REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 22 OF 2019

JAMES KATITA RUPAI……...……..…..…… APPELLANT

VERSUS

REPUBLIC……..……...……..…..RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. C. A. Mayamba dated 21/02/2019 in Kilungu SRM Sexual Offence Case No. 8A of 2018.)

JUDGMENT

1. **James Katita Rupai** the Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on diverse dates between 15th day of January 2018 and 17th day of January 2018 at Mukaa sub-county within Makueni county intentionally caused his penis to penetrate the vagina of **M.W.K** a child aged 15 years.

2. After a full trial he was found guilty, convicted and sentenced to fifteen (15) years imprisonment. He was dissatisfied with the judgment and filed this appeal citing several grounds which he later amended and reduced them to the following:

a) **That,** the trial Magistrate erred in law and fact by failing to find that the prosecution did not prove identification beyond reasonable doubt.

b) **That,** the trial Magistrate erred in law and fact by failing to find that Pw1 was an incredible witness worth of belief.

c) **That**, prosecution did not prove its case beyond reasonable doubt as required by the law.

3. The prosecution case is premised on the evidence of eight witnesses. The complainant (MWK) testified as Pw1. She stated that on 14th January 2018, she had met the Appellant at the river and they exchanged greetings, and she went home as the Appellant went to M. While at home her mother (Pw2) arrived from church and asked her for water which she gave to her. Pw2 went to the bedroom leaving the child on the seat. Later Pw2 asked for the child who was crying and she gave instructions for her to wash school bags for the other children.

4. Pw1 did not comply and instead wore her shoes and left for a walk to M. Darkness found her on the way and she went to the Appellant's home and waited near a tree. The Appellant came back and parked his motorbike and asked her to wait under the tree as he went to their house. He further asked her to wait for his parents to eat and sleep and later he would come for her and also bring her food. He later brought her food behind the toilet.

5. The next stop was the sitting room then his bedroom where they engaged in sex just once. The next morning, she was brought tea in the bedroom. Thereafter he took her behind the house and assisted her scale the fence and she took the route towards Konza and went to the river. The Appellant passed by and promised to bring her food in vain. She went back to the Appellant's home in the evening and hid under the tree again. He came and took her to his bedroom. That night there was no sex.

6. The following day she scaled the wall again and on the way she met her mother and she ran away towards Konza. In the evening she again went back to the Appellant's home and waited near the gate. He came and ushered her into the house and gave her food and they went to sleep, but they did not have sex. The next morning, she again scaled the wall with his help.

7. As she walked towards Konza, she met mama Maureen who invited her to her house for breakfast. She inturn called Pw1's father who came for her and took her home. The father later took her to hospital when she was examined and found to be pregnant. Its then that the matter was reported.

8. In cross examination she said she had cheated the mother about sleeping in the forest. That she was taken to hospital on 3rd February 2018

and found to be pregnant. Its then that she mentioned the Appellant's name. She said her mother (Pw2) used to send her to the creditors around 6:00 pm to collect her debts.

9. Pw2 **VWM** is Pw1's mother. She testified that when Pw1 was eventually found she was very weak. She informed her that she had been sleeping in the bushes and eating wild fruits. She knew the Appellant as her customer in the kiosk. She confirmed that upon being tested Pw1 was found to be two weeks pregnant. She produced Pw1's birth certificate as EXB1. It shows her date of birth as 15th July 2002.

10. In cross examination she said that was the first time for Pw1 to escape from home. She was found with the Sunday school teacher. Reports had been made but no one had reported having seen Pw1 with the Appellant. She denied ever having sent Pw1 to the Appellant's home to collect debts.

11. Pw3 **SKM** is Pw1's father. His evidence is similar to that of Pw2. In cross examination he said despite the caning, Pw1 did not reveal anything to them, not even the owner of the sweater she wore.

12. Pw4 **Mercy Musingi** a nurse at Sultan Hamud sub-county hospital carried out a pregnancy test on Pw1 which was positive on 3rd February 2018. She produced the treatment card as EXB4.

13. Pw6 **Dr. Charles Mwendwa Mutisya** filled the P3 form for Pw1 on 4th February 2018. Upon examination of Pw1, he found the following:

- Normal labia
- Broken hymen
- Urine test was positive for pregnancy
- HVS showed no spermatozoa
- HIV and Syphilis tests were negative

He produced the P3 form as EXB2. It is his evidence that a hymen can be perforated by any object not necessarily the penis.

14. In cross examination, he said the hymen was not broken but perforated. He could not tell when it was broken. They did not conduct a blood pregnancy test.

15. Pw7 **Gadita Mutange Katuku** a clinical officer based at Sultan Hamud hospital filled the PRC form in respect of Pw1. She examined her on 4th February 2018. All tests conducted were negative save for the pregnancy one. She produced the form as EXB3. She confirmed that urinalysis for pregnancy turns positive after 14 days. She too could not ascertain when the hymen was broken.

16. Pw8 **No. 101196 PC Lucy Ashikhongo** investigated the case. She relied on the evidence of Pw1 to arrest and charge the Appellant. She did not visit the scene and neither did she interrogate the Appellant's brothers. She did not get any independent evidence to verify Pw1's presence there.

17. The Appellant gave a sworn statement of defence. He denied the charges saying he lives with his parents and elder brother in the same house and could not therefore bring there girls. He knows Pw2 from whose kiosk he buys things. He was arrested from the stage at M market at 8:00 pm. He said he is a bodaboda operator.

18. Dw2 **Joshua Lenana Rupai** is an elder brother to the Appellant. He said the Appellant stays in their father's house, and he shares the same room with him but different beds. He testified that the Appellant could not have brought girls in their parents' house.

19. The appeal was canvassed by way of written submissions. The Appellant had filed submissions due to delays by his advocate. Mr. J. Kamanda much later filed submissions on 8th July 2020. Since his instructions had not been formally withdrawn, I have accepted the submissions to be placed on record and discard those filed by the Appellant in person.

20. His first issue is with the evidence of Pw1 which was not corroborated. Secondly, he argues that Pw1 never complained of any wrong doing by the Appellant to her parents. The only complaint is that she was under 18 years. He submits that Pw4, Pw6 and Pw7 only confirmed that Pw1 was pregnant but they did not know the age of the foetus or when she had her last menses.

21. He further submits that Pw6 and Pw7 could not tell when the hymen was broken. That the Appellant's name only featured to make him responsible for the pregnancy and not that he committed the offence. She had not mentioned the name when the father had threatened to beat her on 17th January 2018.

22. Counsel submits that Pw1 did not qualify the sex she talked about, since oral sex qualifies as sex. That she did not talk of penetration. He referred to the case of **Salim Hamisi Kiswere –vs- Republic (2018) eKLR** where it was held:

> ***…… There was no specific evidence given by the said witness as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not.***

23. He discredits Pw1's evidence as that of a conniver. Her conduct he says was as that of an adult and section 8(5) of the Sexual Offences Act should have been invoked. It provides as follows:

(5) It is a defence to a charge under this section if –

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

To support this counsel referred to the cases of **Eliud Waweru Wambui –vs- Republic (2019) eKLR; Martin Charo –vs- Republic (2016) eKLR.**

24. He submits that Pw1's testimony points to a person who took herself to the Appellant's house for sex and did not return home. He contends that the Appellant's defence was dismissed without being analysed.

25. The appeal was opposed by the Respondent through the submissions filed by learned counsel Mrs. Anne Gakumu. It's her submission that the three ingredients of *age, penetration* and *identification* were proved.

26. Counsel further submitted that the *proviso* to section 124 of the Evidence Act provides that no corroboration is required in sexual offences where the court believes that the complainant is telling the truth as in this case. She made reference to the case of **Geoffrey Kioji –vs- Republic Criminal Appeal No. 270 of 2010 (Nyeri)** where it was stated that:

"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 accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an 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 reason for belief."

27. It is her contention that the late reporting did not occasion the Appellant any prejudice. On the *alibi* defence, counsel submitted that the same was an afterthought since the Appellant and his witness (Dw2) did not indicate the dates when they were both at home.

28. On whether there was any violation of Article 50(2) (c) of the constitution she submits that the trial was fair and witnesses were recalled for cross examination when the Appellant brought an advocate on record. She urged the court to dismiss the appeal and enhance the sentence to 20 years' imprisonment as provided for by the law.

Analysis and determination

29. This is a first appeal and it's the duty of this court to re-analyze and reconsider the evidence on record and come to its own conclusion. It should bear in mind that it did not see nor hear the witnesses. These principles were laid out by the Court of Appeal in the case of **Okeno –vs- Republic (1972) E.A 32**. It was reiterated in the case of **David Njuguna Wairimu (2010) eKLR** where the Court of Appeal stated thus:

"That the duty of the 1st appellate court is to analyze and re-evaluate 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 circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that 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."

30. I have accordingly considered the evidence on record, the grounds of appeal, both submissions and authorities cited. What I find falling for determination is *whether the prosecution proved its case against the Appellant beyond reasonable doubt.*

31. The offence of defilement can only be said to have been proved if the elements of *age, penetration* and *identification* are proved. I will therefore proceed to examine these ingredients one by one.

Age of complainant

32. Pw1 told the court that she was born in the year 2002 and was 16 years of age as at 5th March 2018 when she testified. Her birth certificate produced as EXB1 shows she was born on 15th July 2002. The alleged dates of offence are 15th – 17th January 2018. As at that time she was therefore aged 15 years, 6 months. The particulars indicate that she was aged 15 years. I therefore find that age was proved to be 15 years.

Whether penetration was proved

33. Pw1 testified that she engaged in sex with the Appellant on 14th January 2018. She did not however give details of what allegedly transpired on that night. It was Pw4's evidence that a urine test for pregnancy conducted on Pw1 on 3rd February 2018 was positive. It therefore confirmed that Pw1 was pregnant. This further confirms that her genital organ was at one point in time or several times penetrated. This penetration must however be linked to the Appellant for the conviction to stand.

Whether the Appellant was identified as the perpetrator

34. The charge sheet shows the dates of commission of this offence as: ***"diverse dates between 15th – 17th January 2018"***

Pw1 in her evidence was categorical that the act of sex only took place once and this was on 14th January 2018. Even with this statement from Pw1 neither the trial court nor the prosecution deemed it fit to have the charge sheet amended to reflect the true position.

35. The medical evidence in this case besides confirming the pregnancy has not helped to determine exactly when the penetration took place. The medical evidence did not determine the age of the foetus, at the time of testing. It follows that the only key evidence in this case is that of Pw1. Was she a credible witness?

36. Section 124 of the Evidence Act provides:

> ***"Notwithstanding the provisions of section 19 of the oaths and Statutory Declarations Act w here the evidence of alleged victim admitted in accordance with the 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."***

37. As was held in the case of **Geoffrey Kioji –vs- Republic** (*supra*) under the *proviso* to section 124 Evidence Act a court can convict an 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 reason for such belief. It is therefore important for this court to assess Pw1's credibility.

38. It was Pw1's evidence that despite the fact that she had been sleeping with the man from the nights of 14th January up to 17th January 2018 morning she only had sex with him once on the night of 14th January 2018 and she kept on going back at nobody's invitation. Pw1 is a child who had done KCPE in 2017 and was to join form one in January 2018. She disappeared from home on 14th January 2018 and only reappeared on 17th January 2018!

39. When she re-appeared on 17th January 2018 she was first taken in by her Sunday school teacher known as mama Maureen. The said mama Maureen was never called to testify. She is the lady who would have told the court how she met Pw1, where they met, the state she was in and what Pw1 told her. The prosecution did not find her to be a crucial witness if at all she ever recorded a statement.

40. From the evidence of Pw2 and Pw3 who are the parents of Pw1, its clear that upon her re-appearance Pw1 did not tell them she had been sleeping at the Appellant's home. What she told the parents was that she had been sleeping in the forest and eating wild fruits. Both parents said the girl appeared weak. Pw1 in her evidence said she was being given food by the Appellant. If indeed she was being given food by the Appellant why was she looking weak as witnessed by her parents?

41. It is either she was staying in the forest and only eating wild fruits or she was living with the Appellant and not being given any food. It is only Pw1 who knows the truth. It is not clear from her evidence what she was engaged in during the day before she would "return" to the Appellant's gate in the evening.

42. When Pw1 re-appeared she was not taken to hospital immediately. The obvious reason is that she did not disclose to the parents that she had been sleeping with any man. The parents believed her and started preparing her for school. Again upon her return she disappeared on a Friday in the name of looking for a donkey. This is what her mother told the court in cross examination at **page 17 lines 14-19** in respect to her conduct:

> *"On 2/2/2018, we went to Eagle medical clinic. I am the one who came with the idea of testing her for pregnancy owing to her behaviours. She informed me that it was James. I did not take her to check how many times she had been involved in sexual encounters. I checked her inner pant but did not notice anything unusual when she came back home."*

Pw2 had noticed that Pw1's behaviours were not good. She could not her trust and so had to do a pregnancy test before the girl could be taken to school.

43. Pw1 confirmed that she only mentioned the Appellant's name when she was found pregnant. This is what she said in cross examination at **page 15 lines 18 – 20**

> *"I mentioned accused's name when I was taken to the hospital on 3/2/2018. I did not at first know why I was being taken to the hospital. I mentioned his name when I was found pregnant."*

44. It is obvious that had she not been found pregnant she would never have mentioned the Appellant's name. So was he the real culprit? Pw1 also said her mother used to send her to the creditors at around 6:00 pm to collect her money. That Pw2 had sent her to the Appellant's home prior to this date, so she knew the home well. The mother (Pw2) denied all this.

45. From all that, I have set out above, Pw1 gives an impression that she is not a truthful girl. She lied to the parents and even her own

mother was suspicious of her. The evidence of such a witness must be corroborated for the court to rely on it. In the case of **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal had this say of such a witness: -

> ***(4) The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence***.

46. No evidence was placed before the court of anyone who ever saw Pw1 and the Appellant together or even at their home. Pw1 said she would go in the late evening and wait for the Appellant under a tree near the gate to the Appellant's home. What was her desperation and agenda? The Appellant never invited her there. There is basically nothing to corroborate Pw1's evidence as to the identification of the Appellant as the perpetrator. They may be knowing each other yes but the issue is whether he is the one who allegedly defiled Pw1, between 15th – 17th January 2018. Even Pw1 herself said she was never involved in sex from 15th – 17th January 2018.

47. There was mention of a sweater the Appellant allegedly came demanding for from Pw2. Who had this sweater? The same was never availed to the court for purposes of identification and even Pw1 did not make mention of it. The Appellant denied the charge saying he could not have brought girls into his parents' house. His brother (Dw2) supported him on this. I would only have analyzed his defence had I been satisfied that the prosecution had established its case against him.

48. My finding is that the prosecution case fell short of the requirement of proof of its case beyond reasonable doubt. Its key witness has been found not to be credible and there was no evidence to corroborate her narrative.

49. The court has been left with a doubt in its mind as to the culpability of the Appellant. I therefore find this appeal to be meritorious and I allow it. The result is that the conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

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

…….

H. I. Ong'udi

Judge