REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. E16 OF 2020

TIMOTHY KINOTI NDATHO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

Introduction

1. The Appellant herein was convicted of the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act, No. 3 of 2006** and sentenced to serve fifteen (15) years imprisonment by the Senior Principal Magistrate at Marimanti Law Courts in **Sexual Offences Act Case No. 44 of 2019**.

2. It was alleged that during the month of February 2019 at Rukuriini area in Tharaka South Sub County, within Tharaka Nithi County, intentionally caused his penis to penetrate the vagina of WK, a child aged 16 years.

3. In the alternative, the Appellant faced the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the alternative charge were that during the month of February 2019 in Tharaka South Sub County, within Tharaka Nithi county, the Appellant intentionally touched the breasts and vagina of WK, a child aged 16 years, with his hands.

The Appeal

4. The Appellant, being aggrieved by the said decision, filed the instant appeal vide the Petition of Appeal dated 22nd December 2020. The same is based on the grounds that:

> ***a. The learned trial magistrate erred in law and in fact in convicting the Appellant where the prosecution failed to prove its case to the required standard.***
>
> ***b. The learned trial magistrate erred in law and in fact in convicting the Appellant in a case where the material ingredients of the offence were not proved to the required standards.***
>
> ***c. The learned trial magistrate erred in law and in fact by failing to find that the prosecution evidence was fraught with glaring inconsistencies and contradictions.***
>
> ***d. The learned trial magistrate erred in law and in fact by disregarding the defence testimony on record thereby arriving at judgment that is wholly untenable.***
>
> ***e. The learned trial magistrate erred in law and in fact when he found that the prosecution had proved its case beyond any reasonable doubt, yet all the prosecution witnesses' evidence was contradictory.***
>
> **f.** ***The conviction was uncalled for in the circumstances***.

5. Based on the foregoing grounds, the Appellant thus prays that this court allows the appeal, sets aside the conviction, and sets him at liberty.

A Summary of the Prosecution's Case

The prosecution called four witnesses**.** The facts of are the complainant WK was a minor aged sixteen years at the time this offence was committed. It was her testimony that at unknown date in the month of February 2019 she was alone at her parent's home when the appellant went there and they finally ended up in her brother's house where according to her they made love for a few minutes and he left. Later in the month of March she missed her monthly periods and she realized she was pregnant. In the month of April the complainant informed the appellant that she was pregnant and he assured her not to worry as she would take care of the child. Later in the month of July the complainant informed her mother (PW2) who in turn reported to the head teacher since the complainant was in class eight (8). The matter was then reported to the chief and eventually to the police. The complainant's mother produced a birth certificate serial No. xxxx to prove that the complainant was born on 5/10/2002 and was therefore sixteen years old at the time of the sexual assault. On 23/9/2019, the complainant and the appellant were arrested by the Chief and the police officers from Nkondi Police Post. The complainant was escorted to Marimanti Level 4 Hospital for a medical examination. A Clinical Officer Lilian Wahu (PW4) examined the complainant who she confirmed was aged sixteen years was thirty two (32) weeks pregnant on the day she was examined, that is 24/9/2019. A P3 form was filled and produced in court as **exhibit- 1**. The appellant was then charged. The appellant gave unsworn defence and stated that he is thirty six (36) years old. He stated that if he had impregnated the complainant as alleged, today she would not be married to a different man. He further stated that the area Chief and the area manager know the full story and his involvent in that pregnancy.

The learned trial magistrate in his Judgment held that the prosecution had proved the charge of defilement beyond any reasonable doubts and proceeded to convict him then sentenced him to imprisonment for fifteen (15 years.`

6. On 15th July 2021, this court ordered that the appeal be canvassed by way of written submissions. The Appellant and the Respondent filed their written submissions on 10th August 2021 and 28th September 2021 respectively.

Submissions

7. The Appellant submitted that the prosecution failed to prove its case to the required standard because it failed to conduct a DNA test on the complainant's baby to ascertain whether it was the Appellant who impregnated her. It was the Appellant's further submission that the material ingredients of the offence were not proved given that the complaint was made seven (7) months after the offence was allegedly committed.

8. On the other hand, the Respondent submitted that it could not be faulted for not availing DNA results in court since the same could not be obtained as the child was not born during the pendency of the proceedings in the lower court. That notwithstanding, it was the Respondent's submission that the evidence of the complainant was succinct on how the offence was committee and positively identified the Appellant as the perpetrator. It was thus the Respondent's submission that all the material ingredients of the offence were proved to the required standard and as such, the appeal against the conviction lacks merit and should be dismissed.

Issues for determination

9. Having considered the submissions of the parties and the evidence tendered before the trial court, it is my view that the main issue for determination is whether the prosecution proved its case against the Appellant to the required standard, that of beyond any reasonable doubts.

Analysis

10. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

11. The Court of Appeal in the case of **David Njuguna Wairimu V. Republic [2010] eKLR**, cited with approval the decision in **Okeno v. R [1972] EA. 32** in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

> **"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."**

12. This court has been called upon to make its own findings and draw its own conclusion as the court in **Okeno v. R** *(Supra*) stated: -

> **"It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."**

13. The critical ingredients of the charge that the prosecution needed to establish to prove the offence of defilement are:

a. That the victim was a minor; that is prove of age

b. That there was penetration;

c. That the penetration was caused by the Accused person. (perpetrator)

[See: **Dominic Kibet Mwareng vs. Republic [2013] eKLR]**

14. In this case, the prosecution called a total of four (4) witnesses in support of its case. The age of the victim is not in dispute as PW2, the complainant's mother, produced in evidence the complainant's birth certificate which indicated that she was born on 5th October 2002. See exhibit 3 which was produced on 19/11/2019. Since the alleged offence occurred during the month of February 2019, it follows that there was cogent evidence that the victim was sixteen (16) years of age at the material time.

15. On the issue of there being penetration, **Section 2** of the **Sexual Offences Act** defines "penetration" as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person"**.

16. It is a matter in the ordinary course of nature that the pregnancy occurs as a result of penetration. In this case, the complainant (PW1) testified that in February 2019, the Appellant, who was her boyfriend, came over to their house and they made love in her brother's house. PW4 testified that PW1 was 32 weeks pregnant when she was examined on 24/09/2019. This court takes judicial notice that the complainant's pregnancy is conclusive proof that there was sexual activity involving penetration as defined by Section 2 of the Sexual Offences Act. The prosecution therefore proved beyond reasonable doubt that penetration took place. The penetration was complete as testified by the complainant that the appellant penetrated her genital organ (vigina) with his genital organ (penis). This she further described as, ***" we then made love".***

17. The only issue that then remains for determination is whether the Appellant was responsible for impregnating PW1. According, to the Appellant, the prosecution failed to prove that he was responsible for the pregnancy as it failed to conduct DNA test and produce a DNA report.

18. It is however trite law that absence of a DNA test in a sexual offence case does not automatically lead to an acquittal. In the case of **Evans Wamalwa Simiyu v Republic [2016] eKLR** the Court of Appeal found as follows:

> **"In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that: *"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

19. The same position was taken in the case of **Kassim Ali V Republic [2006] eKLR** where the court noted that:

> **"So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

20. Under the proviso to **Section 124 of the Evidence Act,** the sole evidence of a sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence. The proviso states as follows:-

> ***"Notwithstanding the provisions of section 19 of the Oathsand Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence,the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence,the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings,the court is satisfied that the alleged victim is telling the truth."***

The learned trial magistrate was alife to the need to treat the testimony of the complainant with care. He held that testimony of the complainant was corroborated by PW2 and PW3 plus other material evidence from the medical report. The trial magistrate after analyzing the evidence of the complainant stated that- ***"I find the complainant a credible and trustworthy witness whose evidence was not shaken…… she appeared quite truthful before this court"*** See page 39 of the record. At page 41 of the record the trial magistrate concluded that-

> ***"Her testimony can therefore be safely relied on to convict."***

The trial magistrate made a finding of fact on the issue of credibility of the complainant. It is trite that an appellate court will not interfere with a finding of fact by the trial court unless it is proved that it was based on no evidence. In this case, the finding by the trial magistrate is well founded on the evidence tendered before him.

In ***Okeno –v- Republic (supra)*** this court has to leave room for the fact it had no chance to see the witness when she testified in order to assess her demenour. The appellant has relied on a persuasive decision in ***Criminal Appeal No.58/2019***. I am not persuaded by the finding since the circumstances differs from the facts of this case. I find that the testimony of the complainant was credible and it was proper for the trial magistrate to rely on it to convict. The appellant has heavily relied on the decision of the High Court in ***Criminal Appeal No.27/2019 Mandellah Lenkokwal –v- Republic*** to state that the conviction was wrong as the D.N.A. report was not produced. The Court of Appeal in

the binding decision above has laid down the law on prove of the charge of rape and defilement and held emphatically that rape and defilement is not proved by way of a D.N.A test or by medical evidence, it is proved by the evidence of a victim or by circumstantial evidence. The decision in ***Mandellah Lenkokwal –v- Republic*** has been overruled by the Court of Appeal and cannot be relied on. Furthermore the circumstances are different because in that case the child had been born unlike in this case where the complainant had not given birth. The prosecution was therefore required to prove penetration and they discharged this burden beyond any reasonable doubts.

21. It was the complainant's testimony that the Appellant was well known to her way before the material incident. Indeed in her testimony the complainant said the appellant was her boyfriend, See page 7 line 6-8 of record where she stated:

> ***" We became friends in 2018. No one knew of our friendship then. That is when we started off being friends. You even gave me uyour mobile phone No.0792124950. You gave me that phone number not my mother."***

The Appellant was also known to the complainant's mother (PW2) as their villages were near each other. According to the complainant, the relationship between her and the Appellant was that of a boyfriend and girlfriend since December 2018 in which they engaged in sexual activity on different occasions.

22. The complainant was examined on 24th September 2019. PW4 testified that at the time of the examination, the complainant was 32 weeks pregnant. This means that the complainant was impregnated sometime in February 2019, which is the material time indicated in the charge sheet. In his defence, the Appellant alleged that the complainant would not be married to someone else had he been the one who impregnated her. In my view, the Appellant was positively identified as the person who impregnated the complainant. Having analysed and evaluated the evidence, I find that the prosecution proved the charge against the accused beyond any reasonable doubts.

Conclusion

23. From the foregoing, I opine that the prosecution did prove its case against the Appellant beyond reasonable doubts and that the learned trial magistrate properly directed himself in convicting the appellant.

I find that the appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF NOVEMBER 2021.

L.W. GITARI

JUDGE

25/11/2021

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

25/11/2021