REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 73 OF 2018

MONTY MUTISYA KIMUYU.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in Kilungu Senior Magistrate's Court Criminal Case No. 196 of 2017 delivered on 5th December, 2018).

JUDGMENT

1. **Monty Mutisya Kimuyu** the Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offence Act. The particulars were that the Appellant on diverse dates between the month of January 2016 and October 2016 in Kyamuoso Location within Makueni county, intentionally caused his penis to penetrate the vagina of **JM** a child aged 17 years.

2. He also faced an alternative charge of indecent act contrary to section 11(1) of the Sexual Offence Act. Particulars being that the Appellant on the diverse dates between the month of January 2016 and October 2016 in Kyamuoso location within Makueni county, intentionally touched the vagina of **JM** a child aged 17 years with his penis.

3. The matter proceeded to full hearing with the prosecution calling four (4) witnesses. The defence called one witness only. The trial court found the Appellant guilty, convicted him and sentenced him to 15 years imprisonment, for the offence of defilement.

4. He was dissatisfied with the Judgment and filed this appeal citing the following grounds;

> ***(i) That*** *the learned Honourable Magistrate erred in law and fact in finding the complainant's evidence believable and truthful whereas the same was punctuated by glaring falsehoods, inconsistencies and lies.*
>
> ***(ii) That*** *learned Honourable Magistrate erred in law and fact in rejecting the Appellant's defence as not plausible and disregarding the same as an afterthought whereas the said defence was very plausible and unshaken/unrembutted by the prosecution.*
>
> ***(iii) That*** *learned Honourable Magistrate erred in law in finding that the prosecution has proved its case beyond reasonable doubt whereas there existed gaping holes, inconsistencies and doubts which should have been resolved in favour of the Appellant.*
>
> ***(iv) That*** *learned Honourable Magistrate erred in law in rendering a guilty verdict against the Appellant against the weight of evidence on record.*

(v) That *the learned Honourable Magistrate erred in law in returning a guilty verdict against the Appellant without any direct evidence connecting the Appellant to the offence and or based on very weak circumstantial evidence.*

5. A summary of the prosecution case is that PW1 (JM) the complainant was born on 24th January 1999. In January 2016 she was a form 3 student at [particulars withheld] secondary and mixed school while the Appellant was a teacher there. The two of them lived on different plots in Nzukini. With time they came to know each other intimately. In July 2016 they had their first sexual encounter.

6. They then did it like once every month. The last time they had sex was in October 2016 and in January 2017, she missed her periods. She informed the Appellant who was not ready for such responsibility. One Sunday in April 2017 he was with her outside the plot and convinced her to do a letter accusing somebody else of the pregnancy. She did the letter to the deputy principal of the school Mr. M.

7. Her mother (PW2) was notified and action was taken. She was then asked to do a second letter verifying the 1st one which she did and now stated the truth by denouncing the first one. A pregnancy test was done and she was found to be 31 weeks pregnant. She presented to the court her treatment card and treatment notes (EXB1) and birth certificate (EXB2). Copies of 2 letters were produced without originals being seen by the court as EXB 3.

8. In cross examination she said she delivered her baby on 13th June 2017. She gave various months as the time she had her last periods. The letters she wrote were under instructions of some persons. She said she had at first lied about the person responsible for the pregnancy because she loved the Appellant and she did not want him to lose his job.

9. PW2 **EBR** is PW1's mother. She learnt of PW1's pregnancy through her other daughter (C) a teacher at I School. She was on 4th April 2017 called to school where she attended a meeting in which PW1 said the Appellant was responsible for her pregnancy. The matter was reported to the police and PW1 was also taken to hospital.

10. PW3 **C.I. Daniel Kariuki Muhuhi** is the investigating officer. He recorded a statement from the Appellant admitting the offence. The said confession was produced as (EXB4). He also got the child's birth certificate (EXB2). In cross examination he said (EXB4) was just a statement and not a confession.

11. PW4 **Eric Kasiamani** a clinical officer at Kilungu district hospital attended to PW1 who was 30 weeks pregnant. Her last period had been on 04/09/2016. He produced the P3 form (EXB5) and the scan (EXB6). He agreed that section **C** of the P3 form (EXB5) had not been signed by the doctor.

12. The Appellant gave a sworn statement in his defence and denied the charges against him. He confirmed having been a teacher at Isovya secondary school after joining it in 2015. He also knew PW1 whose sister C taught in the said school. He said he dealt with her like any other student. The C.R.E teacher had once complained in the staffroom about PW1's strange behavior. He further informed the teachers that PW1 had relationship with boda boda men.

13. He stated that he did not like this and what he heard his colleague complain about PW1. One day while on duty he met PW1 on the road, and she accompanied him telling him a lot of stories and he was suspicious. He declined all her moves, as her social life was not good. Moreover, he was in a stable relationship with his girlfriend. He distanced himself from her especially in the staffroom.

14. He said he was informed of this incident in January 2017 and asked to quit which he did. He had nothing to do with the letters produced in court. He referred to the dates in the various letters by PW1 dated 31/03/2017, 02/04/2017 and 04/04/2017 and their contents plus the treatment notes and PW1's evidence in court and said she was not truthful.

15. As for the statement dated 12th April 2017 he says the same was recorded and he was just asked to

sign and pay Kshs. 20,000/= to buy his freedom. He was still looking for the money when he was charged. The doctor's report was signed on 12th April 2017 and it was not until 18th April 2017 when he was arraigned in court. In cross examination he denied informing anyone about PW1's advances.

16. Both counsel for the parties filed written submissions which they highlighted.

17. Mr. Masaku for the Appellant submitted that the only ingredient of the offence proved was age. He contends that the exact date of offence is not stated and the prosecution failed to prove penetration. It was his view that a DNA test should have been done, in light of the allegation that PW1 was moving about with boda boda men.

18. Relying on Sections 11(1), 107 & 119 of the Evidence Act, counsel submits that the prosecution didn't prove its case to the required standard. That the evidence relied on was circumstantial and had to meet certain standards. He relied on the following cases to support the submissions.

(i) Kariuki, Karanja –Vs- Republic [1986] KLR.

(ii) Judith Achieng Ocheing –Vs- Republic [2009] eKLR.

(iii) James Nachatan Nanyangaten –Vs- Republic [2019] eKLR.

19. He finally submitted that suspicion however strong cannot provide a basis for inferring guilt.

20. Mrs. Monica Owenga learned counsel for the state opposed the appeal and submitted that the prosecution had proved all the required ingredients for a case of defilement to stand. It was her submission that there was evidence to confirm that the complainant was 17 years old when the Appellant engaged her in sex. There was further proof of penetration as a result of which she became pregnant. Thirdly the prosecution identified the Appellant as her boyfriend with whom she had sex on a monthly basis.

21. Counsel submitted that the evidence tendered was direct and not circumstantial as alluded to by the Appellant. On sentence she submits that the 15-year sentence is lawful as it is provided for by the law.

Analysis and Determination

22. This is a first appeal, and the duty of the first Appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusion. See **Okeno –Vs- Republic (1972) EA 32**.

23. In **Kiilu & Another –Vs- Republic (2005) I KLR 174** the Court of Appeal stated thus;

(1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

(2) 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. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

24. The same was reiterated in the case of **David Njuguna Wairimu –Vs- Republic (2010) eKLR** where the Court of Appeal stated;

"The duty of the first appellate court is to analyse and 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 appellate 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 decision."

25. Upon a careful re-consideration and re-evaluation of the evidence on record and taking into account all the submissions made by both counsel for the Appellant and Respondent and further upon careful consideration of the law, the following issues arise for determination;

(i) Whether there was improper, intentional and unlawful penetration of the vagina of JM.

(ii) Whether the Appellant was positively and properly identified.

26. The particulars show that the complainant (PW1) was aged 17 years when this incident occurred. A birth certificate (EXB2) was produced showing that she was born on 24th January 1999. Going by the particulars PW1 was 17 years as at January 2016.

Issue No. (i) – Whether there was improper, intentional and unlawful penetration of the vagina of JM.

27. The Sexual Offence Act 2006 defines "penetration" as

"The partial or complete insertion of the genital organs of a person into the genital organs of another person."

The Court of Appeal in the case of **Sahali Omar –Vs- Republic [2017] eKLR** held that;

"…..penetration whether by use of fingers, penis, or any other gadget is still penetration as provided for under the Sexual Offence Act."

28. In the instant case the evidence of PW1-PW4 confirms that the complainant(Pw1) was found to be 30 weeks pregnant as at April 2017 when an examination was done at the hospital. She was sent to hospital after the matter was reported to the police. She confirmed that indeed she gave birth to her baby on 13th June 2017. The obvious conclusion is that PW1, indulged in sex which resulted in a pregnancy. I therefore find that there was penetration of her vagina.

Issue No. (ii) – Whether the Appellant was positively and properly identified.

29. There is no dispute that PW1 and the Appellant were known to each other by virtue of being a student and teacher at Isovya secondary school. It is also a fact that despite PW1 having delivered her baby on 13th June 2017 and the prosecution closing its case on 11th June 2018 no DNA was carried out to establish paternity of the baby. The issue is who penetrated her on diverse dates between January – October 2016.

30. Therefore, the only evidence available to the prosecution for proof of its case is that of PW1. The learned trial magistrate well captured this in his judgment at page **9** paragraph **16** where he states;

"In the instant case, therefore, I need to look at the evidence of the victim and assess that evidence, like any other evidence and determine whether it was cogent. Was her evidence truthful and reliable enough to be the basis of a conviction? Does the evidence of the victim alone leave the court without reasonable doubt that the accused committed the offence and should be convicted?"

31. Section 124 of the Evidence Act provides as follows;

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, 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."

32. It follows that in sexual offences the court may rely on the victim's evidence only to convict somebody. Reasons must however be given to support that. That means the victim's evidence must be water tight and she/he must be believed of her/his truthfulness.

33. The particulars show that PW1 and Appellant engaged in sex on diverse dates between the months of January – October 2016 at I teacher's quarters. In her evidence in chief PW1 testified that she and the Appellant lived on different plots in Nzukini, but she lived with her sister. Her first sexual encounter with the Appellant was in July 2016 and not January 2016. She said the Appellant would come for her and she goes to his house. After this it became a monthly affair. It means that their 1st involvement was when PW1 was aged 17½ years.

34. Despite living with her sister who was also a teacher at Isovya secondary school, PW1 did not mention to her anything about this even when she started missing her periods.

In her evidence in chief she said she first missed her periods in January 2017 when they had last had sex in October 2016.

35. In cross examination, she said she told the police she had missed periods in the months of November and December (2016) and January 2017. I do note that she was telling the police this in April 2017 when the matter was reported. She even told the police her last period was on 4th September 2016.

36. Copies of three letters were produced in court by PW1 as (EXB3). The said letters are dated 31st March 2017, 2nd April 2017 and 4th April 2017. The three letters are talking about the same subject (pregnancy) but different culprits. Secondly they are copies which ought not to have been produced without the originals, or without proper explanation. They cannot therefore be relied on for whatever is their worth.

37. A statement by the Appellant was produced by PW3 (investigating officer). It's meant to be a confession. PW3 said it was not a confession but just a statement. I have looked at it. It is not a statement under inquiry. The content narrows down to a confession.

38. This was also admitted by the court. The Appellant was not cautioned about the statement as is required under Section 25A of the Evidence Act. Moreover, PW3 being the investigating officer could not take such an admission from the Appellant even if he is a chief inspector of police. He should have referred him to another qualified officer to do that. I therefore find that the trial court erred in admitting the documents (EXB 3 & 4) contrary to the laid down procedure. The documents will not be considered as part of the evidence in this case. They are therefore expunged from the record.

39. It clearly came out in PW1's cross examination that at one point she had exonerated the Appellant from this matter and blamed one George of Ndolo boys in order to save his job, because she loved him. Then she changed her mind on 4th April 2017 after a meeting. Those in the meeting were the principal, deputy principal PW2 (PW1's mother), one teacher and PW1. PW2 then requested the panel to allow PW1 write another letter in accordance with what she had told the panel. It was then that she wrote the letter dated 4th April 2017.

40. The Appellant has vehemently denied sexually engaging with PW1. According to him PW1 had made several advances to him but he had overcome them and not fallen for the trap as he knew PW1 to be his student. He did not report this behavior to anybody in the school or PW1's elder sister who taught with him and stayed with PW1. He even claims that he had information that PW1 used to have affairs with boda boda riders. Again if this was true, as her teacher should have taken action which he did not.

41. I have considered the case of **James Nachatan Nanyangaten *alias* Njiraim** (Supra) cited by the Appellant's counsel.

In that case the evidence was circumstantial. In the instant case, the evidence is not circumstantial and that case is not applicable.

42. Moving further I ask myself whether PW1 would frame the Appellant? There is nothing that has been raised to convince me as to why PW1 would be against the Appellant. PW1 was a young girl aged 17½ years as at July 2016 who had been made to believe she was really loved by the Appellant. She then whole heartedly gave herself to this man. She could be picked from her sister's house and go with the man to his house. Before the pregnancy everything was alright. She did not see anything wrong with what she was doing.

43. PW1 conducted herself as an adult who knew what she was doing. In as much as the Appellant should have conducted himself in a more respectful manner, PW1 should not have followed him for sex. She never said she was forced into it. This just goes further to show how tricky the age of 17-18 years is when it comes to a girl who conducts herself as if she is 18 years above. PW1 conducted herself as such. My conclusion is that the Appellant was led to believe he was dealing with an adult.

44. Secondly following the Appellant's defence on PW1's conduct, the court should have deemed it fit to have a DNA test done to clear the air on the paternity of PW1's baby.

45. **The upshot is that the appeal has merit. I quash the conviction and set aside the sentence. Appellant to be released unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 29th day of January 2020, in open court at Makueni.

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H. I. Ong'udi

Judge