at the time of the alleged offence, the appellant ought to have adduced evidence to show that he was misled that she was over 18 years old. Given what we have pointed out from the record, the prosecution in fact aided the appellant in bringing out ample evidence, on a balance of probabilities, that he made efforts to ascertain her age and was told she was over 18 years old and that all the surrounding circumstances were such as to justify his reasonably believing that she was.

For the reasons stated we think the appellant's conviction was unsafe. We accordingly allow the appeal, quash the conviction and set aside the sentence.

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

This judgment is rendered under **Rule 32(2)** of the **Court of Appeal Rules**, Odek, JA having sadly died before he could sign it.

DATED and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR