REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 44 OF 2018

KENNETH NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from

the original Mpeketoni Criminal Case No. 192 of 2016 in a

judgment delivered on 6th September, 2016 by Hon. J. W. Onchuru – PM)

CORAM: Hon. Justice R. Nyakundi

Mr. J. Mwangi for the state

Appellant in person

J U D G M E N T

This appeal concerns conviction and sentence of (15) fifteen years' imprisonment imposed by **Hon Onchuru (SPM)** sitting at Mpeketoni Magistrate Court against the appellant for the offence of defilement contrary to section 8 (4) as read with section 8 (4) of the Sexual Offences Act.

In brief, it was alleged that on diverse dates between 10th December, 2015 and 9th April, 2016 at [Particulars Withheld] appellant intentionally and unlawfully caused his penis to penetrate the vagina of **JN** a child age 16 years at the time of the offence.

Aggrieved with both conviction and sentence appellant approached this Court to quash the orders against him based on the following grounds; -

1. That the sentence of (15) fifteen years for the offence was punitive and excessive.

2. That the conviction was misplaced as the DNA showed he was not the father to the new born baby on appeal it is apparent.

That the appellant never filed any further information or submissions however on the part of the state prosecution counsel, **Mr. Mwangi** filed written submissions in which he conceded to the appeal on the following grounds.

1. That the birth certificate to proof the age of the complainant was never produced nor admitted as documentary evidence.

2. Secondly, the DNA report on the paternity of the child was non-responsive with the DNA match of the appellant.

3. Thirdly, the evidence on penetration was ambiguous given the diverse dates indicated by the complainant but lacked corroboration to give credibility and probative value to those graphic circumstances described to have taken place by the complainant.

The question therefore in this appeal is whether the prosecution indeed proved the charge of defilement against the appellant beyond reasonable doubt to secure that conviction as founded by the Learned Trial Magistrate.

Resolution of the Appeal

First and foremost the Court of Appeal in **Okeno V R [1972] EA 32** lays down the principles that bind and guide the first appellate Court before making a final conclusion to affirm or vary the impugned judgement. It is therefore an independent evaluation of the entire record, which however bears in mind that the trial court had the advantage of seeing and hearing the witnesses testify, a key factor on demeanor and truthfulness, or veracity and reliability of witnesses. It is now settled law that for a conviction to ensue against an offender of a sexual offence of defilement the prosecution bears the burden to proof penetration, the age of the complainant to be below 18 years ago, identification of the offender as the perpetrator **(See Charles Wamuraya Kurahi V R Cr Appeal No. 72 of 2013).**

From the record, the prosecution case against the appellant depended upon the testimonies of four witnesses. The fundamental questions on conviction ought therefore to be considered by these statements given on oath, more specifically that of the complainant. To start us of is the issue on penetration. Under section 2 of the sexual offences Act, this ingredient stands proven by evidence demonstrating penetration of the female genitalia by the penis of the assailant. It may be either partial or complete insertion of the penis into the genitals of the female victim.

The law also recognizes that absence of medical evidence in support of the fact of defilement or rape is not decisive. As the fact of the incidences of rape or defilement can be proved by the oral evidence of a victim or circumstantial evidence to discharge the burden of proof of beyond reasonable doubt that penetration did occur **(Martin Nyongesa V R (Cr Appeal No. 84 of 2005).**

In the instant case emphasis on penetration came from the single testimony of the complainant. Her explanation on the incidents of defilement were based on various diverse dates in which the appellant seized every opportunity to commit the offence. Upon examination of that evidence and the judgement of the learned trial magistrate it failed the test set out under the proviso of section 124 of the evidence Act. There was no need for the learned trial magistrate to adhere to the contrary safeguards of conviction of the appellant solely on a single identifying witness, without warning himself of such dangers that are likely to arise to that effect. From the excerpts of the judgement there was no such caution and of significance on truthfulness of that single witness that could possibly rule out any mistake or error on the part of that witness to implicate the appellant with the offence. It is evident from the proceedings that **(PW1)** the complainant was defiled severally on diverse dates at various venues. Her testimony should not have been relied upon without questioning why in any of the diverse dates there was no corroboration material to say the least to support the commission of the crime. It is unusual that in the transactions of the diverse dates all what happened was in the privacy of the two people. Whether the penetration occurred without the connivance of the complainant should have been a matter of inquiry by the trial court before the remarkable conclusion on the cogency and reliability of her testimony. It is important to question why the complainant never took the steps to inform her immediate guardians/parents or at an appropriate time report the incident to the police. Altogether it follows therefore that the peculiar facts as narrated by the complainant required totality of examination to establish purposely whether she was capable of telling the truth sufficiently to justify a conviction in favour of the prosecution.

In addition, bearing in mind that in one of the instances when the offence was committed, there were independent witnesses namely Esther and Eunice, it was incumbent upon the trial court to caution itself and the adverse effect of the failure of calling them had against the prosecution case. I am aware that under section 143 of the Evidence Act, the appellant could be convicted on the basis of a single identifying witness, but such evidence must be such that it does not create any doubt in the mind of the Court as to the commission of the crime and identification of the perpetrator.

In the case at bar there are circumstances sufficient enough to create a doubt as to the credibility and probative value of the complainant evidence. It was the case for the prosecution that after the acts of defilement the complainant conceived and pregnancy test done by the clinical officer. **(PW4) Stephen Ewoi** of Mpeketoni Sub-County turned out to be positive. This was also followed with a DNA profile to establish paternity. There was apparently no casual link that the appellant played any biological contribution to father the child. Whereas in the trial the complainant attributed his penetration as the direct cause of the pregnancy. The non responsiveness of the DNA profile a feature enough to impeach the complainant credibility. It would imperative that one who claims that the pregnancy was attributable to a particular identifiable male person, give all such details to positively rule out any other busybody. There was need for the Court to examine, the veracity of the complainant's testimony and the sufficiency of it to positively place the appellant at the scene. There was therefore no strict compliance with the requirements of the proviso to Section 124 of the Evidence Act by the learned trial magistrate. Upon examination of that evidence afresh, there are inherent contradictions and inconsistencies which rendered the complainant's evidence unreliable in consonant with the principles in **Maitanyi V R [1980] KLR 198**. I conclude therefore on my part that the ingredient of the complainant having been penetrated by the appellant remained in the realm of unknown.

On the other hand, it was also the prosecution case. That the complainant was aged 16 years at the time the appellant defiled her, on those diverse dates. As regards proof of age of the complainant it is trite form various case law that is **Hilary Nyongesa V R (Cr Appeal NO. 123 of 2009, Francis Muruni V Uganda Court of Appeal in Criminal Appeal No. 2 of 2000**, the age of the victim being a critical component of the offence may be proved by medical evidence, birth certificate, guardian/parent common sense and material inferences etc.

In this instant case **(PW2)** the mother to the complainant was not categorical as to the exact age and date of birth of the complainant. There was mention of a birth certificate but at the close of the prosecution case, there is no evidence of it being produced or adduced, firmly to prove this element beyond reasonable doubt. On this the trial court erred in not finding that the prosecution failed to prove the age of the complainant beyond reasonable doubt. Therefore, in order for the offence of defilement to be ascertained, the prosecution ought to have proved each of the elements conclusively and beyond reasonable doubt. In the instant appeal both penetration and age of the complainant are in doubt and the same should have been resolved in favour of the appellant.

In the end it is my view that the conviction of the appellant was unsound. It is quashed and the sentence imposed set aside, consequential orders of committal to prison be and are hereby set aside, and with that the appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF SEPTEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The appellant