REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 85 OF 2017

MUTHUNGU MBUI KILOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Nathan S. Lutta, Senior Principal Magistrate,

in Mariakani Senior Principal Magi*strate's Court Criminal Case No. 471 of 2014).*

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the charge were that on the 20th day of April, 2014 in Kinango District, Kwale County within the Coast region, intentionally caused his penis to penetrate into (sic) the vagina of ABC a child aged 15 years. He was found guilty as charged and sentenced to 20 years imprisonment.

2. The appellant being dissatisfied with the decision of the lower court filed his petition of appeal on 6th May, 2015. On 27th November, 2019 the appellant filed his amended grounds of appeal, with leave of the court. The said grounds of appeal are to the effect that the offence was not proved beyond reasonable doubt, the prosecution failed to establish the paternity of the child the complainant gave birth to, through DNA or any other clinical findings, that his arrest had no connection with the matter in question, more so, since the persons who arrested him were left out of the prosecution's case. The appellant also raised the issue of his defence not having been considered and that the sentence meted out to him was harsh and excessive.

3. In his written submissions, the appellant stated that the only evidence regarding the offence he was charged with was that of the complainant (PW1) who testified that she was defiled and made pregnant by him. He argued that there was no other evidence to corroborate the said claim. The appellant contended that there was a possibility that PW1 might have engaged in sexual intercourse with someone else. He submitted that PW1's evidence was that she was engaged in sexual activity with him on more than one occasion but she never told her parents after any of the said incidents.

4. The appellant also submitted that the Investigating Officer should have established the paternity of the child whom PW1 gave birth to, through DNA or any other clinical findings. He stated that the Investigating Officer relied on PW1's pregnancy as the only evidence to implicate him.

5. The appellant relied on the decisions in **Hamisi Bakari & Another v Republic** [1987] eKLR and **Joseph Kinyua Nyaga v Republic** [2012] eKLR, to illustrate that since there was doubt as to whether he defiled PW1 leading to her pregnancy, he should have been acquitted.

6. The appellant challenged the failure by the prosecution to call the officer who arrested him to attend court to testify and explain the reasons as to why he was arrested. He argued that failure to call the said police officer weakened the thread of evidence. He cited the case of **John Kenga v Republic**, Nairobi Court of Appeal Criminal Appeal No. 118 of 1984 to support his submission.

7. The appellant argued that the Trial Court dismissed his defence out of hand, which amounted to a serious error on its part.

8. In concluding his submissions, the appellant stated that the sentence of 20 years imprisonment imposed on him was harsh and excessive given the fact that he and PW1 were almost of the same age group. He relied on the case of **Francis Karioko Muruatetu v Republic** [2017] eKLR and urged this court to review the sentence imposed on him. He also relied on the decisions made in **S v Jansen** 1999 (2) SACR 368 (c) at 373 (G) – (H), **Samuel Achieng Alego v Republic** [2018] eKLR as well as **S v Mofokeng** 1999 (1) SACR 502 (w) at 506 (d), on the issue of a Trial Court's discretion in sentencing. He prayed for his appeal to be allowed, and if not, for his sentence to be reduced.

9. Ms Mwangeka, Prosecution Counsel, supported the appellant's conviction and sentence through written submissions filed on 30th January, 2020. She stated that with regard to the age of PW1, an age assessment form was produced by the clinical officer who testified as PW4. The Prosecution Counsel stated that the said form indicated that PW1 was 15 years old.

10. It was submitted that penetration was proved by PW1 who testified that she met the appellant who was not a stranger to her, on 20th April, 2014 on her way to graze goats. She knew that he used to work for her uncle as a herdsman. That the appellant told her that he loved her and they had sex thrice in the bush. On examination later, she was found to be 16 weeks pregnant.

11. Ms Mwangeka relied on the case of **Ambrose Mwawindo Ngwatu v Republic**, [2016], eKLR which held that paternity may be proof of penetration when fertilization and sexual intercourse take place in accordance with the order of nature but paternity was not proof of penetration in in-vitro fertilization.

12. The Prosecution Counsel indicated that the appellant herein was sentenced to life imprisonment (sic) and should be given a determinate sentence of 30 years imprisonment (sic). She relied on the case of **Jared Koita Injiri v Republic** to support her submission. She submitted that the appellant's defence was considered and that the prosecution proved its case beyond reasonable doubt. She urged this court to dismiss the appeal herein.

13. In response to the DPP's submissions, the appellant pointed out that he was sentenced to 20 years imprisonment and not to life imprisonment as submitted by Ms Mwangeka. The other issues such as failure by the prosecution to conduct a DNA examination, lack of proof of the prosecution's case beyond reasonable doubt, the sentence being harsh and excessive are matters which the appellant had addressed in his submissions filed on 27th November, 2019 and are therefore repetitive. The only other issue raised in the submissions filed by the appellant in response to the submissions by the DPP was for his sentence to be computed to include the period he was in custody before he was sentenced by the Trial Court, as per the provisions of Section 333(2) of the Criminal Procedure Code.

14. A summary of the evidence adduced before the lower court was that CC [name withheld] a minor aged 15 years had gone out to graze goats on 20th April, 2014 when she met with the appellant, whom she knew by name. She also knew him as a herdsman for her uncle.

15. They had sex 3 times in the bush after the appellant told her that he loved her. She indicated that her parents became suspicious after some time and took her for a pregnancy test. It turned out to be positive. She stated that she had already informed the appellant that she was pregnant. That her parents took her to the chief's office and then to the police station. She was referred to hospital and a document (P3 form) was filled. Another document regarding her age was also filled.

16. PW2 Hassan Kidanga was the head teacher of the school PW1 used to attend. He testified that there were allegations that PW1 was pregnant and he informed female teachers. PW1 was thereafter taken to hospital and it was confirmed that she was pregnant. He stated that 2 uncles of PW1 went to see him in school and pleaded with him to be allowed to marry her off because she was already pregnant. He further testified that he wrote letters to the chief and other government agencies about the issue. PW2 gave evidence that he spoke to PW1 and she told him that the person responsible for her pregnancy was the appellant. PW2 indicated that he knew him as a herdsman in their area. He later rerecorded a statement after being requested by the chief to go Mariakani Police Station.

17. PW3 was No. 427000 Corporal Michael Kimani. He was the Investigating Officer. He stated that he was assigned this case after PW1's P3 form had been filled and she had been taken for age assessment. He found out that the appellant was already in custody. He recorded statements from witnesses.

18. PW4, Abdulla Gobu was a Clinical Officer based at Mariakani Sub-County Hospital. He produced PW1's P3 form on behalf of his colleague Chigulu Mwangolo whose handwriting and signature he was conversant with, as the two had worked together for 5 years. He stated that PW1 was examined on 1st July, 2014 after an allegation of defilement had been made. On examination, she was found to be 16 weeks pregnant. It was concluded that she was pregnant secondary to defilement. PW4 further indicated that an age assessment was done and it was confirmed that PW1 was 15 years old. He produced the P3 form and age assessment report for PW1.

19. The appellant gave sworn defence to the effect that he was a herdsman from Chigombero. That on 20th April, 2014 as he was taking back cows after herding them (sic), he saw one of the witnesses in this case with the PW1 but he could not tell what they were discussing. He further stated that on the 14th July, 2014 when returning from Mariakani town he was stopped by one of the witnesses in this case and told to follow him to the chief's office, where he was detained on an allegation of defilement. He was thereafter taken to Mariakani Police Station and to court the day after. He denied having committed the offence he was charged with.

ANALYSIS AND DETERMINATION

20. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced and reach its own independent conclusion while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. The said duty was espoused by the Court of Appeal in the case of ***Njoroge v Republic*** *[1987] KLR 19 at p. 22 in the following words:-*

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570."***

21. The issues for determination in this appeal are:-

(i) If DNA examination was necessary to determine the paternity of the child borne by PW1;

(ii) If failure to call the person who arrested the appellant was fatal to the prosecution's case;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) Whether the sentence meted out to the appellant was harsh or excessive.

If DNA examination was necessary to determine the paternity of the child borne by PW1.

22. The appellant decried the fact that he did not undergo a DNA examination to determine if he was the one who impregnated PW1. He suggested that there was a possibility that PW1 could have had sex with other men and become pregnant as a result. When the appellant was given an opportunity to cross-examine PW1, he did not pose any question to her on whether she had sexual intercourse with anyone apart from him.

23. In her evidence, PW1 stated that she came across the appellant in the grazing fields and he told her that he loved her and they had sex 3 times. The appellant suggested that PW1 meant that they had sex on 3 different occasions. This court's understanding of PW1's evidence was that when they met on 20th April, 2014, they had sex 3 times on the said date. The provisions of Section 36 of the Sexual Offences Act are clear that DNA examination is not a mandatory requirement in defilement cases.

24. In **AML v Republic** [2012] eKLR, the Court of Appeal held that –

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

25. In the Court of Appeal decision in **Williamson Sopwa Mwanga v R**, Malindi Court of Appeal Criminal Appeal No. 52 of 2014, the said court stated as follows on the issue of paternity –

> ***" ……. it is patently clear to us that whilst paternity of PW1's child may prove that the father of the child had defiled PM, that is not the only evidence by which the defilement of PM can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that a sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at most determine whether he was the father of PM's child, which is a different question from whether the Appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured (See Twehangaine Alfred v Uganda Cr. App. No. 139 of 2001. It is partly for this reason that Section 36(1) of the Sexual Offences Act is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."***

26. This court's finding on the issue raised by the appellant about paternity is that the Trial Court set out to determine whether the appellant was the one who defiled PW1 and not about the paternity of the child that PW1 was carrying in her womb. The facts in the case of **Joseph Kinyua Nyaga v Republic** (supra), which was cited by the appellant, are distinguishable from the facts in this case as in the case of **Joseph Kinyua Nyaga** (supra), the complainant had engaged in sexual intercourse more than once between 13th October, 2009 and 18th February, 2010. The court could therefore not rule out that she had done so with someone else. In this case, PW1 was clear in her evidence that she had sex with the appellant 3 times on 20th April, 2014. She never spoke of having had sex with anyone else either before or after she had had sex with the appellant. The appellant's submissions that no DNA examination was done on him cannot hold.

If failure to call the person who arrested the appellant was fatal to the case by the prosecution.

27. In his defence the appellant he stated thus –

> *"On 14th July, 2014 I had been sent to Mariakani Town and on my way back, I met one of the witnesses in this case. He was on a motorbike. He stopped and told me to follow him to the chief's office. I was then detained there and they alleged the complaint."*

28. The above clearly shows that the appellant's source of arrest was known and since he said that he was taken to the chief's office by someone who was a witness in this case, and the chief then took him to the police station, the source of his arrest was known. Even if the chief had been called by the prosecution to give evidence, he would not have adduced other evidence save for what the appellant said about the source of his arrest. In any event, the chief was not an eyewitness to the commission of the offence. Furthermore, the provisions of Section 143 of the Evidence Act state that no particular number of witnesses shall be required to prove a fact, unless otherwise stated in law. The appellant's ground of appeal to the effect that his source of arrest was not established is without merit.

If the prosecution proved its case beyond reasonable doubt.

29. The only eyewitness account which was adduced by the prosecution was that of PW1. She stated that she had sex with the appellant 3 times on 20th April, 2014. He was well known to her as he worked as her uncle's herdsman. PW1's evidence remained firm during cross-examination.

30. She underwent age assessment and it was established that she was 15 years old. She was therefore a minor. The fact that she was defiled

was corroborated by medical evidence adduced by PW4 that she was taken to hospital on 1st July, 2014 and examined. She was then 16 weeks pregnant, which was secondary to defilement.

31. With regard to the evidence of PW1, the Trial Court in its judgment stated that the complainant struck him as a truthful witness and the appellant was a person well known to her. Though not expressly stated in his Judgment, in doing so the Trial Court adhered to the proviso to Section 124 of the Evidence Act to the effect 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; if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

32. In the case of **George Kioji v Republic** Nyeri Criminal Appeal No. 270 of 2012, the Court of Appeal stated thus on the evidence of a single witness to the commission of a sexual offence-

> ***"Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

33. The Trial Court recorded that the reason why he believed the evidence of PW1 was because she struck him as a truthful witness. Her evidence must be considered alongside the defence made by the appellant who only spoke of how he was arrested and taken to the police station. The appellant's defence was considered by the Trial Court which found that the prosecution had proved its case beyond reasonable doubt. This court's finding is that despite his denial that he committed the offence, the evidence against him was overwhelming. It is the finding of this court that the appellant was properly convicted. I hereby uphold his conviction.

Whether the sentence meted out to the appellant was harsh or excessive.

34. Section 8(3) of the Sexual Offences Act provides for a minimum sentence of 20 years imprisonment for an offender who commits defilement with a child between the age of twelve and fifteen. Although Ms Mwangeka stated in her written submissions that the appellant was sentenced to life imprisonment, he was sentenced to 20 years imprisonment.

35. Apart from the case of **Francis Karioko Muruatetu** (supra), the appellant relied on the decisions in **Hamisi Masudi Gambere v Republic** [2019] eKLR where the appellant who was convicted for the offence of defilement had his sentence reviewed from 15 years to 11 years imprisonment. The appellant also relied on the case of **Eliud Muchonde v Republic** [2017] eKLR where the High Court reduced the sentence of the appellant therein from 15 years to 3 years imprisonment. This court has looked at the decisions cited by the appellant and indeed appreciates that Trial Courts and appellate courts have the discretion when it comes to sentencing, in instances where minimum sentences are provided for.

36. In **Juma Baya v Republic** [2020] eKLR, the appellant therein was 19 years old while the victim who was defiled was 15 years old. The Court of Appeal noted that mitigating factors had not been considered by the Trial Court and the first appellate court. The Court of Appeal considered the age of the appellant and the circumstances in which the offence was committed. In this case, the Trial Court considered the mitigation proffered by the appellant. I have also done so.

37. Noting that the age difference between PW1 and the appellant herein was 3 years, and that both were teenagers, I am inclined to interfere with the sentence. I hereby set aside the sentence of 20 years and substitute thereof a sentence of 12 years imprisonment. Since the appellant was in custody throughout his trial before the Magistrate's court, in line with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence shall be effective from the 15th of July, 2014 when he was first arraigned in court. The appeal succeeds to the above extent. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **June, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi - Prosecution Counsel, for the DPP

Mr. Oliver Musundi - Court Assistant.