REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 12 OF 2019

SA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the decision of; Hon. E Kanyiri, in criminal case number; S.O. 5509 of 2014, at the Chief Magistrate's Court; Makadara)

JUDGMENT

1. The Judgment herein relates to an appeal filed by the appellant, one SA, challenging the conviction and sentence in; Criminal Case No. 5509 of 2014, at Makadara Chief Magistrate's Court. It is premised on the petition of appeal dated; 6th November, 2018, and the grounds as here below reproduced.

a) That, the learned trial magistrate erred in both law and facts when she acted on defective charge to convict him;

b) That, the learned trial magistrate erred in both law and facts when she relied on contradictory evidence to convict him;

c) That, the learned trial magistrate erred in both law and facts when she convicted him in the present case and failed to find that crucial witnesses never testified in court;

d) That, the learned trial magistrate erred in both law and facts when she convicted him on unfair trial;

e) That, the learned trial magistrate erred in both law and facts when she dismissed his plausible defence;

f) That, he be furnished with a copy of the appeal record to enable him raise more reasonable grounds and be present before court.

2. The appeal was canvassed through written submission; wherein the appellant faulted the voir dire examination conducted by the trial court as having been improper. He argued that, the trial court did not "appreciate the purpose" that examination. Further, the questions "put to the minor were not geared to ascertain the minor's ability to appreciate telling the truth and nature of an oath." As such, the evidence of the complainant was not properly received.

3. The appellant also submitted that, the DNA results were not conclusive proof of his involvement in the matter. He termed the DNA report as just an opinion. Further, the witness; Ms AW stated that, the samples generated for DNA analysis were confusing. According to the appellant, the evidence of scientific or expert witnesses "is tainted with bias on their mind to support the prosecution and its ideology".

4. He further argued that, the incident is alleged to have occurred in the year 2014 and yet the evidence was obtained in the year, 2017, after the child sired had been born, yet the delay was not explained. The appellant argued that, the sentenced passed by the trial court of thirty (30) years was in excess of the minimum sentence of twenty (20) years, provided for under the law, yet there were no aggravating circumstances to warrant the sentence imposed.

5. The appellant further submitted that, crucial witnesses necessary to prove basic facts did not testify, in particular, the Headmaster from the complainant's school and a neighbour by the name of; "L". Finally, the appellant submitted that, he was charged with the offence of; defilement instead of "incest, yet according to the evidence, he is the complainant's step-father.

6. However, the respondent opposed the application vide submissions dated 4th March, 2021 and in a nutshell argued that, the ingredients

required to establish the charge of defilement are; the age of the complainant, penetration and the identity of the perpetrator. That, all the medical reports produced as exhibits 1, 2 and 3 confirmed that, the complainant was defiled. Further the Government analyst report confirmed 99.99+%, that the appellant was the father of the child. Therefore, penetration was proved. Similarly, accordingly to all the medical evidence produced and in particular the evidence of; PW2, MAA, the complainant's mother, it was established that, the complainant was 12 years old at the date of the incident, having been born on 12th September, 2002. Further, it is clear from the evidence that, the complainant was known to the appellant, as he was her step-father and therefore positively identified.

7. Finally, the respondent submitted that, on the issue of a defective charge sheet, the variance in the date on the charge sheet and the date given by the complainant in her testimony does not render the charge sheet defective. The respondent relied on the provision of; sections 214(2) of the Criminal Procedure Code.

8. I have considered the appeal and the arguments advanced in support of and opposition thereto; and I find that, it is important to lay the factual background of the matter for a better understanding. In a nutshell, it is stated that, on the 24th November, 2014, the appellant was arraigned in the trial court charged in count 1, with the offence of; defilement contrary to, section 8(1) as read together with section 8(3) of the Sexual Offences Act, No. 3 of 2006 (herein "the Act") and in count 2 with; committing an indecent act with a child contrary to; section 11(1) of the Act.

9. The particulars of the charges read that, on the 2nd November, 2014, at Sinai slums, in Industrial Area, within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of; FA, a child aged 12 years, and/or intentionally touched her private parts (vagina) with his penis.

10. The appellant pleaded not guilty to both charges and the case proceeded to a full hearing. The prosecution called total of; six (6) witnesses while the defence relied on the appellant's evidence alone. At the hearing of the case, the prosecution led evidence to the effect that, the complainant, was staying at Soweto slums, with her parents being; her biological mother, the appellant, who was her step-father, together with her sister and brother.

11. That, on the 18th May 2014, while she was alone in the house with the appellant, her mother having travelled up country and while her siblings were playing outside the house, the appellant held her, put her on the bed and told her to remove her under-pant. That, he held a knife warning her not to raise an alarm as he would kill her. He then slept on her and put his penis into her vagina and did to her "tabia mbaya". The complaint testified that, after the "act" the appellant put on his clothes and left the house.

12. The complainant stated that, a day after the incident, she realized she was discharging something like "mucus" but she did not inform her mother about the incident, as the appellant had warned her, he would kill her, if she told anyone about it. She stated that, the appellant continued to defile her on consecutive occasions but, still did not confide in her mother. That on one occasions she woke up and her pant was on the bed having been removed without her knowledge. That, in total the appellant defiled her on three different occasions.

13. That later on, the head teacher of her school told her to tell her parents to go to school, as he had realized her stomach was "big." However, further evidence states that, the complainant had written a letter to the head teacher, that, she wanted to leave the school as her father had made her pregnant. It is this letter that triggered the investigation in the matter. The appellant was arrested when he went to school, as apparently, the head teacher had called in the police. Upon subsequent medical examination, the complainant was found to be pregnant. She later gave birth to a child, but was not allowed to "see" the child. After investigation, the appellant was charged accordingly.

14. At the close of the prosecution case, the court ruled that, the accused had a case to answer and placed him on his defence. He testified through an unsworn statement that, on 18th November, 2014, he was at his place of work, when a previous worker he had dismissed from employment, approached him in the company of; "wazee wa Kijiji" and pointed him out. He was arrested and taken to the Chief's camp, where he found a woman and a child waiting for him. They accused him of defiling the child. He was then charged as herein stated.

15. He termed the entire incident as a lie, arguing that, if it was true, the complainant's mother would not have hidden her for two years before she testified. He further testified that, there was enemity between him and the complainant's mother, as she used to steal money from him and take to her home. Further she wanted him to marry her by force and she was domineering over him. He testified that, the complainant was raped while at her rural home. He faulted prosecution for failing to call the head teacher and the chief who arrested him as witnesses. He further argued that, the age of the child was not proved.

16. At the conclusion, of the entire case, the trial court subsequently delivered a judgment dated 22nd August, 2018, and convicted the appellant. The court stated as follows: -

> *"In his defence the accused stated the reason he was accused of having defiled the minor was due to the fact the minor mother was upset at him. It was his testimony that he (sic) had sacked the complainant's mother after she stole from his shop.* ***However, this is incomplete contradiction of three consistent testimonies of both PW1, PW2 and PW3.*** *The accused evidence is also not probable since it does not explain why FA would then also accuse the accused of defilement since she was not sacked. I find no reason for the child to have fabricated such a story and chose to believe what she said transpired".*

The trial court further stated: -

> *"In contrast to the contradiction of the accused as above summarized, the court has noted that the evidence of the complainant who is a child as narrated to the court at the time of her testimony was corroborated in all material particulars to all the people she reported to as to what had transpired. The minor's narration was consistent as per the reports given by those individuals to this court through their evidence. Further PW1 evidence is corroborated by DNA report which found that the accused was the father of the child that minor bore".*

17. The trial court then pronounced the sentence stating as follows:

> *"I have considered the offence and the penalty provided under the law. I have considered the time spent by the accused in custody which is 3 years to date. I have also considered the pre-sentencing report filed on 25.9.2018 and dated the same. I have also considered the mitigation by the accused on 22.08.2018. I note that in this case, the accused was the victim step-father and took advantage of first child placed in him and it affected her life and her education. Since the incident was only discovered after the child wanted to abandon her education. Not only that at very young age she conceived and had to give up her child since the mother to the victim said it was a taboo and child shifted to study in her rural home. The victim was severely affected. For those reasons accused is sentenced to 30 years imprisonment. Right of appeal 14 days explained to accused."*

18. Having considered the entire appeal, I note that, the appellant has raised the following grounds of appeal namely; the charge sheet was defective, evidence was contradictory, crucial witnesses were not called, the trial was unfair and his plausible defence was dismissed. In addressing these issues, I am well guided by the laid down principles that, as the first appellate court, this court should, **reconsider the evidence adduced in the trial court, evaluate it itself and draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses and make due allowance in this respect.**

19. The role of the first appellant has been summarized in several decisions inter alia; *K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015*, ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 and Okeno vs. Republic (1972) EA 32,*** **as follows: -**

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge"*

20. To revert back to the matters herein, the appellant was convicted of the offence of; defilement contrary to section 8 (1) and read together with section 8(3) of the Act. The ingredients of the offence are; identification or recognition of the offender, penetration and *the* **age of the victim (see: George Opondo Olunga v Republic (2016) e KLR)**

21. The Appellant is not challenging the issue of identity and penetration but he is challenging the issue of proof of the age of the complainant. However, before I revert to that issue, I wish to deal with certain issues raised in the submissions. First, the issue of a defective charge and/or charge sheet. I note that, the charge of defilement was read to the appellant on the 24th November, 2014, and he pleaded not guilty thereto. He did not raise the issue of any defects therein. Indeed, the case was fully heard and concluded without the appellant raising that issue. Therefore, that issue cannot be raised at the appeal stage.

22. Be that as it were, the appellant did not expound on what the alleged defect in the charges and/or charge sheet is, save to argue that, he should have been charged with the offence of "incest" as he is alleged to be the complainant's step-father. The submissions in that regard are rather puzzling in the light of the fact that, he denied committing any offence. Even then, the provisions of the Act that provides for the offence of incest do not refer to a "step-daughter".

23. The subject provisions stipulate as follows: -

> *20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years"*

24. My understanding is that, the relationship between the victim and the person who is alleged to have committed the offence of incest must be founded on "blood relationship" between them. The appellant did not sire the complainant hence treated as a step-father and step daughter. In that case I find that, the argument on defective charge does not lie.

25. I shall now consider all the other grounds of appeal namely; evidence was contradictory, crucial witnesses were not called, the trial was unfair and the plausible defence was dismissed, **under one umbrella; namely whether the prosecution proved its case beyond reasonable doubt as required under the law. In that regard, it is not in dispute that, the appellant was residing with the complainant in the same house. He was her step- father and were thus well known to each other as family members. As such the issue of mistaken identity does not arise.**

26. **As regards the issue of penetration, I have considered the finding of the trial court and/or analysed it afresh and I find that,** PW3 Dr. Nyambu, testified that, the complainant was examined at MSF Clinic Lavender House on 19th November, 2014 and confirmed at 22 weeks pregnant. The HIV Test was negative. PW4 Dr. Shoko testified that, she examined the complainant on 21st November, 2014 and found she was 24 weeks or 6 months pregnant. She had been treated at MSF Mathare. Similarly, PW6 Dr. Joseph Kagnda, from the Government Chemist, testified that he received "buccal samples" from the appellant and a child "FA" and complainant. He was required to examine the paternity of the child in question. He did the analysis and prepared the DNA profile of all three (3).

27. That, generally each person gets ½ of DNA from each parent. In this particular case, he found there is possibility of; 99.99+% that, SA, the appellant is the father of the child, who gave out the DNA gotten from the buccal sample of one labelled child. Also, the complainant is the mother of the child. Dr. Kaguno produced, the report he prepared, together with the exhibit memo form accompanying the swab as exhibits. The other medical reports prepared by the medical officers who testified were also produced.

28. In my considered opinion, the DNA evidence sealed the fate of the appellant as the person who defiled the complainant; to the exclusion of all others. That as a result of the defilement he and sired the subject child. The DNA results fully corroborated the complainant evidence

that he defiled her. As such, the issue of contradictory evidence does not arise and neither is the issue of penetration in dispute. Further, that evidence renders "the alleged plausible defence" as untenable.

29. However, the issue that appears not to have been comprehensively considered by the trial court is, the issue of; the age of the complainant. In this regard, the evidence reveals that, the complainant stated in her evidence as follows;

> *"I am 14 years old----I am in standard 6. I am going to standard 7 next year."*

Pw2 her mother stated that;

> *"I have another child called FA, who is not the accused daughter. She is now 14 years of age. She was born in 2002. On September 12th on Wednesday"*

30. The prosecution applied to recall Pw 2, the complainant's mother to produce evidence to support the age of the complainant but that was never to be. No reason has been given for the same.

31. It is noteworthy that, the Honourable trial magistrate, identified and addressed at length in the judgment, the ingredients of the offence of defilement; being; penetration and identification but did not, address the issue of the age of the complaint. That was a serious omission, in view of the fact that, the accused had raised it in his defence and/or final submissions.

32. It also suffices to note that, the law is settled that, the age of a child in sexual offences cases must be proved. This is informed by the fact that a minor is defined as a person or child below eighteen (18) years. In the case of; **Kaingu Elias Kasono vs Republic, Criminal Appeal No. 54 of 2010** the Court of Appeal held as follows:

> *"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"*

33. In the case of; Hadson Ali Mwachongo vs. Republic (2016) eKLR; the Court of Appeal stated that;

> *"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows; "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."*

34. However, in the case of; **Richard Wahome Chege –Vs- Republic Criminal Appeal No. 61 of 2014**, the same Court of Appeal, held that: -

> *"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old.*
>
> *What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."*

35. In the same vein, the Court of Appeal in Uganda, stated in the case of; Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000, that;

> *"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. However, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."*

36. It does appear from the authorities cited that, although the cogent proof of age of the child should be based on the birth certificate and other documentary evidence, such as baptism card, it may also be inferred from the oral evidence of the witnesses and the other circumstantial evidence.

37. In the instant case, all the witnesses including the Appellant referred to PW 1, the complainant as a "child." That is evidence of the fact that; visual observation of the complainant, revealed she was a child. It is also in evidence that; she was in primary school in standard six (6). The court can take judicial notice of the fact that, a child who starts her primary school education at age five (5) will be eleven (11) years' old in standard six (6). Thus, certainly not eighteen.

38. Similarly, I note from the Post Care Form (PRC) that, the complainant date of birth is indicated as; 12th September, 2002. In the same vein, the medical report produced as P.3 form indicates that, she was 12 years old. At section 3 of that form, the doctor indicates that, the "estimated age of the person examined to be 12 years." To the contrast the appellant's P.3 form indicates he was an adult.

39. Indeed, it is an old adage that, justice must not only be done but must be seen to be done. In fact, with the promulgation of the Constitution of Kenya, 2010, in particular Article 159, (1) (d) the courts are implored to uphold substantive justice. It therefore, calls upon the courts to uphold the test of a "reasonable man" to determine whether justice can be done and seen to be done.

40. In this case, the question that begs an answer is; whether taking into account the total evidence herein, in particular proof of paternity of the subject child, whether the court can hold that there was insufficient evidence to convict the appellant simply because the birth certificate of the complainant was not produced? Would an answer in the affirmative give justice to both parties? Would the interest of the complaint have been protected in this case?

41. In my considered opinion, as much as the courts should be careful to insist on production of primary evidence in any case, there is adequate evidence herein, to support the fact that, the complainant was a minor aged 12 years as stated in the evidence of the witnesses and the P.3 form. The doctor observation therein is a medical opinion. As such, coupled with the other evidence referred to herein, the submissions by the appellant that age was not proved is not tenable.

42. Finally, the appellant faulted the voire dire examination, and the failure to call crucial evidence, but I find that, those submissions hold no water, as the record indicates clearly the voire dire was done and indeed the appellant benefitted from the sworn statement of the complainant, as he had the benefit of cross examining her. Further the evidence of the head teacher and the neighbour would be hearsay and require corroboration. Its absence did not prejudice the prosecution's case.

43. Finally, the appellant alleges the sentence was severe. I have already quote herein the sentiments of the trial court and the factors taken into account before the appellant was sentenced. I find that, the court indeed considered all the salient issues. Similarly, it should not be lost to the fact that, there are two other persons herein; the complainant and the child of the defilement whose life will never be the same again.

44. The child in particular will never grow under the care and love of its biological parents and/or know them, or the biological parental lineage, and if the issue of taboo alluded to herein is anything to go by, the child will never forever get to know its place of birth. Thus the psychological, legal and social impact on both victims of crime cannot be taken and/or treated lightly while imposing the sentence.

45. The offence of defilement is provided under the relevant provisions of the Act as follows:

> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*
>
> *(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years*

46. In conclusions I find that, the sentence meted upon the appellant is legal, proper, and/or lawful. Indeed, the offence committed by the appellant herein, cannot be described in any other way other than "atrocious, heinous and wicked".

47. The upshot is that, the appeal against sentence and conviction has no merit and I dismiss it in its entirety. The appellant shall serve the full sentence imposed unless otherwise lawfully released.

48. It is so ordered.

Dated, delivered virtually and signed on this 24th day of March, 2021

GRACE L. NZIOKA

JUDGE

In the presence of;

Appellant present in person

Ms Ndombi for the Respondent

Ombuna and Kinyua: Court Assistants