



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 32 OF 2015**

*(Appeal originating from the conviction and sentence by Hon. L. N. Wasige-SRM in Kilifi CR NO.16 of 2012)*

**MARTIN CHARO.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars were that the appellant on diverse dates between 2<sup>nd</sup> December 2011 and 3<sup>rd</sup> January 2012 at **[particulars withheld]** area in Kilifi County within Coast Province intentionally and unlawfully caused penetration of his genital organ namely Penis into the genital organ, namely vagina, of E N a girl aged 13 years.

The trial court convicted the appellant and sentenced him to serve twenty years in prison. The grounds of appeal are that the charge sheet was defective and was at variance with the evidence, that Section 200 of the Criminal Procedure Code was not complied with, that a crucial witness by the name Florence was not summoned to testify, that the case was not proved beyond reasonable doubt, the sentence is excessive and that the P3 form was irregularly produced by a person who was not the one who filled it. The appellant filed written submissions. The submissions mainly expound on the above grounds and do not raise any other serious issue.

Mr. Fedha, prosecuting counsel, opposed the appeal. Counsel submitted that the complainant narrated what happened. She was fourteen (14) years old and a class six (6) pupil. Her age was assessed. Defilement was proved. PW3 saw he appellant engaging in sex with the complainant after peeping through the window.

Before the trial court PW1 was the complainant. She testified that she was a class six pupil aged 14 years old. On 2<sup>nd</sup> January 2012 she was with her other siblings and they went to the beach. She later dodged her siblings and went to the appellant's house. After a while her brother went there and asked her to leave. The appellant told them that she was not there. They later escaped and went to the appellant's parents' home. She stayed there for three days and they used to have sex. After three days she went back home. She told her father where she was. She was taken to the police and later taken to

hospital. It is her evidence that she had known the appellant for about three years as he does not live very far from their home. It was her evidence that she had gone to see the appellant, have sex and then go back home.

PW2 N C is the elder brother to PW1. On 2<sup>nd</sup> January 2012 he went to the appellant's house to take away PW1. He saw PW1 hiding under the bed. It was around 1.00 am and was in the company of PW3 and other relatives. The appellant got out and started shouting that there were thieves. PW2 and the other people ran away. PW2 reported the matter to the police at Takaungu AP. Camp. PW1 returned home after two days.

PW3, S N is a brother to PW1 and was with PW2 when they went to look for PW1. He peeped through the window and saw PW1 and the appellant having sex. There was a chimney lamp in the room. The appellant shouted that there were thieves and they ran away. PW4 APC PATRICK MUNENE was attached to the Takaungu AP Post. On 4<sup>th</sup> January 2012 at about 11:30 am his boss, Sergeant Ombora, called the appellant who went to the AP post and was arrested. The case had already been reported there. PW4 took the appellant and PW1 to Kilifi Police Station. PW5, PC JAMES MWAI was based at Kilifi Police Station. On 4<sup>th</sup> January 2012 at 1.57 pm he was instructed by his boss to investigate the case. He saw the appellant and PW1. His investigations revealed that PW1 had disappeared from home from 25<sup>th</sup> December 2011 until 2<sup>nd</sup> January 2012. PW1's age was assessed to be 14 years old. He caused the appellant to be charged with the offence.

PW6 Dr. Hashim Suleiman was based at Kilifi District Hospital. He produced a P3 form that had been filled by his colleague, Dr. Rashida on 16<sup>th</sup> February 2012. According to the medical examination, PW1's genitalia was normal. Her hymen was broken. HIV and syphilis tests were negative. During the examination PW1 was having her monthly period. There were no evidence of spermatozoa seen.

In his sworn statement the appellant explained how he was arrested on 4<sup>th</sup> January 2012 at Takaungu by some police officers. He is 24 years old who is engaged in the music industry. He denied committing the offence.

The main issue for determination is whether the appellant defiled PW1. The ground of Appeal that Section 200 of the Criminal Procedure Code was not complied what is misplaced. Page 17 of the proceedings of the trial court indicate that Section 200 was explained to the appellant who opted to proceed with the case from where it had reached. Similarly, on the issue of production of P3 Form, the appellant recorded that he had no objection for the p3 form to be produced by PW6. The charge sheet was not defective and there is no witness by the name F who was to be called. F was with PW2 and PW3 and she ran away when the appellant shouted that there were thieves at his place.

The trial court held that PW1 was a minor and her genitalia was penetrated by the appellant. This led to the conviction of the appellant. The evidence on record shows that indeed PW1 was 14 years old. She testified that she had gone to the appellant's place to have sex and then go back home. She had known the appellant for about three years. She dodged her brothers after going to the beach and sneaked into the appellant's house. The medical evidence shows that she was a mature lady who was experiencing her menstrual periods. Her genitalia was normal.

It is clear to me that although PW1 was a young lady aged 14 years; she was behaving like a full grown up woman who was already engaging and enjoying sex with men. She seems not to have been complaining about the incident. She had only gone to the appellant's house to have sex and go back home only for her brothers to interfere. She opted to run away to the appellant's parents' home where they continued having sex for three days. She then decided to go home. She told her father where she

was.

It is true that under the Sexual Offences Act, a child below 18 years old cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown up who knows what she is doing. The appellant was 23 years old when the incident occurred as per the pre bail report. It would be unfair to have the appellant serve 20 years behind bars yet PW1 was after sex from him. The evidence does not show that the appellant knew that PW1 was a student or that the appellant took advantage of PW1 being a young girl. It is clear to me that PW1 started engaging in sex way before that date. It is possible that PW3 saw his sister enjoying sex with the appellant at 1.00 am.

Section 8 (6) of the Sexual Offences Act states as follows: -

**“(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.”**

It is always assumed that for the defence under Section 8(5) to apply courts should have regard to the circumstances of the case including the steps taken by the accused. This does not mean that the accused has to prove beyond reasonable doubt that he took steps to ascertain the age of the complainant: It should not be the case that the accused should prove that he asked the complainant 's age, that he made inquiries about her age either at her home or school or from her friends. It should not be lost that the accused has a right to remain silent and not testify under Article 50 (1) of the Constitution. What would happen if the accused opts to exercise such a right: The prosecution is expected to prove its case beyond reasonable doubt. It should not be expected that the accused would explain how he went into great length to find out the age of the complainant. What is of great importance is the circumstances of the case. The behaviour of the complainant and his/her evidence in court usually gives the circumstances of the case.

The circumstances of this case is that the complainant had known the appellant for a about three years, they had met on Christmas day. During cross examination, the complainant stated as follows: -

**“I came to see you, have sex then I go back home. When my brothers came you were inside your house. You are Martin Charo. On 2.1.2012 we were together. You were not checked by the doctor.”**

That is the complainant's evidence on cross examination. The question then is, does the circumstances of the case paint a picture of someone who was "defiled" Can we say that the appellant took advantage of a young girl and defiled her" The circumstances clearly show that it is the complainant who went to the appellant's house to have sex and then go home. She even dodged her brothers. When her brothers went there at night to collect her, she opted to remain with the appellant. If she was a young girl then why did she go to the appellant's home to have sex" I believe her brothers also knew that the appellant was her boy friend.

The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends. The conduct of the complainant plays a fundamental role in a defilement case. One can easily conclude that the complainant was defiled after hearing her evidence. Several issues come into focus. Did the complainant report the defilement immediately after the incident" Was she threatened after the incident" How long did it take for her to

report. Was there threat on her life" How long was the relationship. Were the parents aware of the relationship. All these issues lead to the circumstances of the case as envisaged under Section 8(5) of the Sexual Offences Act.

It is important to distinguish between law and morals. It is the law that a child below the age of 18 years cannot consent to sex. Section 8 (5) qualifies the provisions of Section 8 (1) to 8 (4) which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship.

In Spain, until recently, the age of consent was thirteen (13) years. It has now been increased to 16 years. In the same country marriageable age for a girl was 14 years for a long time. It is now 16 years. This is subject to parental consent. In South Africa, one can get married at 15 years with parental consent. In countries like Austria, Belgium, Bulgaria, Switzerland Czech Republic, Germany, U.K and Hungary, a girl or boy can get married at the age of 16 years with parental consent. In Denmark, Slovenia, Ukraine, and Estonia, the marriageable age is 15 years with parental consent. I believe all these legal avenues are put in place in recognition of the fact that young people are nowadays getting exposed to sex at a very early stage.

The medical evidence herein shows that PW1's genitalia was normal: There was no spermatozoa seen: PW1 testified that she went to the appellant's parents' home, they continued to have sex and then went back home. Those cannot be the circumstances of a victim of defilement. Even if the appellant did not give evidence as to the steps he took to ascertain the age of the complainant, the circumstances are that the complainant behaved like an adult. She left her parents' home and went to the appellant's house purposely to have sex. The appellant should not be condemned for the voluntary acts of the complainant. The complainant was enjoying the relationship.

I do find that the appellant falls within the defence under section 8(5) of the Sexual Offences Act. It is PW1 who behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the complainant. The relationship continued for quite a long time to the extent that age became a non issue. I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated and delivered in Malindi this 25<sup>th</sup> day of April, 2016.**

**S.CHITEMBWE**

**JUDGE**



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