



REPUBLIC OF KENYA



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**Wekesa v Republic (Criminal Appeal 129 of 2019)
[2022] KEHC 11706 (KLR) (23 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 11706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 129 OF 2019
LK KIMARU, J
FEBRUARY 23, 2022**

BETWEEN

DANIEL WEKESA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon. M.I.G Moranga
(Senior Principal Magistrate) in Kitale Chief Magistrate's Court
Criminal Case (S.O) No. 161 of 2018 delivered on 17th December 2019)*

JUDGMENT

1. The Appellant, Daniel Wekesa, was charged with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on the 26th day of April 2018 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SK, a child aged fifteen (15) years. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the 26th day of April 2018 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of SK, a child aged fifteen (15) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty. After full trial, the Appellant was convicted on the main charge and sentenced to serve fourteen (14) years imprisonment.
2. The Appellant is aggrieved by his conviction and sentence. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He maintained that the Prosecution failed to establish the elements necessary to convict him on the charges leveled against him. He contended that the Prosecution's case was marred with discrepancies and contradictions. He faulted the trial magistrate for failing to uphold his rights as enshrined in Articles 49 (1) (f) (i) and (ii)



and 50(2)(b) of the Constitution. He argued that his right's to have the matter begin afresh was unfairly denied. He stated that the Prosecution witnesses were incredible. He decried that his cogent defence was inexplicably rejected. In the premises therefore, the Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. During the hearing of the appeal, both the Appellant and the Prosecution relied on their written submissions in support of their respective rival positions. The Appellant submitted that he was not arraigned in court within 24 hours and/or reasonable time hence compromised his constitutional rights. He maintained that the omission of the word 'unlawful' rendered the charge sheet defective. He added that the failure to have the case commence *de novo* violated his right to a fair trial. He argued that the absence of conducting a DNA on the complainant's child inconclusively proved penetration. He contended that age of the complainant was not proved. He maintained that DNA testing, on the born child, would have conclusively ascertained penetration. He treated the evidence of the complainant with suspicion as she only reported the alleged sexual assault five (5) months after the incident had occurred.
4. On the part of the State, Learned Prosecutor Mr. Omooria submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. He maintained that contradictions or inconsistencies (if any) did not go to the root of the Prosecution's case. He submitted that all crucial witnesses testified. He dismissed claims of hearsay evidence as an afterthought. He maintained that DNA evidence was not necessary. However, he submitted that the consequence of its failure is to order a retrial and not allow the appeal in favour of the Appellant. He observed that the Appellant's defence was weak and incredible. He submitted that the prosecution had discharged its burden of proof to the required standard of proof beyond any shadow of a doubt. He urged this court to uphold the conviction, affirm the sentence and consequently dismiss the appeal.
5. The facts established by the Prosecution and giving rise to the charges are recorded as follows; PW2 the Complainant SKB, testified that she was a fifteen (15) year old class seven (7) student at [particulars withheld] Academy at the time of the alleged offence. During the school holidays at Kinyoro, she attended a four (4) day seminar whilst residing at the church. On April 26, 2018 at 8:00 p.m., while the complainant was going to the washroom when she met the Appellant. She identified him as the school's cook. She had known him for about two (2) years. He then held her at the back of her shoulder, took her behind the washroom, removed her trouser and sexually assaulted her. She neither resisted nor screamed. She bled. After the incident, the complainant proceeded to the dormitory where she took a shower. She informed her friend S the following day who informed her uncle RMM (PW4).
6. The complainant failed to inform any other person. It was however discovered five (5) months later that she was pregnant following investigations to establish why her performance in school was deteriorating. She maintained that she was impregnated by the Appellant. She was taken to Sokomoko Health Centre for medical examination.
7. Meanwhile, PW2's uncle, PW4, summoned the Appellant. PW4 and the Appellant were members of the same church. After quizzing the Appellant, PW4 slapped him. PW4 further informed the court that his informant, S informed him that he found the Appellant pulling up his trouser after engaging in sexual intercourse with the complainant. The Appellant was then taken to the Police Station. The complainant recorded a statement with the police.
8. The complainant was later on taken to Kitale County Referral Hospital on September 21, 2018. She was seen by PW3, Linus Ligale, and clinical officer. He observed that the hymen was torn and old looking. She tested positive for pregnancy. He concluded that the complainant suffered sexual assault



and pregnancy. He produced the complainant's treatment notes and P3 form as Prosecution Exhibits 2 (a) and 2(b) respectively.

PC Linet Omwamba No. xxxxxx (PW5) was assigned to investigate the case. She interviewed the Appellant in remand on September 23, 2018. She issued a P3 form on September 24, 2018. She recorded witnesses' statements. She testified that the complainant had tried to scream when the Appellant sexually assaulted her. The Appellant was arraigned in court on September 25, 2018 where he was charged with the offence that he was convicted.

9. The Appellant was placed on his defence. His sworn testimony was to the effect that he was at home on September 21, 2018 when two (2) people came to his house. They then proceeded to PW4's home. He stated that PW4 assaulted him with a plastic chair by hitting him on the head. He was further assaulted by the other people present. He was then escorted to Kitale Police Station. He was subsequently arraigned in court where he denied the charges. He insisted on having a DNA conducted to establish the true paternity of the child. He got wind of the fact that the complainant had given birth to a child at the time he was adducing his defence in court.
10. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge v Republic* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant
 2. Identification of the perpetrator
 3. Penetration
12. As regards the complainant's age, PW2, the complainant, testified that she was fifteen (15) years old at the time of the alleged offence. Her evidence was corroborated by that of PW1. Evidence of her age was further tendered by the reliance on Prosecution Exhibit 1, the age assessment report. The evidence of PW1 and PW2 was consistent. This court thus finds that the age of the minor was ascertained by the Prosecution to the required standard of proof.
 13. The element of penetration is the next ingredient. Section 2 (1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
 14. The evidence of PW3 was that PW2's hymen was torn and old looking. She tested positive for pregnancy. He concluded that the complainant was sexually assaulted and as a result got pregnant. PW2 testified that she was sexually assaulted by the Appellant. Penetration was proved insofar as it was established that the complainant was five (5) months pregnant at the time investigations commenced. The hymen was torn and old looking.

Of importance is whether it was the Appellant who caused the penetration. On the identification of the perpetrator, PW2 testified that she knew the Appellant who had been the school cook for two (2) years prior to the time of the offence. PW4 identified and recognized him as a fellow member of their local church. The complainant testified that the Appellant defiled her by the washrooms while she was



attending a seminar. The complainant was emphatic that it was the Appellant who defiled her. She implored that he should not deny who he was the father to her unborn child.

15. The Appellant asserted that in order to concussively apportion blame on him, a DNA test ought to have been conducted to ascertain paternity of the child. He cast doubt on the efficacy of the charges leveled against him. He lamented that he was only formally charged five (5) months after the alleged offence had occurred. On the part of the Prosecution, this was irrelevant to prove penetration. The Prosecution maintained that the DNA did not ascertain penetration but urged that the Appellant was the father of the child.

The trial court informed the Appellant when he requested for DNA that the onus was on the Prosecution to dictate the nature of the evidence they intended to adduce. The Appellant was however insistent that the DNA test was necessary in the circumstance. This court is alive to the fact that DNA test need not be done. However, in cases where the credibility of other witnesses and/or the evidence adduced before the court is insufficient, it will be necessary for such a test to be conducted. This is bearing in mind that the burden of proof in criminal cases never shifts to the accused.

16. In this Appeal, this court is persuaded that the period of five months between the time the sexual assault is said to have occurred and the report to the police militated against the credibility of the prosecution's case. This court forms the view that consequently, doubt was raised as to whether indeed it was the Appellant who defiled the complainant. This court is alive to the proviso of Section 124 of the *Evidence Act*. However, the evidence of the complainant alone was insufficient in this instance to establish the identity of the perpetrator. In this court's view, it was critical for the prosecution to connect the Appellant with the offence by having DNA evidence as relates to the paternity of the child adduced into evidence. This is more so once the Appellant insisted that he required it to be done. Further, owing to the lapse of time between the occurrence of the alleged offence and the report of the same, this court finds the evidence adduced was fraught with doubt. To sustain the conviction of the Appellant would constitute a miscarriage of justice. The conviction was unsafe.
17. Consequently, this court must interfere with the decision of the trial court for the above reasons. The appeal is merited and is hereby allowed. This court sets aside the conviction and sentence of the Appellant. He is acquitted of the charge. The Appellant shall be set at liberty unless otherwise lawfully held.

It is so ordered.

DATED AT KITALE THIS 23rd DAY OF FEBRUARY 2022

L KIMARU

JUDGE

