



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 203 OF 2013

PAUL KHALIFA KIIRU.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable M. A. Otindo - Resident Magistrate,

delivered on 5th September, 2013 in Nakuru Chief Magistrate's Court

Adult Criminal Case No. 285 of 2012)

JUDGMENT

1. At the Nakuru Chief Magistrate's Court, the Appellant, Paul Khalifa Kiiru was charged with defilement Contrary to section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars stated in the charge sheet were that on diverse dates between 9th January, 2011 and 17th November, 2012 at [particulars withheld] in Njoro District within the Rift Valley province, the Appellant unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of NNM, a child aged 14 years, which caused penetration.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences act No. 3 of 2006. The details on time, place and victim were the same as those of the main charge.

3. The Appellant pleaded not guilty and the case proceeded to a fully-fledged trial. At the trial, the Prosecution called seven witnesses (one of whom could not testify due to mental disabilities) and the Appellant, upon being put on his defence, gave sworn testimony. The Learned Trial Magistrate was persuaded that a case had been made beyond reasonable doubt on the main charge and convicted the Appellant. She proceeded to sentence the Appellant to twenty years imprisonment.

4. The Appellant is dissatisfied by both the conviction and the sentence and has appealed to this Court. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see *Okeno v Republic* [1972] EA 32).

1. That the Hon Learned Magistrate faulted in law when he failed to observe that I was detained for 4 days longer than prescribed in article 49(1)(f)(i)(j) of the Constitution.

2. That the Hon. Learned Magistrate faulted both in matter and law when he based his conviction on the medical evidence which was not inclusive give that:-

a. No scientific examination was done which could link me to the alleged offence.

b. Since the complainant was found 6 month pregnant DNA of the foetus could have been done to ascertain my guilty as provided in Sec 36(1) of the Sexual Offences Act.

3. That is was burden of proof shifted tome despite that Section 107 and 109 of the Evidence Act is clear on this.

5. When filing Written Submissions in support of the Appeal, the Appellant added the following grounds of Appeal:

1. "That the Trial Court erred in law and fact in convicting and sentencing him on reliance of insufficient evidence.
2. That the Trial Court erred in law and fact by not observing and being biased/partiality on defence side.
3. That the Trial Magistrate erred in law and fact in considering the prosecution had proved its case to the required standards.
4. That the trial Court erred in law and facts by not indicating the language used as I did not understand the ongoing sessions."

6. In the Court below, the following evidence emerged. The Complainant testified as PW1. She testified that she was 16 years old at the time and that she was born in 1996. She told the Court that she knew the Appellant, who was a neighbour to her aunt, VWC, with whom she was living. On a date between January and April, 2014, the Complainant remembers the Appellant went to her aunt's house on a Sunday when her aunt had gone to church. The only other person who was present was a Chege, another child who, it turned out, had developmental disabilities and could not testify.

7. The Complainant told the Court that on that day the Appellant grabbed her and pulled her to the ground and forcibly had sex with her. The Complainant told the Court that the Appellant threatened that he would kill her if she told anyone. So, she did not tell anyone what had happened. The Complainant further said that the Appellant went the following Sunday to ask for forgiveness from the Complainant. The Complainant told the Court that she forgave him but that led to many other Sundays in which she and the Appellant had sex. The Appellant would pick her up at her aunt's house when the aunt was in church, and they would go to the Appellant's house and have sex.

8. According to the Complainant, this pattern continued for a while. It stopped when the aunt to the Complainant, VWC, who was living with the Complainant and who testified as PW3, noticed behavioural changes in the Complainant: she had lost appetite; and was picky with what she was eating. When Veronica checked the Complainant's room, she noticed that all the sanitary pads she had been giving the Complainant to use when she was supposed to be having her menstrual periods, were still intact and un-used. Suspecting her niece was pregnant, V enlisted the help of her neighbour, MW, to confront the Complainant and inquire. When so confronted, the Complainant confessed that she and the Appellant had been having sex on Sundays at his house. MW testified as PW2 and confirmed this version of the story.

9. Veronica reported the matter to the Complainant's Primary School and then to the Area Chief and the Police Station. The area Chief, Samwel Macharia Kamau, testified as PW6 and confirmed receiving the information and acting on it by arresting the Appellant and handing over to the Police.

10. At the Police Station, Veronica was advised to take the Complainant to Njoro Health Centre for assessment. She did. Jacob Chelimo was the Registered Clinical Officer who saw the Complainant on 06/12/2012. He examined her and filled a P3 Form which he produced as an exhibit in the case. The results showed that the Complainant was pregnant and that the hymen was perforated. The health facility did not conduct any DNA test. The Complainant had no infections.

11. The Investigating Officer was Corporal Annie Muthoni Ndegwa who confirmed receiving the information on the alleged defilement and conducting investigations. Finally, Dr. Stephen Odhiambo testified that he had carried a scientific age assessment on the Complainant and concluded that she was more than 14 years old but less than 16 years old.

12. Put on his defence, the Appellant delivered a straight denial. He said he did not defile the Complainant. His theory was that a third person, a man who had allegedly been employed by the aunt to look after goats is the one who was responsible for the pregnancy and not him. He also claimed that he was clinically impotent and incapable of performing any sexual activity. The Appellant also protested that if he were indeed the father of the child, there should have been a DNA test performed to confirm the parentage of the child.

13. During the hearing of the Appeal, the Appellant filed written submissions and informed the Court that he had nothing to add to them. The Learned Prosecutor, Ms. Rotich, orally supported the conviction and sentence. She submitted that there was sufficient evidence adduced by the seven Prosecution witnesses to support the conviction. She submitted that the three ingredients of defilement: age; penetration and identification were all proved.

14. In pertinent part of the judgment, the Learned Trial Magistrate stated as follows:

As regards forensic evidence and whether the resultant baby should have been taken for DNA sampling and testing, the provisions of section 36(1) of the Sexual Offences Act is not couched in mandatory terms. It gives the Court the discretion to make such orders by using the words as the court may direct that an appropriate sample be taken for purpose of scientific testing including DNA.

The Accused Person alleged that the Complainant's aunt had employed a young man who alleged[ly] was found having sex with the complainant. However, the complainant together with the aunt denied having ever employed any one at her home. It was the evidence of the Complainant's aunt PW3 that the Complainant could be left at home on Sunday so as to take care of a young child who had a mental problem. If at all there was an employee at the home then why would the complainant be left at home (sic). This allegation by the Accused was not strong enough and was not supported by any evidence so as to warrant this Court to give directions as to DNA testing. The court was not persuaded enough to give such directions.

15. Herein lies the crux of the matter. The Appellant denied that he had defiled the Complainant; and alleged that there was a third person – an employee of the aunt who lived in the same compound as the Complainant – who had probably done it. The Complainant was pregnant. No DNA test was conducted to prove the paternity of the Complainant's child.

16. It is true that our decisional law has established many times that rape or defilement is proved by evidence, not by way of DNA test only.

See *AML v Republic [2012] eKLR*. However, there are instances where the absence of DNA testing when circumstances would counsel such testing would lead to inference being drawn against the Prosecution. Such is the case here. The Accused Person claimed that a third party was involved in the case. Evidence seemed to suggest that there was, indeed, a third party (though the Complainant's aunt denied it, evidence showed that she had a child of special needs and that she used to go to church every Sunday leading to an inference that there was another adult who was left home taking care of the child with special needs). Further, the Complainant was pregnant. In these circumstances, it seems readily obvious that the best way to dissolve any reasonable doubts whether the Complainant was defiled by the Appellant or not was the scientific route: to conduct a DNA test to establish the paternity of the child of the Complainant. It is difficult to understand the reluctance of the Prosecution to conduct the DNA test in these circumstances especially in light of the Appellant's protestations.

17. In my view, this point disposes this appeal. The conviction was not safe and free from error in this case: the failure to conduct DNA tests in the specific circumstances of this case raise reasonable doubts which must be resolved in favour of the Appellant.

18. In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.

19. Orders accordingly.

Dated and delivered at Nakuru this 20th day of February, 2020

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JOEL NGUGI

JUDGE