



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 30 OF 2019

ELISHA KIPKOECH MUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate (SRM)

Hon. Amwayi R. delivered on 2nd of April 2019 in Molo CM Criminal Case No. 39 of 2017

Republic Vs Elisha Kipkoech Mutai.

JUDGMENT

1. The Appellant 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** with alternative charge of **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the main charge are that on the diverse dates between the month of November 2016 and March 2017 at *[Particulars Withheld]* area in Kuresoi Sub County within Nakuru County, intentionally caused his penis to penetrate the vagina of **IC**, a child aged 17 years.

2. The particulars of the alternative charge are that on the diverse dates between November 2016 and March 2017, at *[Particulars Withheld]* area in Kuresoi Sub County within Nakuru County, intentionally touched the vagina of **IC**, a child aged 17 years with his penis.

3. The appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution calling 4 witnesses and the appellant gave unsworn statement. The trial magistrate found the appellant guilty and convicted him of the main charge. He was sentenced to 15 years Imprisonment. The Appellant being dissatisfied with the conviction and sentence filed this appeal on the following grounds: -

- i. THAT the Learned Trial Magistrate erred in law and fact by failing to find that the appellant was not served with the appropriate statement to defend himself.*
- ii. THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate that the age of the victim was not conclusively proved as required by the law.*
- iii. THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate that the DNA results did not connect the Appellant to the alleged crime.*
- iv. THAT the Learned Trial Magistrate erred in law and fact by failing to consider that the medical evidence adduced in Court did not connect the Appellant to the alleged offence.*
- v. THAT the Learned Trial Magistrate erred in law and fact by failing to consider that crucial witnesses were not called upon to testify.*
- vi. THAT the Learned Trial Magistrate erred in law and fact by failing to consider that the prosecution case was not proved beyond reasonable doubt as required by the law.*

SUBMISSIONS BY THE APPELLANT

4. Appellant submitted that he never participated in the crime in question; that he was innocent and still remain innocent to date. He submitted that he is not saying that the complainant was not defiled but his argument is his involvement in the said crime. He denied having defiled the complainant on diverse dates between 2016 November to March 2017.

5. He submitted that he used to attend the same church in which she also attended. She told the Court in her evidence that I approached her for love affairs which she accepted/conceded. He submitted that the complainant in her testimony said the appellant approached her and never forced her raising question as to his age.

6. He submitted that the complainant said that she had her first sexual intercourse with the appellant, which meant that she had never known any man or male sexually before and she further stated that she was certain that the appellant was responsible for the pregnancy. He stated that the complainant said she had sex with him in the year 2016 and that she missed her menstrual period in March 2017. He submitted that this raises question as to when she conceived. Further submitted that she gave birth on 17th July 2017. He submitted that even though the complainant alleged that he was responsible for the pregnancy, DNA examination was done and the report excluded him from being the father of the child. He urged Court to find that the charge was not proved beyond reasonable doubt and quash the conviction and set aside the sentence imposed.

SUBMISSIONS BY THE RESPONDENT

7. The state counsel submitted that in respect to age, the complainant stated that she was 15 years old and the same was corroborated by her mother who produced health card.

8. On identification, she submitted that PW 1 identified the Accused and stated that he was E and had known him well as they used to meet on Sundays. She stated that the Accused was a bodaboda operator and PW2 identified him as a neighbour; and PW4 stated that he arrested the appellant upon being identified by the complainant.

9. She further submitted that on penetration, PW1 stated that she had been defiled by the Accused on several occasions and she became pregnant and examination by PW3, she was 30 weeks. The exhibits were produced.

ANALYSIS AND DETERMINATION

10. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first Appellate Court are set out in the case of *Okeno Vs Republic [1972] EA 32* where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. 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 witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

11. In view of the above I have perused the lower court record. I note that the complainant testified that at the time of the alleged offence, she was in class eight and aged 16 years old. She stated that she was in a love affair with the appellant who was a moto cycle rider and that he told her his intention to marry her. She said they had sex in the forest every Sunday and that she missed her period in March 2017 and gave birth on 17th of July 2017. On cross examination she stated that they would have sex every Sunday when she went to the trading centre and that she never told her parents until she was pregnant.

12. PW2, **SCB**, the mother of the complainant. She stated that the complainant was born on the 30th of October 2000. She stated that the complainant informed her that the appellant had impregnated her. She said at the time of arrest, the complainant was 7 months pregnant. There was no cross examination.

13. PW3, **Kiprotich Nathan**, Clinical Officer confirmed that on examination he found the complainant approximately 7 months pregnant. He concluded that she was defiled. He produced the Treatment Chit, P 3 form and the PRC form.

14. PW4, **PC Calistus Manyonge, No. 96418**, produced Child Health Card which indicated that the complainant had been born on the 30th of October 2000. He said DNA test was done on the 19th of December 2017 after complainant had delivered her baby. He testified that the results received on the 22nd of December 2017 showed that the Appellant was not the father of the complainant’s baby. He produced the DNA report.

15. The appellant opted to give unsworn statement but after introducing himself and indicating that he understood the charges, he said he wished to plead guilty. Charges were read to him and in response, he said the charges were not true. I also note that when he was asked to cross examine the complainant, he said he had no question and when the prosecutor asked for another date, he stated that he had not refused to take care of the child and that the child was his.

16. I have considered the evidence adduced before the trial Court and wish to consider whether the ingredients for the offence of defilement were proved beyond reasonable doubt.

17. The ingredients of the offence of defilement were laid down in the case of **Dominic Kibet Mwareng v Republic [2013] eKLR**, where

the **Hon. Justice Linnet Ndolo** stated as follows:

“The critical ingredients forming the offence of defilement are;

i. age of the complainant,

ii. Proof of penetration

iii. Positive identification of the assailant.”

18. In respect to the complainant’s age the mother to the complainant produced child held card which confirmed the complainant date of birth as 30th October 2000. In **Edwin Nyambogo Onsongo Vs Republic (2016) eKLR** where the Court of Appeal held that: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

19. The production of child health card was not challenged. There is therefore no doubt that the age of the complainant was proved beyond reasonable doubt.

20. In respect to penetration PRC form produced showed normal outer genitalia, normal anus and a broken hymen. The broken hymen and the fact that the girl conceived confirmed that her genitalia was penetrated.

21. On identification, the DNA examination was done after the birth of the child. The results excluded the appellant from being the father of the child born out of the alleged defilement. I take note of the fact that the complainant testified that it is the appellant who first had sex with her and that she was certain that he was the father of the child. The DNA results is contrary to her testimony; it casts doubt on her credibility and her testimony to the effect that the appellant had sexual intercourse with her. Even though the appellant said he wanted to plead guilty during his defence, he denied that charges read to him and one cannot therefore conclude that he confirmed the complainant’s testimony that they had sex. The burden was for the prosecution to prove the appellant guilty and not for the appellant to prove himself innocent.

22. In the case of **Eliud Ouma Agwara v Republic [2016] eKLR, Makau J**, stated as follows:

“The DNA results having not connected the appellant with the complainant's child as a result of the alleged result of defilement and the complainant having not connected the appellant with any other previous act of defilement or having not stated that she has had an earlier encounter with another person who could in view of the DNA results be said to be the father of the child, meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. The appellant should have been accorded the benefit of doubt. The trial Court fell into an error when it held that DNA results could never be a defence in an offence of defilement as the Court did not properly evaluate and analyse the evidence which prosecution was relying upon thus as a result the defilement of the complainant she became pregnant meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. It was therefore apart from proving defilement the duty of the prosecution to prove as they alleged the complainant has had no other sexual intercourse with any other person prior to the date of defilement to prove that as a result of the alleged defilement PW1 became pregnant, bore the child whose DNA test report connected the appellant with the act of defilement.”

23. And **Odero J**, in the case of **Simon Gichuki Maina v Republic [2016] eKLR** stated that:

“Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.

Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant’s claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case. I therefore quash the appellant’s conviction on the charge of defilement. The subsequent sentence of 25 years’ imprisonment is also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.”

24. In my considered view, the fact that DNA report concluded that the Appellant was excluded as the father cast doubt as to whether it is the appellant who defiled the complainant. It casts doubt in the credulity of the complainant; the doubt goes to benefit the appeal. From the foregoing, this appeal succeeds.

25. FINAL ORDERS

1. **This appeal is hereby allowed.**
2. **The conviction against the appellant is hereby quashed.**
3. **sentenced of 15 years' imprisonment is set aside.**
4. **The appellant is hereby set free unless lawfully held.**

Judgment dated, signed and delivered via zoom at Nakuru

This 17th day of September, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person

Rita for State