



REPUBLIC OF KENYA



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**Jumba v Republic (Criminal Appeal E058 of 2021)
[2022] KEHC 17122 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E058 OF 2021
AC MRIMA, J
NOVEMBER 17, 2022**

BETWEEN

LEENHAS JUMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. Mercyline N. Lubia (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 30 of 2019 delivered on 4th August 2021)

JUDGMENT

Introduction:

1. Leenhas Jumba, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on September 21, 2018 in Sitatunga Location within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of NNN, a child aged 17 years old.
2. In the alternative, the Appellant was charged with 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 same day and in same place, the Appellant intentionally caused his penis to touch into the vagina of NNN, a child aged 17 years old.
3. On arrest, the Appellant was arraigned before Court. He pleaded not guilty to the charges. After a full trial, the Appellant was convicted on the main charge and sentenced to serve 15 years' imprisonment.



The Appeal:

4. The Appellant was aggrieved by the conviction and sentence. He filed Grounds of Appeal and further supplemented them. He remained unconvinced that the ingredients to the charge of defilement had been established to the required threshold. In particular, he lamented that penetration was not proved conclusively bearing in mind that no evidence was adduced to place the Appellant as the father of the complainant's child. He was also of the view that the trial Court shifted the burden of proof to him thereby arriving at an erroneous conclusion.
5. He further accused the trial Court of failing to consider his defence and mitigation during sentencing. He cited that the trial Court wrongly relied on his submissions and not his defence thereby erred. He was ardent that the charges leveled against him were as a result of a grudge between the Appellant and the complainant's family; he had been implicated. Finally, the Appellant found error in trial Court's findings for convicting him on a defective charge sheet.
6. 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.
7. Parties relied on their respective filed and oral submissions in arguing the appeal. The Appellant highlighted some thematic areas in support of his Appeal. Firstly, he found glaring inconsistencies with the evidence of the complainant. So much so that a conviction based on her evidence would render the conviction unsafe. In that regard, he submitted that this was a Romeo and Juliet archetypal relationship because the complainant consented to having sexual intercourse on several occasions. He added that the complainant's father was a critical witness yet he was not called to testify.
8. Dissatisfied with the findings on penetration and the identification of the perpetrator as ingredients to a charge of defilement, the Appellant observed that the medical tests were conducted four (4) months after the alleged act. This cast doubt as to whether the standard of proof had been met.
9. Furthermore, it was crucial to establish whether the complainant did proceed with the pregnancy to full term to ascertain the father's identity. In that regard, the Appellant propositioned that he ought to have been medically examined to establish a direct link that he committed the offence. He was of the view that the trial court was in breach of Section 36 (1) of the *Sexual Offences Act*.
10. On the age of the victim, the Appellant submitted that conflicting evidence was adduced. It was argued that PW1 testified that she was 18 years old at the time of the offence. The charge sheet revealed that the complainant was 17 years while the Age Assessment Report concluded that the minor was 16 years old. In this regard, the age of the victim was not aptly ascertained beyond reasonable doubt.
11. Lastly, on sentencing, the Appellant relied on the probation report. The said report observed that the Appellant was twenty 20 years old at the time of the commission of the offence. It was thus recommended that he serves a 15-year custodial sentence. He submitted that the sentence by the trial Court was draconian, excessive and in conflict with trends in sentencing. He urged this Court to review the sentence should the appeal on conviction fail and find the Appellant eligible for a non-custodial sentence.
12. The appeal was opposed by the Prosecution. Learned Counsel for the State submitted that all the ingredients to a charge of defilement had been proved beyond reasonable doubt. She relied on the Age Assessment Report to conclude that the complainant was 16 years old at the time of the offence. On penetration, Learned Counsel submitted that the trial Court was not mandatorily required to comply with Section 36 of the *Sexual Offences Act* as the said provision was discretionary in nature. She further



submitted that the Appellant's defence of animosity between the parties was an afterthought and was thus properly rejected. She urged this Court to uphold the conviction and affirm the sentence.

Analysis:

13. 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 Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.
14. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant. To that end, the prosecution was required to establish the charge of defilement and to, in particular, prove the three essential elements being; the age of the victim (complainant), the aspect of penetration and finally the identity of the perpetrator.
15. However, before discharging the said duty, it is crucial to review the evidence adduced at the trial.
16. The prosecution called 5 witnesses in a bid to establish the charges drawn against the Appellant. Although the charge sheet read that the complainant was a 17-year old girl called NNN, the complainant, who testified as PW1 stated that she was MNN, a Form One student aged 16 years old at Our [Particulars Withheld] Secondary School.
17. The evidence was corroborated by PW2 as well as the Age Assessment Report which was produced in evidence and marked as Prosecution Exhibit 1. On cross examination, she testified that she was born in 2001.
18. The complainant was on September 21, 2018 at midnight heading home from a funeral when she bumped into the Appellant. She recognized him as a Caretaker. The Appellant expressed his love interest for her but she declined. On a previous occasion, the Appellant had shared his sentiments to the complainant's friend.
19. The Appellant asked the complainant to her to help him find a cow under the promise that he would escort her home thereafter. Based on that trust, the complainant followed the Appellant. They ended up in the Appellant's house. The Appellant then undressed the complainant and also removed his clothes. The Appellant then had sexual intercourse with the complainant for about an hour on the floor of the house. She told him that she felt pain. After he was done, the Appellant took the complainant to her home where she arrived at 4:00 am.
20. The complainant proceeded to sleep. She then showered the following day and reported to school. On October 10, 2018, the complainant missed her monthly period. She intended reach out to the Appellant via his mobile number to inform him of the same. On another occasion, she met the Appellant but did not greet him because she was antagonized by him.
21. During the December 2018 holidays, the complainant visited her sister in Nairobi. The complainant grew suspicious that she was pregnant with the Appellant's child as she had not slept with anyone else. She then confided in her sister about what had transpired between herself and the Appellant.
22. When the complainant reported back to school in January, she on January 7, 2019 unusually returned home from school. When inquired, she informed her mother, GNM, PW2 that she was pregnant with the Appellant's child.



23. At the time of her testimony, the complainant was 7 months pregnant. She added that she never had a romantic relationship with the Appellant although she had sexual intercourse with him in January 2019 when she informed him that she was pregnant.
24. The families of the Appellant and complainant thereafter met to discuss parental responsibility. The complainant and PW2 visited the Appellant at his homestead. They found the Appellant and his parents at home. However, the meeting did not bear any fruit as the Appellant's family grew hostile towards them. They preferred to have the minor's DNA conducted upon birth but firstly to conduct a pregnancy test. PW2 escorted the complainant to Kapsara Health Centre where it was confirmed that she was pregnant.
25. The complainant's father reported the matter at Sibanga Police Post on January 27, 2019. The matter was handed over to PC Martin Mwenda who conducted the investigations and pieced the evidence together. However, it was PC Teresia Njoki, PW5, who testified on behalf of the investigating officer.
26. On that very same day, the complainant was referred to Kitale County Hospital. She was seen by a Clinician Dr John Koima, PW4, who found that the complainant was 17 years old at that time.
27. The Complainant informed PW4 that the perpetrator was her boyfriend and that they had unprotected sex from September 2018 to January 2019. On general observation, the complainant had a palpable mass of about 4 months. Her hymen was torn. She was pregnant. The P3 form and treatment notes were produced in evidence as Prosecution exhibits 2 and 3 respectively.
28. The Appellant was then arrested on February 2, 2019 and charged with the instant offences.
29. The complainant was on February 25, 2019 examined by Dr Mercy Oyieke to ascertain her age. The resultant report was presented in evidence by Dr Rachel Mujira, PW3, a Dentist working at Kitale County Referral Hospital. Based on the dental examination, it was concluded that the complainant was 16 years old. That information was captured in the Age Assessment Report.
30. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence. His unsworn testimony was that in September 2018, he was attending a funeral when he met the complainant who was in the company of his friend Barasa. After the funeral, they all dispersed to their respective homes.
31. In January 2019, the Appellant met the complainant. She asked him for Kshs 100/=. Due to the fact that he did not give her the money, the complainant sent him threatening messages. One week later, the Appellant was arrested and charged with the present offence. He denied committing any of the offences.
32. Before analyzing the evidence on record, I note that the Appellant lamented that he was convicted on a defective charge. He, however, did not furnish any particulars of the defect. I have carefully looked at the charge sheet. I note that the complainant's name was captured differently from that who testified.
33. The trial Court made similar observations. It held that the error was not fatal as to cause a miscarriage of justice.
34. This Court agrees with the findings of the trial Court on the issue. The Appellant was represented at trial by a Learned Counsel. The issue of the defectivity of the charge sheet was not taken up at trial. Instead, the trial proceeded and witnesses were aptly cross-examined based on that charge sheet.



35. Section 382 of the *Criminal Procedure Code* provides the necessitates that a propounder raising the allegation of irregularity must demonstrate. It must further be proved that irregularity occasioned a failure of justice.
36. In determining an irregularity, a Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.
37. By taking the totality of the evidence on record and the alleged irregularity, this Court finds that there was no miscarriage of justice that was occasioned to the Appellant. The objection is, hence, dismissed.
38. Having dealt with the preliminary point, the Court will now look at whether the ingredients of the offence of defilement were established.
39. The 3 elements to a defilement charge are: -Age of the complainant.Penetration.Identity of the perpetrator.

The Age:

40. The Appellant challenged the evidence of the complainant's age. He cited the contradiction between the charge sheet (17 years old) and the oral testimonies (16 years old) and wondered what the complainant's actual age was.
41. The Complainant testified that she was born in 2001 and that she was 16 years old. That was corroborated by PW2, the complainant's mother.
42. There was also the Age Assessment Report prepared by an expert Dentist. It estimated the minor to be 16 years of age.
43. The difference of the age as contained in the charge sheet and the witness testimonies can be easily reconciled. Whereas the police who drafted the charge sheet were not experts in ascertaining the age of a person, an expert Dentist did so. This Court, therefore, finds that the fact that the complainant was 16 years old at the time of the commission of the alleged offence was duly corroborated and that it can be safely relied on. Suffice to note that whether the complainant was 16 or 17 years old, she was still a child within the meaning ascribed to the term under Section 2 of the Children's Act.
44. This Court, hence, settles the age of the complainant at 16 years old.

Penetration:

45. 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."
46. The complainant was 7 months pregnant at the time of her testimony. According to the evidence presented by PW4, the complainant tested positive for pregnancy. Her hymen was torn. The fact of pregnancy brings an element of direct and certain confirmation that indeed the complainant had engaged in sexual activity.
47. Penetration was proved.

Identity of the perpetrator:

48. This aspect was so hotly contested by both parties.



49. In this matter, there is no doubt that the complainant and the Appellant knew one another well as they both hailed from the same locality. Their rival testimonies on the identification of the perpetrator have also been captured above.
50. The incident was reported to the police about 4 months after the alleged date of commission of the offence. That was after it was medically confirmed that the complainant was pregnant.
51. The complainant was the sole witness to the crime. The general legal principle in criminal law is that a finding of guilt will not be sustained in the absence of corroboration. However, the proviso to Section 124 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that in sexual offences, the sole evidence of a victim can sustain a conviction so long as the Court is satisfied that the victim is telling the truth.
52. Was the Appellant the perpetrator of the present offence? This Court is not firmly convinced beyond any shadow of a doubt that the Appellant committed the alleged offence. The Court's suspicion is based on the period of 4 months between the commission of the offence and the time the report was made to the police.
53. There is no evidence that the complainant was not sexually active between September 2018 and February, 2029. As such, the possibility that the complainant could have been in a sexual relationship with someone else other than the Appellant between the said period is not far-fetched. It is, therefore, possible that the complainant may have engaged in a sexual relationship with the Appellant. It is also possible that the complainant may have engaged in a sexual relationship with someone else.
54. Given the passage of time, the prosecution was duty bound to avail further evidence in establishing the fact that the Appellant was the perpetrator. However, the prosecution failed to do so and there lingers a reasonable doubt as to who the perpetrator was. That prevailing doubt can only be reconciled in favour of the Appellant.
55. The upshot is that it was not clearly established by way of evidence that the Appellant was the perpetrator of the alleged offence. The offence of defilement was, therefore, not proved as required in law and it was legally unsafe for the trial Court, with utmost respect, to convict the Appellant.
56. Consequently, the appeal succeeds and the following final orders hereby issue: -
 - a. The conviction on the offence of defilement is hereby quashed and the sentence of 15 years imprisonment is set aside accordingly.
 - b. The Appellant, unless otherwise lawfully held, shall be forthwith set at liberty.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF NOVEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mbaka, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Kirong – Court Assistants.

