



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO. 17 OF 2019**

**JAPHET BUNDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. N. KAHARA (R.M) in the Chief Magistrate's Court at Chuka Law Courts in Criminal Case No.SOA 44 of 2015 dated 18<sup>th</sup> February 2019)*

**J U D G E M E N T**

1. **JAPHET BUNDI** the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence as per the charge sheet are that on 24<sup>th</sup> May 2015 in Iriya Muthambi Location within Tharaka Nithi County he intentionally caused his penis to penetrate the vagina of (name withheld) a child aged 16 years.

2. The Appellant denied committing the offence including the alternative charge of committing an indecent act with a minor contrary to **Section 11(1)** of **Sexual Offences Act**. After trial however he was found guilty of the main charge and convicted. He was sentenced to serve 15 years imprisonment. He was dissatisfied with both the conviction and sentence and preferred this appeal.

3. A brief look at the evidence presented at the trial shows that the victim of the offence was found to be a vulnerable under **Section 31(5)** of the **Sexual Offences Act** by the trial after mental assessment carried out on her revealed she is not fit to testify on her own. The mother, JK(PW1) then testified on her behalf and informed the court that her daughter (victim in the case) was mentally challenged and was born in 1999. She told the trial court that she had sent her daughter to buy some sugar from a Kiosk that the Appellant ran and that the girl brought the sugar and disappeared for a month and only reappeared when she was already pregnant. The girl gave birth on 31<sup>st</sup> January 2016 to a baby girl and the mother brought her to court when she testified. She blamed the Appellant for taking advantage of her daughter.

4. The prosecution applied for DNA analysis to be taken to confirm if the Appellant was the father of the minor who at the time of hearing was aged 2years and the results from Government analysisist tendered by Emily Okoro (PW2) confirmed that the Appellant was actually the father of the child. PW1 told the trial court that the time her daughter disappeared was in tandem with when the little girl was born.

5. Mr. Kaburi John Mwiti, a mental health worker at Chuka General Hospital tendered mental assessment report he authored as P. Exhibit 5 showing that the minor was unstable with mild retardation. He also tendered age assessment report as P. Exhibit 2 which indicated that the complainant's approximate age was between 15 and 16 years.

6. When placed on his defence the Appellant gave unsworn defence and simply denied committing the offence stating that he had been implicated.

7. The trial court evaluated the evidence tendered and found that the Appellant had engaged in sexual intercourse with the complainant on 24<sup>th</sup> May 2015 because she conceived the same month and 9 months later a child was delivered whose DNA test revealed that he was the father. The trial court further found that an offence was committed under Sexual Offences Act because the complainant was aged 16 years as per age assessment report. He court then convicted the Appellant and sentenced him to 15 years imprisonment.

**The Petition of Appeal**

8. In this appeal, the Appellant has raised the following grounds namely;

*(i) That the learned trial magistrate erred in law and fact in entertaining a charge brought under Sexual Offences ct instead of Section 146 of the Penal Code.*

(ii) *That the learned trial magistrate erred in fact in failing to find that the testimony of PW1 was unbelievable .*

(iii) *That the trial magistrate failed to note that the evidence of PW1 and PW3 were contradictory and failing to apply the contradiction in favour of the Applicant.*

(iv) *That the learned trial magistrate erred by admitting evidence in contravention of Section 33 and 77 of the Evidence Act.*

(v) *That the learned magistrate made conclusions without aid of evidence.*

(vi) *That the learned trial magistrate erred by disbelieving the Appellant.*

(vii) *That the learned trial magistrate erred by making assumption that conception can only result from an act of sexual penetration.*

9. In his written submissions through learned counsel M/s Basilio Gitonga, Murithi and Associates the Appellant contends that the prosecution ought to have amended the charge sheet once it was established that the complainant was afflicted by mental retardation. In his view the offence fell under **Section 146** of the **Penal Code** and that failure to amend the charge rendered conviction a nullity.

10. The Appellant further avers that the PW1 was not credible when she told the trial court that she suspected that her daughter (complainant) was pregnant after disappearing between 24<sup>th</sup> May 2015 to 27<sup>th</sup> June 2015 arguing that period of 33 days is not sufficient for the pregnancy to be visible.

11. The Appellant further contends that the mother did not allude that her daughter was retarded contrary to the evidence of PW3 and that the said contradiction should have been applied to the benefit of the appellant which was not the case.

12. The Appellant has faulted the production of DNA report (P. Exhibited 3) P3 form (P Exhibited 6) and age assessment report (P. Exhibit 7) as evidence stating that the production did not strictly adhere to **Section 33(b)** as read with **Section 77 Evidence Act**.

He insists that it was not demonstrated that Nelly Papa who conducted the DNA examination could not be procured at all or could not be procured without an unreasonable amount of delay or expense. He avers that a mere fact that PW2 was a colleague to the said Nelly Papa and was familiar with her handwriting and signature was not sufficient to render the report admissible.

13. The Appellant also avers that a mental health worker is not qualified to assess the age of the complaint or fill in a P3 form. The Appellant submits that with the above deficiencies, the offence was not proved and has pointed out that the following 2 elements were not proved;

- i) Penetration
- ii) Age of the victim

He has relied on the case of *John Michubu -vs- Republic (Meru H.C CRA No. 184 of 2009.)*

14. The Appellant contends that there was no sufficient prove of penetration because the DNA samples taken only related to the child and the Appellant and he argues that because no specimen was taken from the mother there was no evidence to show that the complainant was the mother of the child. He relies on the decision of *David Nderitu Rukwaro- vs- Republic [2016] eKLR* where the court *inter alia* observed that that in the absence of a certificate of birth of the complainant's child or any other evidence to demonstrate the birth of the child it could not be assumed that the complainant begot a child whose father was the Appellant or that the Appellant could not be linked to a child whose existence had not been proved. The Appellant further contends that even PW1 was the mother there was no evidence that the child was conceived through penetrative sex. In his view the case against him was not proved beyond reasonable doubt and has relied on the case of *Ismail Ibrahim Kofa -vs- Republic [2014] eKLR*

15. The Respondent has conceded to this appeal vide written submission through the Office of the Director of Public Prosecution dated 19<sup>th</sup> May 2020. The grounds upon which this appeal has been conceded are;

*i) That the trial court did not follow the laid down procedure in declaring the victim a vulnerable witness under Section 31 of Sexual Offences Act.*

*ii) Production of DNA report, P3 and age assessment did not conform to the dictates of Section 33 of the Evidence Act.*

16. In view of the Respondent's concession this court has considered the grounds upon which the State has conceded to this appeal and finds them valid.

17. In the first place, the trial court erred by failing to adhere to the procedural requirement under **Section 31 (3)** of the **Sexual Offences Act** before taking the evidence of the victim's mother. This court finds that based on the evidence tendered by the medical officer, there was sufficient basis to declare the victim a vulnerable witness but upon such declaration, the trial court should have invited the mother or any guardian of such a victim to lay basis of the vulnerability and the extent of the same before proceeding to declare the mother or guardian an intermediary in terms of **Section 31 (5)** of the **Sexual Offences Act** in order to testify on behalf of a person who for reasons of mental

retardation or any other affliction is unable to testify.

18. Secondly and more importantly it is imperative that a trial court must be diligent when dealing with expert evidence.

19. The provisions of **Section 48** of the **Evidence Act** provides that opinion of experts in a given field are admissible. However a trial court must first satisfy itself that the person giving an opinion or statement is a person specially skilled or possess expertise in that given field before admitting the opinion/statement in evidence. A trial court as a matter of practice should require such experts lay basis for their expertise before proceeding to testify.

I have gone through the proceedings and find that PW2 clearly laid basis for her expertise in DNA analysis. However, I find that the trial court and the prosecution failed to lay sufficient basis for her under **Section 33** of **Evidence Act** to testify on behalf of her colleague. It is given that the Government Chemist works under constrained environment because of lack of sufficient staff etc but the same ought to be brought out clearly in order to comply with the requirements of **Section 33** of the **Evidence Act** otherwise such evidence would be rendered hearsay evidence despite expense & time taken to procure attendance of such an important witness.

20. I have also noted that the prosecution and the court in regard to PW3 totally failed to lay any basis on the expertise of Kaburu John Mwiti. Going by the court proceedings, the qualification of PW3 is really a matter of conjecture. Was he an accountant, Nurse, Doctor, Clinical officer or even a cleaner working at the department of Mental Health at Chuka General Hospital? There was no basis laid in terms of **Section 33** of **Evidence Act** or **Section 48** for him to tender P3, age assessment and even the mental assessment report.

The above shortcomings in my view rendered the trial a mistrial because there is no evidence that the "*experts*" who tendered the expert opinions upon which the conviction of the Appellant was based were actually qualified in terms of **Section 48** of the **Evidence Act**. The attendant result of the above was that neither the victim nor the Appellant got justice and they cannot be faulted in any way. In the end this court finds that in the interest of justice, I will allow this appeal by setting aside the conviction and reversing the sentence. I also find that this is one of cases that is prudent to exercise my discretion under **Section 354 (3) (a) (i) Criminal Procedure Code** and order for a retrial before another court of competent jurisdiction because the incident is still fresh and all the persecution witnesses can easily be traced. I direct that the Appellant be produced before the Chief Magistrate's Court Chuka for fresh plea and in view of the **Covid -19** Pandemic, that court and the prison authorities should explore all possibilities to ensure that the Appellant is produced for fresh plea even through any other media like skype or zoom if physical production becomes a challenge. The fresh plea shall be taken before the Chief Magistrate's court on 2<sup>nd</sup> July 2020.

**Dated, signed and delivered at Chuka this 29<sup>th</sup> day of June 2020.**

**R. K. LIMO**

**JUDGE**

**29/6/2020**

Judgment signed, dated and delivered in the open court in presence of Murithi for Appellant who is connected via zoom and Momanyi for State.

**R.K. LIMO**

**JUDGE**

**29/6/2020**