



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 88 OF 2017

BETWEEN

HUMPHREY BARAZA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Conviction, Judgment and Order of the High Court of Kenya at Eldoret (W. Korir, J.) dated 29th September, 2016

in

H.C. Cr. A. No. 43 OF 2015)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the Chief Magistrate, Busia for the offence of **defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act** and sentenced to 15 years imprisonment. He appealed to the High Court against conviction and sentence but his appeal was dismissed. He now appeals against the judgment of the High Court.

[2] The particulars of the charge alleged in essence, that the appellant on diverse days between July 2013 and 7th April 2014 intentionally and unlawfully defiled the named complainant aged 17 years. The prosecution called six witnesses, namely the complainant; **FN(F)** the complainant's mother; **JB (J)** the complainant's aunt; **BO (e), Sammy Obuguma (Sammy)** a clinical officer and **Cpl. Mary Boke** of Busia Police station.

[3] The prosecution case was briefly as follows:

The complainant was born on 1st March 1996. Sometimes in 2013, when she was a pupil in class eight (8), she met the appellant and he became her boyfriend. The appellant is the complainant's cousin as her mother **F** is a sister to the appellant's father. In July 2013, the appellant took her in a motorcycle to Uganda to visit his sister. By then, the complainant had finished standard 8. They remained in Uganda for one week during which they had sex on several occasions. However, **F** testified that the complainant was away for two weeks. When she came back, her parents were annoyed since she had been away without their permission. They took her to her aunt **J** in Nambale to live with her and as she took a tailoring course. In August 2013, the complainant discovered that she was pregnant. Her mother and her aunt confirmed that she was pregnant.

The complainant's parents called the father of the appellant to discuss the matter but the father of the appellant refused to co-operate. The parents of the complainant reported to the Children's Officer who advised that the matter be discussed by the family. When the appellant's father failed to co-operate the appellant's father and the appellant were summoned by the Children's Officer. The appellant and the complainant's parents appeared before **B** on 7th April 2014 and signed an agreement whereby the appellant allegedly acknowledged sole responsibility for the pregnancy. On the same day, **F** reported at Busia Police station. **Cpl. Mary Boke** issued the complainant with a police examination report form (P3). **Sammy** examined the complainant on the same day. She was 18 years old and had a 39 weeks pregnancy. According to the complainant, she gave birth on 14th April 2014 but the child died.

[4] The appellant made an unsworn statement at the trial stating that he denied the charges of impregnating the complainant on the two occasions he was summoned before the Children's Officer.

[5] The trial magistrate made a finding that the complainant was aged 17 years in July 2013; that the complainant was defiled, became pregnant and later gave birth to a baby who died, and that the identity of the appellant as the person who defiled her from the complainant and **F** was corroborated by the contents of the agreement signed before the Children's Officer.

[6] At the hearing of the appeal in the High Court, **Mr. Owiti** a Prosecution Counsel who appeared for the State conceded the appeal on the grounds that defilement was not proved by medical evidence as the complainant was examined after she had given birth; that the agreement which amounts to a confession was improperly admitted in evidence; and that DNA was not conducted to ascertain the father of the child.

[7] Nevertheless, the High Court, after excluding the agreement, made a finding that the complainant's evidence was supported by the evidence of **F** and **J**; that pregnancy confirmed sexual engagement and that although sexual acts were consensual, the complainant was 17 years and 5 months old in July 2013.

[8] The appeal is based on six grounds. We quote only three verbatim.

“(1) The learned Judge erred in law by holding that the prosecution had properly discharged its duty of proving penetration and the age of the victim ending in the pregnancy and which pregnancy had not sufficiently and exclusively linked to the appellant.

(2) ...

(3) The learned Judge erred in law by substantively concluding that the unspecified sexual transactions allegedly occurring between July 2013 and April 2014 ended in pregnancy for which the appellant was responsible despite having discounted as insufficient the medical evidence the obtained some 9 months after the sexual transactions complained of.

(4)

(5)...

(6) The learned Judge erred in law by holding that he prosecution's concession to the appellant's appeal in the High Court was unfounded and unnecessary.”

Mr. Wanyama, learned counsel for the appellant has filed detailed written submissions. Similarly, **Ms. Karanja** the learned Prosecution Counsel has filed written submissions on which she opposes the appeal

[9] There were some peculiar features in the prosecution case. Although the complainant and the appellant are closely related, the complainant was a girl friend of the appellant. According to the complainant she had two other boyfriends before the appellant became her boyfriend in 2011. Further, while in Uganda, the appellant told the complainant that he had married her. When the appellant came from Uganda in July, 2013, no report of commission of any offence was made to the police. When it was discovered that the complainant was pregnant, the parents of the complainant called the appellant and his father for an amicable settlement but the appellant's father was uncooperative. The report was made to the police after approximately eight months and only after the appellant had allegedly signed an agreement before the Children's Officer admitting responsibility for the pregnancy. A week after the report to police, the complainant allegedly gave birth but the child died.

[10] There were concurrent findings of fact by the two courts below that the appellant had sexual intercourse with the complainant and impregnated the complainant. As already adverted to, the complainant is a cousin of the appellant. She gave detailed evidence of how their relationship started, the several occasions they had sexual intercourse including in Uganda. She also gave evidence of the aborted attempts made by her parents to resolve the issue of her pregnancy with the appellant and his father. The appellant did not in his evidence refer to the complainant's evidence of her love relationship with the appellant. He merely stated that he denied responsibility before the Children's Officer and did not sign the agreement. There was no reason for the complainant to lie about her love relationship with the appellant and the several acts of sexual intercourse. The complainant's evidence was given credence by the evidence of her mother and aunt that she reported that the appellant had impregnated her to them. We are satisfied that the concurrent findings of fact were supported by credible evidence and find that, indeed, the appellant had consensual sexual intercourse with the complainant on several occasions which caused a pregnancy.

[11] The main question raised in the appeal is whether or not the several acts of intercourse occurred when the complainant was under the age of 18 years. The particulars of the offence stated in the relevant part that the appellant defiled the complainant aged 17 years on diverse days between July, 2013 and 7th April 2014. The date of registration of the complainant's birth is indicated in the Certificate of Birth as 21st December 2011. This is a late registration of birth but no issue has arisen about the date of birth. The date of birth is shown as 1st March, 1996. The High Court made a finding that by July 2013 the complainant was aged 17 years and 5 months.

[12] It is submitted by the appellant's counsel that the dates of the several acts of sexual intercourse in the charge sheet are unspecified and that from 1st March 1996 when the complainant was born to 7th April 2014, which is the last date of the alleged sexual intercourse shows that the complainant was aged 18 years and 36 days and therefore had sexual intercourse when she was over 18 years old. When the complainant was examined on 8th April 2014 she was found to be 18 years old and had a 39 weeks pregnancy. Going by the date of birth, she was over 18 years old at the time of examination. It seems that the complainant assumed that she got pregnant when she was in Uganda in July 2013. The month of July is derived from her memory. Further, she did not know which date in the month of July 2013 she got pregnant. There was no concrete evidence that she gave birth on 14th April 2014 or any evidence that the pregnancy ran the normal biological period as no documents were produced regarding the pregnancy and birth of the child. Yet the prosecution specifically relied on the fact of pregnancy to prove penetration of the complainant's genital organs.

[13] In the premises we are not satisfied that the High Court properly evaluated the evidence relating to the age of the complainant and the

time of conception. Considering the ambiguity in the charge sheet on the dates of the offence(s), the age of the complainant and the fact that the complainant's report to the police was belated, and was apparently motivated more by the desire by the complainant's parents for securing compensation for pregnancy more than the pursuing of criminal justice for the complainant, it was not proved beyond reasonable doubt that the complainant was below the age of 18 years at the material times specified in the charge sheet. She was certainly over 18 years on 7th April, 2014, the last date indicated in the charge sheet.

[14] For the foregoing reason, the appeal is allowed, the conviction is quashed and the sentence of 15 years imprisonment set aside. The appellants shall be set at liberty unless otherwise lawfully held.

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR