REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 193 OF 2016

SIMON WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Molo Chief Magistrate's Criminal Case Number 1369 of 2016 by Hon. R. Amwayi (RM) in a judgment dated 13th December 2016)

J U D G M E N T

1. The complainant herein, her parents and the witnesses were at the material time residents at an IDP camp in Rongai Sub County where PW2 was the 'Chairman' and PW3 the 'Chairlady'.

2. On 26th April 2016 **PN PW1** was at home when something about the appearance of NW her 4th born child drew her attention. The child was walking towards her. She noticed that her breasts had enlarged and she had put on extra weight. She became suspicious and wanted to know from her child if she had any sexual intercourse with anybody. The child denied having had any sexual intercourse with any person. It is then that she took her to one Muthoni or Mama Buda. It is not clear whether the said Muthoni or Mama Buda is also **PW3, Teresia Wairimu Kahora.** She testified that on 7th May 2016 at 11.30 p.m. PW1 went and told her about her suspicions. She also told her that the child had been interrogated by other women and confirmed to be pregnant. She sent for the child. She asked her whether she was pregnant. She told her she had missed her periods for three (3) months, and that she had sex with Baba Munene. She told her that they had sex twice. She described the place where they had sex, on two (2) consecutive Sundays.

3. PW3 asked her whether she could repeat what she told her in the presence of the said Baba Munene, his wife and the elders. The child said she could. PW3 recorded all this on her phone. She then called the child's mother and they went and reported to the chairman, PW**2, John Koimboni Rotich**. The dates are a bit mixed up because he says that they went to him on 6th May 2016 at 8.00 p.m. i.e. the chairlady, PW3, the child's mother. They reported to him what the child had told the chairlady and he also heard the interrogation that was on her phone. He called *Nyumba Kumi* one Samuel Mburu and told him what he had been told and what he heard. They also told another elder, and the chief. They then all went to the police station. The accused was rang on his mobile phone. He went to the police station, and was interrogated by **PW5, the investigating officer**. He denied the allegations made against him but was treated as a suspect placed in cells.

4. During the trial, the trial magistrate conducted *voire dire* and upon satisfying herself as to the child's understanding of the nature of an oath, and the importance of telling the truth took her evidence on oath. The complainant **PW4 NW** testified that she was 14 (fourteen), having been born in 2001. That the accused was their neighbour and every so often he would hire casual labourers to help on his farm or just ask for help from his neighbours. Again the dates here mixed up on the record because she testified the accused went to her home on 28th February 2016 as requested her to go and assist on the farm. She went. It is then that he told her that they meet the following day after church. The following day was 28th February 2016, a Sunday. She left home as though going to church, but went to the place they had agreed to meet. The Accused was at that time operating a boda-boda. He arrived on his boda-boda, she boarded and they went to some bush, in the forest. There he told her to lie down, and in her words

> "…. removed my panty and he unzipped his trouser and he did tabia mbaya to me… he inserted his penis inside my vagina (what someone uses to urinate). He also touched my vagina. When he was done we cleaned up and I boarded the motor cycle and he took me up to a place where I could go home. He gave me Kshs. 50/= and warned me not to tell anyone. I then went home. On 6th March 2016 I was going to church and we boarded the motor cycle and took me to the same place… and he had sex with me… gave me Kshs. 50/=……on 6th May 2016 my mother heard it as people were saying I was pregnant… I knew I was pregnant because since 28th March 2016 I have not had my periods… I told PW3…. She recorded the conversation. She called my mother and they went to the chairman. I went to the police station with my mother and the chief and he reported the matter…. The person who took me to the bush is called Simon. He used to come to our home and give us some work. He is married. He has a wife and kids….

Simon had sex with me twice. I have never had sex with anyone apart from Simon."

5. When the matter was reported at Rongai Police Station No. 77303 PC Veronicah Onchuru was assigned to investigate the case. The report was booked on 9th May 2016. She requested the mother to take the child to hospital, and rang the accused who came to the station. She arrested him and placed him in the cells. When the P3 and treatment card were brought back confirming that the child was pregnant, she charged the accused with **defilement** and in the alternative, **indecent act with a child**. She had the child's age assessed and she turned out to be fifteen (15) years of age.

6. The child told her that she and her father had worked on accused's shamba on 27th February 2016 and that is when the accused had asked her to meet him on 28th February 2016. She did and they went to a bush, two (2) kilometers away where he had sex with her and also on 6th March 2016.

7. **PW6 Bildad Bargoge** a clinician at Rongai Sub County Hospital examined the complainant on 9th May 2016. On "*abdominal examination revealed a mass of 22 weeks and suspected to be pregnant."* A pregnancy test was positive. He testified *"My conclusion was that she was three (3) months pregnant."* He formed the opinion from the examination and history that these were consistent with defilement. He filled Post Rape Care form, the P3. He concluded that the fact of pregnancy confirmed penetration.

8. In his testimony in defence the accused told the court that he was a boda-boda operator and also a teacher. He denied the offence, he said he had known the complainant since 2011, she and her parents were his neighbours and their homes were about 150 metres apart. He said on 27th February 2016 he went to request her parents to work for him but they were not available. That on that date the complainant was not on his farm neither were her parents. He denied ever going to any bush with the child. He alleged that the forest is on the road and his motor bike would be seen from the road.

9. He went to testify that the charges were fabricated against him at the instigation of PW2 the chairman. He said that they had a land dispute with PW2. That he was always objecting to whatever the chairman did and the chairman had sworn to eliminate him. That he taught in a girls' school and never had any issues. That he was at the material time teaching in a mixed school and never had any issues, that he was married with three (3) children. He denied the offence.

10. In a judgment delivered on 13th December 2016 the trial court found the accused guilty of **defilement contrary to Section 8(1) as read with 8(3)** convicted him and sentenced him to serve twenty (20) years imprisonment.

11. Aggrieved by those findings the accused filed this appeal on the following grounds.

1. THAT the learned trial magistrate erred in law and in fact in the present case yet the prosecution failed to satisfy the burden of proof required in a defilement charge where the complainant is pregnant.

2. THAT the learned trial magistrate erred in law and in fact in convicting the appellant on the evidence of PW4 the complainant yet its veracity was doubtful as it was inauthentic to sustain a safe and sound conviction.

3. THAT the learned trial magistrate erred in law and fact in misdirecting herself on the appellant's plausible sworn defence in failing to note that the prosecution failed to discharge its burden provided under Section 309 of the Criminal Procedure Code in failing to evaluate it alongside the prosecution case.

4. THAT the learned trial magistrate erred in law and fact by failing to give the appellant an opportunity to make his oral submissions before passing the judgment.

5. THAT the learned trial magistrate erred in law and in fact by convicting the appellant on evidence that was marred with inconsistencies and was not corroborated.

6. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the charge sheet was fatally defective.

Later he filed two (2) additional grounds: -

1. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that no DNA was produced in court despite the genesis of the case being the pregnancy of the complainant.

2. THAT the learned trial magistrate erred in law by failing to appreciate that the medical evidence adduced before court did not corroborate the charges.

12. He also filed written submissions.

13. In arguing the appeal Mr. Maragia for the appellant submitted that this defilement case was based purely on the pregnancy of the complainant, that had she not been found to be pregnant, then, this case would never have come up, and for that reason, it was inevitable that the evidence of DNA to determine the paternity of the child would have been provided by the state.

14. He argued further that the medical evidence was exculpatory of the appellant, the record shows that the clinical officer found an abdominal mass of twenty-two (22) weeks, then concluded it was pregnancy of three (3) weeks, how could that be? In any event, that there

was no evidence that the complainant and the appellant met on 27th February 2016. He also attacked the evidence of PW1, mother to complainant, who at first said nothing happened on 26th April 2016, and upon being recalled said that that is the date she noticed her daughter's pregnancy and the medical report for being unreliable. He also submitted that DNA evidence was requested and wrongfully denied. He submitted that the police officer did not investigate the case to corroborate the alleged evidence that the appellant had admitted having sex only once with the child. That the complainant was intelligent enough to know right from wrong and ought to have reported the matter to the parents or any other person.

15. In the written submission the appellant relied on **Baten v Baten (1950) All 2 ER at page 459** where the said the Judges held:

> **"In criminal cases the charge must be proved beyond reasonable doubt. The requirement to proof means that facts must be established to the satisfaction of the court. Facts do not represent an objective truth but sometimes an accurate, or sometimes a crude estimate truth of the most convincing version of events. Technically evidence is conclusive only where by virtue of a rule of law, it cannot be contradicted."**

16. His position was that the evidence in this matter was not conclusive to prove the alleged defilement. He counted the days for the court, that from 28th February 2016 to 9th May 2016 was exactly nine (9) weeks. How then could the clinical officer of 15 years experience come up with twenty-two (22) weeks on physical examination, then fifteen (15) weeks on pregnancy test, and conclude the pregnancy was three months old, and still have his appellant accused of having impregnated the complainant on 28th February 2016 or 6th March 2016? He argued that the dates did not just add up, and, he could not have been the one who had sexual intercourse with the complainant as the compliant could not have conceived on the alleged dates. That only DNA evidence would have established the fact that the pregnancy was indeed his, and that lack of it created reasonable doubt as expressed in **Woolmington vs DPP (1935) AC 462** where it was held;

> **"… If there appear any reasonable doubt as to guilt of an accused and the doubt is created by the prosecution, then accused person ought to be accorded a benefit of doubt and is entitled to an acquittal on its footing…"**

17. He argued that the court ought not to have relied on the evidence of the complainant alone and ought to have required corroboration. On this he relied on the old case of **Musikiri vs R (Nyeri) High Court Criminal Appeal Number 120 of 1986** where he quoted the following passage:

> **"... it has been held again and again that the case of alleged sexual offences. It is really dangerous to convict on evidence of the woman or a girl alone, it is dangerous because human experience has shown that girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute; such stories are fabricated for all sorts of reasons and sometimes for no reason at all..."**

18. Let me pause here to say something about this authority. With respect that this is one of those judgments that was steeped in patriarchal attitudes of yore where the female part of the human experience was not seen as human at all. We now have the law and Constitution that stand in the way of such thinking. Any human being minded to do so can fabricate a story, for no reason at all.

19. The appellant argued further that he raised a defence of alibi and it was the duty of the prosecutor to discharge the same. He relied on **Karanja vs Republic (1983) KLR 501** and **Victor Mwendwa Mulinge vs Republic [2014] eKLR** and **Section 309 of the Criminal Procedure Code** on what the prosecution should do once and accused persons raises an alibi defence.

20. He argued that the prosecution failed to call a very important witness one teacher Moses who it was alleged had seen him and the complainant in a hotel having tea and *mandazi* on the 28th February 2016. Citing **Bukenya vs Uganda** he argued that the allegation that this was crucial evidence, which would have established by way of independence evidence that indeed he was with the complainant on 28th February 2016. It was the complainant's testimony that the first time she went to the forest or bush with the accused person, they stopped to have tea and mandazi in a hotel where her science teacher saw them and even greeted her. The fact that the prosecution did not call teacher Moses can only be construed to mean that his testimony would not have supported their case.

21. In the further written submissions, the appellant reiterated his submissions on the failure by the trial magistrate to have the DNA report produced. He relied on two (2) Ugandan cases, **Uganda vs Lopenyok 179/2013 (2014) UGHCCRD & Uganda vs Matiko** cited as in "**Criminal Case Ruk OO-CR-CSC-003/29 UGHC209"** where the court was of the view that only DNA results would have been conclusive evidence to connect the accused persons to the sexual offence they were charged with.

22. On the effect of failure to produce DNA results where the complainant was pregnant, he cited the **Kitale Criminal Appeal Number 48 of 2013 Gaileth Mubarak Elkana vs Republic [2013] eKLR** where the judges cited the case of **Abdisalan Burale vs Republic [2008] eKLR** were *Ojwang J* acquitted the appellant for lack of DNA in similar circumstances.

23. In opposing the appeal Ms. Nyakira for state reiterated the evidence, and submitted that the age of the complainant was established at fifteen (15) years, penetration by the medical report, and identity of the penetrator was not in dispute as he was well known to the complainant. Further that during the examination the clinical officer found a mass of twenty-two (22) weeks but confirmed that the pregnancy was three (3) months old. That a DNA report would only have confirmed the paternity of the child and would have meant waiting until the child was born. That lack of DNA did not negate penetration.

24. Having considered all the grounds raised by the appellant and the rival submissions, it appears to me that they can be collapsed into one: ***whether prosecution proved their case beyond a reasonable doubt to warrant the conviction and sentence meted by the trial court***.

25. I am guided by **Okeno vs Republic (1972) EA 372** where it was stated;

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."**

I will first look at the evidence before the trial court. The fact is that the defilement came into light after the complainant showed signs of pregnancy. She fixed the dates of the defilement on 28th February, 2016 and 6th March 2016. She could have conceived on either of these two (2) dates. She was certain that she had never had any sexual intercourse before the alleged defilement and that the appellant had sex with her only twice, 28th February and 6th March 2016, and that since the 28th February 2016 she had not had her periods.

26. The medical evidence on record is that was either she was twenty-two (22) weeks pregnant or three (3) months pregnant as at 9th May 2016 when she was examined. From 28th February 2016 to 9th May 2016 when the test was taken was not twenty-two (22) weeks. Neither is it three (3) months. Three months with effect from 28th February 2016 would have been by 28th May 2016. If we take the 6th March 2016, then the three months would have been 6th May 2016, and if we take the twenty-two (22) weeks and work backwards the pregnancy would have occurred in December 2015. From the point of view of the dates given by the complainant and the medical evidence, the complainant would not have possibly conceived on 28th February or 6th March.

27. In our jurisprudence on sexual offences, it is the view that defilement as defined by **Section 8(1) of the Sexual Offences Act**, penetration of a genital organ by another, is not proved by DNA or medical evidence but by the evidence of the victim. This was the position taken by the trial court, that *"evidence by victim or even circumstantial evidence is enough to prove defilement as the case may be"*. The trial court relied on **Fappyton Mutuku Ngui vs Republic [2014] eKLR** where the Court of Appeal upheld the position in **Aml vs Republic [2012] eKLR** that;

> **"the fact of rape or defilement is not proved by way of DNA test but by way of evidence."**

Kassim Ali vs Republic Criminal Appeal Number 84 of 2005 (Mombasa)

> **"…. [The] absence of medical examination to support the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

Further that the court in **Fappyton** held that, DNA evidence was not necessary because;

> **"In our view the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her."**

And **Benjamin Mbugua Gitau v Republic [2011] eKLR** where the Court of Appeal was of the view that the DNA test was not necessary as penetration which is the main element of defilement was proved.

28. On the strength of these authorities the trial court was satisfied with the medical evidence. However, it is noteworthy that in those case other than the oral evidence of the victim, there was other physical evidence in the genitalia of the complainant to prove that they had been defiled. More differently, the 'genesis' of the defilement was not a pregnancy as is in this case. In this case, the case for the prosecution was that the proof of defilement was the pregnancy and the oral evidence of the complainant. The question that begs is, how do you separate the pregnancy from penetration and say that in this case the oral evidence was sufficient proof of penetration? When the standard of proof is that of beyond a reasonable doubt, then it becomes necessary to bring on board science. The suspect is entitled to a full investigation of the case, even, and especially, because of the proviso to **Section 124 of the Evidence Act**. In this case the trial court found the complainant to be believable, that she was consistent in her testimony and pointed out the appellant both in the village and in court as the perpetrator of the offence against her. That this was supported by the fact that there were no grudges between the two (2) families, that the grudge the appellant brought up as between him and PW2 had nothing to do with the family of the complainant. That the complainant's testimony came through as unshaken and truthful, and according to her, sufficiently corroborated. That even under cross examination she remained consistent and coherent.

29. The first thing that stands out about this case is that the defilement was discovered only because the complainant was pregnant. She had not reported it herself to anyone. (See **Paul Kanja Gitari vs R [2016] eKLR)** This was established by her telling PW3 on 7th May 2016 that indeed she was pregnant. According to PW3 they were just two (2) of them when she told her it was the appellant who was responsible. She says she recorded the conversation on phone. The second place the complainant said it was the appellant was at the police station. So, everyone had to work backwards from 9th May 2016 when the clinical officer PW6 conducted the pregnancy test, to place the conception of the pregnancy to either 28th February 2016 or 6th March 2016.

30. The complainant gave the dates. These were denied by the appellant who denied meeting her on those two (2) dates. The prosecution had the obligation to prove that indeed, on those two (2) dates the complainant and the appellant were together, and it would have to begin with the 27th February 2016 when the complainant said she and her father and other people worked on the complainant's farm and that is when they spoke about meeting the following day. What evidence was available to establish this fact? The investigating officer never visited the appellant's farm. She never spoke to any else, who could have been with the complainant on appellant's farm on 27th February 2016. Even the complainant's father. It was necessary for the investigations to establish that indeed the complainant and appellant met on 27th February 2016.

31. Secondly, the complainant testified that on 28th February 2016, which was the first time, the appellant took her to a hotel and bought her tea and mandazi. Her science teacher by the name Moses saw her and even greeted her. This was her science teacher. It was a Sunday morning. The, complainant, fifteen (15) year old girl was having tea at a hotel with a man. The investigating officer was obligated to seek out this teacher whose evidence would have placed the complainant with the appellant in the morning of 28th February 2016. Then people around the hotel may be would have remembered seeing the two on the appellant's motorbike. The appellant having denied being with complainant on 28th February 2016 this was the one person who would have placed the complainant with the accused together. (See **Bukenya vs Uganda 1972 EA**)

32. Was the medical evidence necessary in this case? In my view in the circumstances of this case, the medical evidence was crucial. The moment the pregnancy and when it was conceived became an issue, the pregnancy became the proof of penetration, whichever way one looked at it because of the certainty of the dates when the defilement is alleged to have happened and the age of the pregnancy when it was discovered. Proof that the penetration was caused by the appellant was to prove that it was the appellant who had impregnated her. Proof would have been the paternity of the child.

33. The appellant's application to have the DNA evidence as part of this appeal was denied on the basis that he never asked for the DNA test during the trial and in any event that defilement could be proved by oral evidence.

34. It is my view that the appellant did not have to ask for DNA evidence. That burden was on both the investigators, the prosecution and the court. The police are empowered by **Section 122A of the Penal Code** which states:

> **Senior police officer may order DNA sampling procedure on suspect**
>
> (1) **A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence**.
>
> (2) In this section—
>
> "DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—
>
> (a) the taking of a sample of saliva or a sample by buccal swab;
>
> (b) the taking of a sample of blood;
>
> (c) the taking of a sample of hair from the head or underarm; or
>
> (d) the taking of a sample from a fingernail or toenail or from under the nail, **for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;**
>
> **"serious offence"** means an offence punishable by imprisonment for a term of twelve months or more (emphasis mine)

35. Defilement is a very serious offence compared to the one described under **Section 122A**. Nothing stopped the police from carrying out the test as soon as the child was born.

36. The lower court could also have proceeded under **Section 36 of the Sexual Offences Act** which provides;

> **Evidence of medical, forensic and scientific nature**
>
> *(1) Notwithstanding the provisions of section 26 of this Act or any other law, **where a person is charged with committing an offence under this Act**, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, **including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*** (emphasis mine).

37. Science has come to help us ascertain certain facts, to the requisite standard of beyond a reasonable doubt. In light of the contradictory and inconsistent evidence medical evidence and the gaps in the case for the prosecution, would have been the *msema kweli*. In fact, what stands out is that this case was not investigated. The police officer who was assigned the case treated it as open and shut, yet, for the charge to be proved beyond a reasonable doubt the investigating and prosecuting authorities needed to do more. The legal provisions above mean that even during the trial the court could have made the order for the DNA test to be carried out once the child was born. It cannot be overemphasized that even in a criminal case the complainant and the accused remain equal before the law. Each is entitled to a fair trial. Each is entitled to proper investigations of the case. And where the court is to rely on **Section 124 of the Evidence Act,** it is the duty of the police and the ODPP is to demonstrate that the only available evidence was that of the complainant. And that in the circumstances of this case, that in itself creates reasonable doubt as to whether the appellant herein committed the offence.

38. The complainant's testimony hangs out alone while there was all these other evidence that was not placed before the court and that could have exonerated the appellant or supported the case for the prosecution. That in itself makes the conviction unsafe.

39. The provisions of **Section 358 of the Criminal Procedure Code** provide

> **"S.358. Power to take further evidence (1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.** ***(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal. (3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken. (4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court."***

40. I have anxiously considered the issue whether to re -open the case and order for the DNA test. The application by the appellant for this DNA evidence was denied. In any event, that would have formed the basis either for a retrial or for additional evidence. Now it would be prejudicial to the appellant and it may re-victimise the victim. The appellant has served almost four (4) years of his sentence.

41. In the upshot, I find that in the circumstances of this case, failure to conduct DNA was fatal to the case of the prosecution as their case was not proved beyond a reasonable doubt, rendering the conviction to be unsafe.

42. The appeal succeeds. The conviction is quashed. The sentence is set aside. The appellant be set at liberty unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 29th day of May, 2020.

Mumbua T. Matheka

Judge

In the presence of: - VIA ZOOM

Edna Court Assistant

For state Ms. Wamboi

Appellant present

Maragia for appellant N/A