REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E017 OF 2021

JOASH OUMA RANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Joash Ouma Randa, the appellant, was convicted of the offence of defilement contrary to Section 8(1) and (4) of the Sexual Offences Act.

The particulars of the offence are that on diverse dates between 19/10/2019 and 21st October, 2019, in Kisumu County, intentionally caused his penis to penetrate the vagina of P. A. O. a minor aged seventeen years.

In the alternative, the appellant faced a charge of indecent Act contrary to Section 11(1) of the Sexual Offences Act in that he touched the vagina of P. A. O. a child aged seventeen years .

Upon conviction he was sentenced to serve ten years imprisonment. The appellant is now dissatisfied with the trial court's judgment both on conviction and sentence and filed this appeal dated 11/11/2021 through the firm of Ms. Apondi Advocate . The petition of appeal contained seven grounds of appeal which can be summarized as follows:

1) That the offence was not proved to the required standard;

2) That there was no medical evidence to support the charge;

3) That the court failed to evaluate the evidence on record;

4) That the court failed to take into account the appellant's mitigation.

For the above reasons, the appellant prays that the conviction be quashed and sentence set aside. The court directed that the appeal be canvassed by way of written submissions and both parties complied.

In the appellants written submissions filed in court on 18/1/2021, it was submitted that the burden of proof always rests on the prosecution; that the complainant testified that she had had sex with other people and was pregnant; that it could not be ascertained that it is the appellant who caused the pregnancy; that there was no evidence of recent sexual activity; that the court did not comply with Section 124 of the Evidence to explain why the magistrate believed PW2's testimony, Counsel relied on the decision of **Bassita v Uganda S. C. Criminal Appeal 35 of 1995**; that the complainant's testimony had contradictions and was not believable; it was also submitted that the complainant being aged seventeen (17) years had reached a stage that she knew what she was involving herself in and consented to the act.

On sentencing, counsel relied on the decisions in **Joseph Kaberia Kahinga & 11 others vs. Attorney General (2016)EKLR and S vs Mchunu and Another (AR 24/2011 (2012)ZAKZPHC 6 Natal Kwa Zulu Natal High Court** and urged that ten (10) years imprisonment was too harsh and urged the court to reduce the sentence; that since the complainant was sexually active and impregnated by another person, that was enough mitigation to reduce the sentence.

The prosecution counsel, **Mr. Kimanthi,** filed his submissions on 19/11/2021 where he submitted that the three ingredients necessary to prove the offence of defilement were proved when the victim testified that she had a sexual encounter with the appellant in a lodging on 19/10/2019 in Kisumu Town and had never engaged in sexual activity before; that PW2's evidence was sufficient to found a conviction, pursuant to Section 124 of the Evidence Act; that the age was proved, at seventeen (17) years old as evidenced by the birth certificate produced in court.

On identity of the perpetrator, PW3 knew the appellant. The two had travelled in the same vehicle from Nyatike to Kisumu. PW2's evidence was corroborated by the evidence of PW1, PW3, PW4, PW5 and PW6.

Counsel also urged that in his defence, the appellant denied knowing the complainant, which was a mere denial; that under Section 8(4) of the Sexual Offences Act, upon conviction, one is liable to a sentence of not less than fifteen (15) years and hence ten (10) years was lenient. Counsel urged that the appeal lacks merit and should be dismissed.

This is a first appeal and this court has a duty to examine afresh all the evidence tendered in the trial court, analyse and evaluate it and arrive at its own independent conclusions but bearing in mind that this court neither saw nor heard the witnesses testify. This court is guided by the decision **of Kiilu vs Republic (2005)Eklr.**

The prosecution called a total of five witnesses in support of their case. **PW1 Maurine Makamba**, a clinical officer at Nyatike Sub County Hospital examined the complainant (PW2) on 22/10/2019, and found that she had blood stains in the pants, the hymen was broken but there were no bruises and lab tests revealed that she was pregnant and that she admitted to having had other sexual encounters before 19/10/2019.

PW2 RAO, told the court that she was seventeen years, having been born in 2002; that in September, she had met the appellant at a shop while she was in company of other two girls who were collecting money for a camp; that the appellant gave them his contact; that on 18/10/2019, she escorted her friend M. She met her brother in law and later a teacher confronted her asking to know where she was from; that after the teacher called her a fool, she contemplated suicide but decided to go to the appellant's house for counselling. The appellant invited her to accompany him somewhere next morning which she agreed to. They travelled to Ahero where he rented a lodging and they spent a night there where they had sexual intercourse. They spent a second night and on 21/10/2019, the appellant left for Nyatike and gave her transport. On 22/10/2019, she travelled to Nyatike and went to her sister's place from where she was arrested and she found that the appellant had already been arrested. She was later examined at the hospital and found to be pregnant. She admitted to having a boyfriend but denied having been involved in sexual intercourse there before.

PW3 KOO, a teacher at [particulars withheld] School recalled that he had accommodated the complainant (PW2) in his house; that on 18/10/2019, he left keys with the complainant and on returning at 8:00p.m. did not find the complainant and learnt that she had gone towards the nearby Secondary School claiming to have been sent by a teacher; that PW2 returned but on 19/10/2019, he was informed that the complainant was not in school and did not return till 21/10/2019. The complainant's sister reported to the police and later he informed him that the appellant had been arrested in connection with the complainant's whereabouts.

PW4 MAO, a sister to PW2, recalled that on 18/10/2019, she had gone for a funeral when the complainant's teacher called to inform her that she had seen the complainant leave the school compound about 5:00p.m; that PW2 later returned to the school but next day, a teacher called to inform PW4 that PW2 was not at the school. On 20/10/2019, she reported to the police and they managed to trace the appellant through a phone number that PW2 had used to call her mother. They tracked the appellant through face book, that the owner of the phone number was the appellant, the school Chaplain of Moi Nyatike Boys. She got directions to his house about 9:00p.m and the person on seeing them ran off but was chased and arrested and on being questioned, claimed that PW2 was at his aunt's house in Ahero. Police were called and arrested the appellant. PW4 called the appellant's aunt who said that PW2 had left and arrived at Nyatike at 5:00 p.m and she was picked up by police.

PW5 CPL Erick Ouma of Macalder Police Station received a call on 21/10/2019 about 10:00 p.m requesting that police go to arrest a suspect of defilement and he did.

PW6 PC Stanley Songol was the investigating officer in this matter. He testified that after PW5 arrested the appellant, and while at the police station, the appellant gave them a contact in Kisumu who told them that PW2 had been left there; that PW2 arrived at Nyatike about 4:00p.m and was arrested and both complainant and appellant were taken to hospital for examination.

When called upon to defend himself, the appellant stated on oath that on 19/10/2019 to 21/10/2019, he was at Nyatike; that he travelled to Nyatike on 19th October to have the mother discharged; that on 20/10/2019 he attended a collection service at the school where he worked as a chaplain. He then remained in his office till 6:30p.m and went to sleep; that 21/10/2019 was a holiday and from the assembly, he went to the office. He left school at 8:00p.m and about 9:00p.m when outside his house is when people went to his house, chased him, caught up with him and alleged he was with a girl which was not true. he was arrested.

I have now considered and re-evaluated all the evidence on record.

Having been charged with an offence of defilement, it was the duty of the prosecution to establish beyond reasonable doubt that the following ingredients exist, namely:-

1) **that the complainant is a minor;**

2) that there was penetration;

3) that there was proof of the perpetrator's identity.

of Age:

The complainant testified that she was seventeen (17) years old. Her evidence was supported by the birth certificate produced as an exhibit which confirms that she was born on 11/7/2002. As of 19/10/2019, she was indeed seventeen (17) years and therefore a minor.

Of penetration:

Penetration is defined under Section 2 of the Sexual Offences Act as:-

> **"The partial or complete insertion of the genital organ of a person into the genital organ of another person."**

In this case, PW2 testified that she met with the appellant they travelled to Ahero, spent two nights together and they had sexual intercourse. She did not disclose the action that took place. However, I take cognizance of the fact that the complainant was seventeen (17) years old and was even pregnant and was old enough to know what sexual intercourse entails.

PW2 was found to have been pregnant. Though she claimed that she had never had sexual intercourse before, she was not truthful. This is because she was examined two (2) days after the incident and according to PW1, a pregnancy could only have manifested itself after two weeks it means. So the absence of the hymen is not of itself evidence of penetration. However, I believe that the appellant could not have taken PW2 to a lodging all the way from Nyatike to Ahero near Kisumu for no reason. Besides, there is more corroborative evidence to prove that the appellant was with the complainant in a lodging. According to PW3, the complainant's sister, they traced the appellant through his cell phone line which the complainant had used to call her mother and they checked the face book and were able to establish the appellant's identity. Upon arrest, PW4 and PW6 contacted the appellant's aunt who had allegedly been left with the complainant who confirmed she had been there but had left. This court is satisfied that the trial court correctly found that the appellant defiled the complainant.

This is not about the pregnancy. Even if PW2 was already pregnant and the pregnancy belonged to another person, the issue is whether the appellant defiled PW2. PW2 was still a minor and had no capacity to consent to sexual intercourse. The fact that she was sexually active can only be used as a mitigating factor in the sentence.

Identity of the perpetrator:

PW2 knew the appellant. They travelled together from Nyatike to Ahero and Spent two nights together in a lodging. There is totally no reason why PW2 would have framed the appellant. The appellant raised an alibi as his defence; that he was in school where he worked as a Chaplain from 19/10/2019 to 22/10/2019. It is trite law that even when an accused raises an alibi defence, the burden of proof still rests on the prosecution to disprove the alibi and prove its case beyond reasonable doubt. In the case of **Charles Anjare Mwamubi vs Republic Criminal Appeal No. 226 of 2002,** the Court of Appeal held as follows:-

> **"An alibi defence raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduce into the mind of a court a doubt that is not unreasonable, Kiarie vs Republic (1984)KLR 739 (para 25)."**

In the **Uganda case of SSentale vs Uganda (1968) EA 36**, the court said:-

> **"The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."**

I have considered the appellant's alibi which came up as an afterthought in his defence, that he was just at the school where he worked as a Chaplain between 19/10/2019 to 22/10/2019. It is not believable and it did not dislodge the prosecution evidence.

In the end, I find that the court arrived at the correct verdict that the appellant defiled the complainant. I have no reason to fault the conviction.

The appellant was sentenced to ten (10) years imprisonment. Under Section 8(4) of the Sexual Offences Act, the appellant should have been sentenced to not less than fifteen (15) years upon conviction. I have taken into account the fact that the appellant was treated as a first offender and taking into account the complainant's conduct and all the circumstances of this case, I find the sentence to be on the higher side. I will set aside the sentence of ten (10) years and instead I substitute it and I sentence the appellant to six (6) years imprisonment. The sentence will take effect from 30/9/2020, the date that the appellant was sentenced. The appeal partially succeeds.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 24TH DAY OF MARCH, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa for the Respondent.

Appellant present.

Nyauke Court Assistant