REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 3 OF 2018

SOLOMON KOSEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the judgement (conviction and sentence) of Hon. W. Juma, CM, delivered on 8/2/18 in the Chief Magistrate's Court at Narok in Criminal Case (SOA) No. 50 of 2016, Republic v.* Solomon Kosen)

J U D G E M E N T

1. The Appellant has appealed against his conviction and sentence of fifteen (15) years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported the conviction and sentence.

3. In this court the appellant has raised seven (7) grounds of appeal in his petition of appeal; which his counsel, Mr. Kamwaro has coalesced into three grounds.

4. In ground 1 counsel has summarized it as to: "*Whether the trial court misdirected itself in law and in fact in convicting the appellant yet the report exonerated the appellant as a father of the child the product of the alleged defilement."* In this regard, the evidence of the victim (Pw 2), E.P, the initials of her name, is that she was 17 years old and was in class 7. She also testified that she was a girlfriend of the appellant, which continued until 5/5/2016. She continued to testify as follows. It was on 5/5/2016 that she slept with the appellant for the first time. The time when she had sex with the appellant was during day time. It was on that day that she became pregnant.

5. Furthermore, there is the evidence of the clinical officer namely Benjamin Tum (Pw 1). Pw 2 examined the victim on 24/6/2016. His findings were as follows. She was sober and had no injury on the neck, head, throat, abdomen, upper and lower limbs. Upon the examination of the genitals, there was no hymen, it was long standing broken. It is on this basis that Pw 4 concluded that there was penile penetration. Pw 4 then requested for a pregnancy test, which was positive. Pw 4 then advised the victim to start ante natal clinic. Pw 4 then produced his report as exhibit exh 1A.

6. In addition to the foregoing evidence, there is the evidence of No 77299 Cpl Joyce Ruto (Pw 5), who was the investigating officer. It was her evidence that on 23/6/2016 the parents and brothers of the victim reported that the victim was missing. As a result, she booked the report under OB No. 26 of 23/6/2016. On the same day they brought the victim to the police station. Pw 5 learned that the appellant was in T.M. area. They arrested him on 24/6/2016. Pw 5 took the victim to hospital; where a P3 form was completed; which was put in evidence as exhibit exh. 1. The victim was expectant.

7. Pw 5 obtained a court order for a DNA to be done. Thereafter they obtained a report dated 28/4/2017, which was prepared by the Government Chemist department analyst namely R.K. Langat. The report was put in evidence as exhibit exh. 3. It was her evidence that the said report excluded the appellant as the biological father of the of the victim's child.

8. The appellant testified on oath denying the charge. The appellant testified that he was arrested on 24/5/2016 and he was not told the reason for the arrest. He further testified as follows. He did not know the victim. The victim went to where the appellant stayed in Nairasirasi in March 2016; when the appellant was in school. In May 2016 he returned home from school and within two weeks he was arrested for *"something I did not know."*

9. Under cross examination the appellant admitted that he had known the brothers of the victim, since 2015. It is these brothers who arrested him. Two of the eldest brothers of the victim are his age mates. It was also his evidence that he had no grudges against the brothers of the victim. And that it was his parents who had shamba disputes, which have not been resolved.

10. The appellant called his father namely John Kosen Palkeyo Ole Kosen (Dw 2) as his witness. Dw 2 testified that he knew the victim as a

neighbour for a long time. Dw 2 further testified that they had never had a shamba dispute with the family of the victim.

11. The appellant also called Emmanuel Kosen (Dw 3), who is his younger brother. Dw 3 testified that he did not know the victim; although he admitted knowing the family of the victim since childhood. Dw 3 also testified that he knew they were taken for DNA testing; but he did not know the results of that DNA testing. He also admitted knowing the brothers of the victim; who were his former schoolmates. He also admitted that there were no differences between their family and that of the victim. He admitted knowing the victim. He also admitted knowing that DNA testing was done and he did know the results.

12. This is a first appeal. I am required to independently re-assess the entire evidence and make my own independent findings. See *Pandya v Regina [1957] EA 336*. I have done so. In this regard, the respondent submitted that this was a case of proofing (*sic*) penetration and not proof of paternity. The respondent cited AML v Republic [2012] e-KLR (Mombasa), in which the court stated that: "The *fact of rape or defilement is not proved by way of a DNA test but by way of evidence."* Additionally, the respondent cited two more authorities which I find that they restate the same principle. I therefore need not cite those authorities.

13. The respondent also cited section 36 of the Sexual Offences Act which donates to the trial court a discretionary power to order for the carrying out of a DNA testing in respect of the concerned parties.

14. Finally, counsel for the respondent submitted that the trial court found the victim to be a credible witness, whose evidence was that it was the appellant who defiled her. Counsel has therefore submitted that the evidence adduced by the prosecution satisfies the requirements of section 124 of the Evidence Act (Cap 80) Laws of Kenya, which is in relation to a conviction being based on the evidence of the victim, if it is found credible.

15. In response thereto Mr. Kamwaro has submitted that the DNA profiling which ended with the production of the Government analyst report as exhibit exh. 3 exonerated the appellant as the biological father of the victim's child.

16. The issue that comes out of these rival submissions turns on the question whether or not the victim was rightly found to be a credible witness. According to the evidence of the victim, she became pregnant after having a sexual intercourse with the appellant. In other words, her evidence is that the appellant is the biological father of the victim's child. The report of the Government analyst exhibit exh 3, has excluded the appellant from being the biological father of the victim's child. After re-assessing the entire evidence as a first appeal court, I find that the victim was not a credible witness. And for that reason, the finding of the trial court that the victim was a credible witness is not borne out by the evidence on record. I further find that the Government analyst report exhibit exh 3 has exonerated the appellant from this offence.

17. Furthermore, I find that the trial court erred in rejecting the Government analyst report in the absence of other expertise evidence on record before the trial court. The accuracy of the DNA is rated very highly and is fairly reliable, although it is not conclusive proof of defilement. I find as persuasive the case of *Lemour v The State of Florida 802 So. 2d 402 (2001*), in which the court described the DNA in the following terms:

> "*DNA is derived from the chemical substance Deoxyribonucleic Acid that is used to enable the genetic information in living organisms. The usual objective of forensic DNA analysis is to detect variations in the genetic material that differentiate one individual from another. Its accuracy is rated very high and it is considered reliable."*

18. I also find as persuasive the case of *Eliud Ouma Agwara v Republic [2016] e-KLR,* in which the court stated that DNA testing is very accurate and that its accuracy is 100% correct. That court further observed that the prosecution did not challenge the DNA test nor did it call for a second opinion.

19. In view of the foregoing factual finding that the victim was not a truthful witness and the Government analyst that has exonerated the appellant, I find that the authorities cited by prosecution are applicable wherein the victim has been found to be a truthful witness, which is not the position in this case.

20. In the premises, I find that the report of the Government analyst in respect of the DNA profiling has excluded the appellant as the biological father of the victim's child. I further find that the appellant did not have sexual intercourse as alleged by the victim. It therefore follows that the trial court erred in rejecting the DNA expert report, which exonerated the appellant. I find that the said rejection is not supported by any evidence on record.

21. Furthermore, I find that the learned magistrate was right in rejecting the defence evidence on the ground that it was incredible. The evidence of the appellant was that he did not know the appellant. The evidence of his father (Dw 2) is that they are neighbours to the family of the victim. I therefore find it incredible that the appellant did not know the victim. Additionally, the appellant testified that their family has a land dispute with the family of the victim. The appellant's father contradicts his evidence in that regard. The father and the younger brother of the appellant testified that they do not have any land dispute with the family of the victim.

22. Where the defence has been discredited as in the instant case, it cannot form the basis of the conviction of the appellant. It still remains the duty of the prosecution to prove their case beyond reasonable doubt. And this burden never shifts to the defence, even where the accused is found to be a liar.

23. In the premises, I find that the appellant's appeal succeeds.

24. In the circumstances, I find it moot to consider the other grounds of appeal: see *The Attorney General V. Ally Kleist Sykes [1957] EA 257.*

25. The upshot of the foregoing is that the appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed.

26. The appellant is hereby ordered set free unless he is held on other lawful warrants.

Judgment signed, dated and delivered at Narok this 29th day of September, 2020 through video link in the presence of the appellant and Ms. Torosi for the Respondent and Mr. Kamwaro for the appellant.

J. M. BWONWONG'A.

J U D G E

29/09/2020