REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 9 OF 2018

ANDREW RUNYA MUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from original case No. 71 of 2014

before Hon. E. Kadima (SRM) at Garsen, Judgment dated 8th March 2018).

Coram: Hon. Justice R. Nyakundi

Gekanana Advocate for the appellant

Mr. Mwangi for the state

JUDGMENT

The appeal is against the Judgment of **Hon. Kadima** determined on 8.3.2018 against the appellant for the offence of defilement contrary to Section 8 (1) as read with Sub-Section (4) of the Sexual Offenses Act.

The brief particulars of the charge were that on the 13.4.2014 at Livestock Department within the staff quarters intentionally caused his penis to penetrate the vagina of **(TW)** a child aged 16 years. Following the full hearing and taking evidence of eight prosecution witnesses and the defence of the appellant, the Learned trial Magistrate convicted the appellant and sentenced him to serve fifteen (15) years imprisonment.

Being aggrieved with conviction and sentence, Learned counsel **Mr. Gekanana** for the appellant preferred an appeal to this Court.

> ***(a) That the Learned trial Magistrate erred in fact and Law in relying upon a forged copy of the birth certificate to proof age of the complainant.***
>
> ***(b) That the Learned trial Magistrate failed to appraise the evidence and proceeded to make his decision based on contradictions and inconsistencies of the witnesses.***
>
> ***(c) That the Learned trial Magistrate erred in fact and Law for placing reliance upon unreliable DNA test evidence.***

Counsel's Submissions

Mr. Gekanana appeared for the appellant and in his written submissions he proceeds to urge the Court as follows. That the Learned trial Magistrate failed to appraise the prosecution evidence thereby convicting the appellant on insufficient evidence which did not establish the elements of the offence beyond reasonable doubt. Counsel contended that the trial Magistrate erred in admitting a copy of the birth certificate to proof the age of the complainant which was indeed a forgery. He therefore asserted that, age of the complainant was never proved as required by the Law.

Counsel cited the cases of **Hudson Ali Mwachongo v R {2016} eklr, Alfayo Gombe Okello (CR. Appeal No. 203 of 2009).** Counsel argued and submitted that in absence of an original birth certificate, a copy thereof produced by the prosecution was inadmissible as proof of the element on age.

Counsel further submitted that the prosecution evidence of the eight witnesses was majorly contradictory and inconsistent to say the least. Counsel took issue with the inconsistencies which emerged by the trial as to the date of the alleged offence and the delay in reporting the matter to the police. According to counsel, the delay of two months was criminate and no reasons were given by the witnesses for that length of time to report the crime. On this, counsel cited the principles in the case of **Philip Nzaka Watu v R {2016} CR. Appeal No. 29 of 2015 and David Ojeabuo v Federal Republic of Nigeria {2014} LPELR – 22555 (CA).** It was counsel submissions that the evidence on the DNA test contradicted Article 50 (2) and 159 (2) (2) of the Constitution. Counsel argued that any other person besides the appellant would have been responsible for the pregnancy. Further, counsel submitted that the DNA evidence so admitted violated Section 77 of the Evidence Act.

Learned Counsel for the respondent on the other hand supported the decision by the trial Court. He submitted that the Learned trial Magistrate evaluated the evidence and the materials thereto to come to the correct findings on the issues raised in the indictment. He further argued that contrary to the allegations by the appellant counsel, there were no primary contradictions in the prosecution case to vitiate the conviction by the trial Magistrate.

Consideration of the Appeal

This is the first appeal and it is the duty of the Court pursuant to the principle in **Pandya v R {1957} EA 336** to re-evaluate and examine the evidence presented before that trial Court and draw its own inferences without disregarding the Judgment of the Court appealed from by the appellant. The prosecution at that trial called eight witnesses in an endeavor to proof the charge of defilement beyond reasonable doubt. These witnesses were:

(PW1) TW the victim of the offence who stated in Court that on 13.4.2014, the appellant invited her to his house which consisted of three rooms. It was at that house of the appellant where he was kissed and fondled resulting in sexual intercourse. Apparently, according to **(PW1)** evidence, it took long to tell anybody of the incident until when she tested positive to pregnancy. In **(PW1)** evidence, she traced the pregnancy to the sexual act she had with the appellant.

In light of the facts that she had now conceived, **(PW1)** told the Court that the pregnancy was carried to full term with a baby being born as by-product of the unlawful act of the appellant.

(PW2) – FM, a broker to **(PW1)** testified that he also became aware of the pregnancy through information given by **(PW3) EWM** – their mother. In the testimony of **(PW3)** she confirmed to have sent **(PW1)** and her two siblings to PEFA church to attend worship. According to **(PW3)** the other siblings returned back home minus the complainant **(PW1).** In the course of **(PW1)** alleging she was unwell **(PW3)** took a step to accompany her to the hospital for treatment. It was at that moment among other examination **(PW1's)** pregnancy test turned to be positive of about 1 ½ months. On further inquiry, **(PW3)** stated in Court that **(PW1)** confessed that the appellant was responsible for the pregnancy.

(PW4) MB the father to **(PW1)** confirmed that **(PW1)** was born on 18.11.1997 as per the birth certificate. He also blamed the appellant for impregnating his daughter.

(PW5) Benson Mwarubu the clinical officer at Witu Health Center who examined **(PW1)** established that she had a swollen belly, the hymen was broken and the pregnancy test turned positive. He filled the P3 Form which was presented as an exhibit in support of the prosecution case.

(PW6) George Oguda Principal Government Chemist testified as to the results on the DNA test to determine paternity of the child. In this regard samples were taken from **(PW1),** the child and the appellant. According to **(PW6),** the DNA profile generated matched together proved that the appellant was the biological father of the minor. He produced the DNA analyst report as exhibit.

(PW7) – PC Joseph Ndegwa of Mokowe Police Station effect arrest against the appellant. It was also on record that **(PW7)** and **(PW8) – PC Chumo** investigated the incident in which the appellant was indicted with the offence of defilement.

The appellant in his defence denied any participation with the alleged offence. Its trite that proof of the alleged sexual intercourse requires of the prosecution evidence to establish that there was penetration of the complainants general organs as defined under Section 2 of the Sexual Offences Act. That penetration may be partial of complete insertion of the male penis to the vagina of the female complainant. In the case of **Bassitu v Uganda S. C. Crim Appeal No. 35 of 1995** the element of penetration is held to be complete even with only a slight penetration of the vagina would be sufficient to sustain a conviction for the offence of defilement.

The Court further stated that:

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration whatever the evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."***

In the case at bar the trial Court had in its possession the evidence adduced from **(PW1).** She demonstrated on how the appellant took to her to house and in that encounter may had sexual intercourse. After that event **(PW1)** left for her home where she was questioned by **(PW3)** on the reasons why she is arriving late from the church function. It emerged from **(PW3)** evidence that a need arose to take **(PW1)** to the hospital who complained of being unwell.

(PW5) excluded **(PW1)** and conceded that sexual intercourse had taken place by virtue of a ruptured hymen and the fact of pregnancy there

were however no injuries on the external or internal genitalia. The clinical officer's evidence did more than support **(PW1)** evidence that she had sexual intercourse. His conclusion was based on the ruptured hymen and the findings of entry of spermatozoa into the vagina to trigger conception and subsequent pregnancy. Though the rupture of the hymen alone of a woman's genitalia is not conclusive proof of penetration, or sexual intercourse, but the essential fact of pregnancy is a definitive factor.

Similarly, in the instant case, it is crystal clear that the prosecution went ahead to call for DNA profile on paternity of the child. It was again a case where the analyst evidence **(PW6) Lawrence Oguda** played a large part in corroborating the testimony by **(PW1)** that sexual intercourse had taken place on 13.4.2014 at Livestock Department Staff quarters.

The Learned trial Magistrate accepted the cogent evidence on the DNA profile which was instructive of the fact that the appellant was the author of the pregnancy which culminated into the known by-product of a she-child. Traditionally, pregnancy arises out of sexual intercourse between a male and a female during the consideration of that encounter.

(PW1) evidence was that she was with the appellant for all that time when the rest of the siblings went back home. To that extent, she placed the appellant squarely on the scene of the crime.

On identification, the Court in the case of **Roria v R {1967} EA 583** had this to say:

> ***"Subject to certain well known exceptions, it is trite Law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification especially when it is known that the conditions following a correct identification was difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt."*** **(See also R v Turnbull {1976} 3 ALL ER 549)**

To advert to the facts of the case, the complainant personally recognized the appellant who apparently was no stranger to her since they worshipped in the same church. The sexual act also took place during the day before 6.30 p.m. The description given by the complainant **(PW1)** to her mother **(PW3)** led to the arrest of the appellant. The other evidence to corroborate **(PW1)** evidence to show that the appellant participated in the commission of the crime, came from the DNA profile match on paternity as stated by **(PW6)** the government analyst.

Notwithstanding DNA evidence, the Courts have held again and again that the evidence adduced by the victim of the offence on identification is the best evidence to proof that fact. Therefore, in that trial identification evidence is one which was watertight and never controverted by the defence in rebuttal to the charge. The position as emphasized in the evidence evaluated by this Court and the principles in the cited cases, the grounds premised in the appeal and submitted by counsel for the appellant on contradictions and discrepancies, lacks merit.

The quality of the evidence by **(PW1), (PW2), (PW3)** and **(PW4)** showed no iota of contradictions or inconsistencies to fragment the prosecution case to cast a doubt on the occurrence of the offence and the fact of the appellant committing it and no one else except him can be held culpable. In the circumstances of this case, in proving the sexual act, the Court had the advantage of the clinical officer **(PW5)** and the DNA analyst report by **(PW6)** that admissible evidence which was cogent reliable and cogent leads to demolish any arguments that there is from the appellant on contradictions and insufficiency on the DNA evidence. It suffices therefore that the appellant case on penetration and subsequent identification failed to dislodge the prosecution case.

Further in this appeal, the appellant was also dissatisfied with the documentary evidence of the birth certificate exhibited to proof the age of the complainant. It was submitted that the trial Magistrate admitted a photocopy without a corresponding original. In particular, the appellant was uncomfortable with the absence of certification of the copy therefore making it in violation of the Evidence Act.

As in penetration, it is also trite that in sexual offences, the age of the complainant must be sufficiently proved that at the time of the offence she was aged below 18 years. The Law in Kenya as stipulated in the cases of **Hudson Mwachongo (supra)** and **Alfayo Gombe Okello (supra)** proof of age is important for purposes of sentencing.

At the trial, it can be proved by medical evidence, birth certificate, the evidence of a parent/guardian or other reliable cogent documentary evidence. This particular case at hand, the prosecution presented a birth certificate corroborated by the testimony of **(PW4)** – the father to the complainant.

When placed to his defence, the appellant gave no other alternative evidence to impeach the authenticity and reliability of the birth certificate indicative by her age to be 16 years old. The question of age was considered by the Learned trial Magistrate. He considered it and dealt with the issue. There being no real evidence against the ingredients on age, that ground of appeal also fails.

The ultimate question is whether the appellant has argued and submitted sufficiently for the Court to be persuaded that its unsafe to allow the conviction to stand upon the basis of the issues raised in the memorandum of appeal. Taking into account all these and subjecting the evidence to afresh evaluation and re-appraisal of the record, the appellant conviction was safe and there is nothing else to substitute it with as of now by the Court.

I cannot think of any misdirection by the Learned trial Magistrate to call upon the appellate Court to interfere with the Judgment on conviction of the appellant. The right thing to do is to affirm it and appropriately reject any challenge to its legality and validity to find the accused guilt and conviction for the offence of defilement.

As regards the sentence, there is nothing manifest of it being excessive, punitive or wrong in principle. The original minimum sentence is still applicable inspite of the principles in **Francis K. Muruatetu v R {2017} eKLR.**

The upshot of it, there is no merit in the appeal on both conviction and sentence. It is dismissed. That is the order of the Court.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 18TH DAY OF MARCH 2021.

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The appellant