REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 31 OF 2019

ROYTON MURIUNGI KIRIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior

Resident Magistrate HON. S.M. NYAGA (S.R.M) at Marimanti in the

Principal Magistrate's Court SOA NO. 10 of 2019 dated 24th October, 2019.)

J U D G M E N T

1. The Appellant was convicted of the offence of Defilement contrary to **Section 8(1)(4) of the Sexual Offences Act No.3 of 2006** by the ***Senior Resident Magistrate at Marimanti Law Courts in SOA No. 10 of 2019*** and ordered to serve fifteen years imprisonment.

The appellant was dissatisfied with both the conviction and sentence and filed this appeal which was initially based on ten grounds.

The Appellant filed amended grounds of appeal and raises the following grounds:-

> ***1. That, the learned trial magistrate erred in both law and fact by failing to note that the complainant was a grownup lady.***
>
> ***2. That, the learned trial magistrate erred in both law and facts by failing to note that the girl deceived the appellant to believe that she was over 18 years.***
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> ***3. That, the learned trial magistrate erred in both law and facts by failing to note that no scientific test (DNA) was conducted as per the provisions of Section 36(1) of the Sexual Offences Act No.3 of 2006 to ascertain whether or not the appellant committed the present offence which was unsuitable to base a conviction.***
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> ***4. That, the learned trial magistrate erred in both law and facts by failing to note that there was no evidence to show that the appellant was colluded with the complainant for interference for DNA to be not conducted.***

It is his prayer that the appeal be allowed, the sentence be set aside, conviction be quashed and he be set at liberty.

The appellant filed this appeal in person. However upon the appeal being admitted, the firm of Murango Mwenda & Company Advocates came on record for the appellant. The court proceeded and gave directions that the appeal be disposed off by way of written submissions. The counsel for the appellant filed submissions. The appellant also filed submissions in person. When matter came up to confirm the filing of submissions, the appellant informed the court that he had abandoned his advocate and wished to rely on the submissions which he had personally filed.

2. The Respondent opposed the appeal and filed submissions through the office of the Director of Public Prosecutions. They urge the court to dismiss the appeal. The brief facts of this case are that the complainant CN was a student at [Particulars withheld] Secondary School. She told the court that the appellant was her husband though they were not living together. She also told the court that the applicant was her boyfriend and that in August 2018 she had sex with appellant during school holidays and she became pregnant. She was taken for medical test by police at Marimanti Level 4 Hospital. She identified the treatment notes and the P3 form. In cross-examination she told the court that she had sex with the appellant in his house and she told her parents. She further told the court that her parents knew about the intimate relationship between her and the appellant which started when she was in class seven.

According to PW2, MCM the complainant who is her daughter dropped out of school due to pregnancy and that she had told her that she had sex with the appellant in August 2018. She also confirmed that she was aware that the complainant and the appellant were lovers.

PW3 Lilian Nyaguthii a clinical officer at Marimanti Level Four (4) Hospital testified that she examined the complainant on 7th February 2019. She had reported to her that she had sexual intercourse on several occasions while not using protection, the last one being in January 2019. On examination she found that she was pregnant for 25 weeks. She confirmed that there was penetration due to the broken hymen though not freshly and the pregnancy. According to PW3 the complainant was eighteen (18) years old at the time she examined her.

PW4, No.96836, P.C David Ngiti Mutua of Marimanti Police Station who is the investigating officer testified that on 5th February 2019 PW1 & PW2 accompanied by the Area Chief went to the police Station and reported that PW1- was pregnant and that she was defiled by the appellant. He recorded a statement from the complainant and she said that she had a love affair with the appellant since 2016 and they had been engaging in sexual inter- course. She became pregnant and reported to her parents. PW2 sent her to hospital for examination and it was confirmed that she was pregnant. PW4 realized that the complainant became pregnant when she was seventeen years old. The appellant had been arrested and so he charged him with this offence.

The appellant gave unsworn defence and told the court that he is twenty three years old. He told the court that the case was a frame up and that their parents had a grudge over land and that they are neighbours.

Before the judgment was delivered, the complainant gave birth. This prompted the court to order a DNA test to be conducted to determine the paternity of the child. However, this was not to be after it was alleged that the appellant had colluded with the complainant and she went into hiding with the child. After a futile search of the complainant, the State abandoned the application.

The trial magistrate proceeded and gave the Judgment and held that based on the undisputed evidence contained in that birth certificate that the complainant was born on 2nd September 2000, she was seventeen years and eleven months in August 2018. That she was below 18 years and therefore a child as defined under the Children Act and the Sexual Offences Act. That penetration as defined under the Sexual Offences Act was proved and the appellant was identified as the perpetrator. He rejected the defence as a mere denial and convicted the appellant.

3. The appeal proceeded by way of written submissions. The appellant submits that the complainant testified that she was eighteen years and did not allege that she was forced to have sex. That the trial magistrate failed to find that the complainant was an adult. He has relied on **Section 8(5) and (6) of the Sexual Offences Act.** That he had reasonable basis for believing that the complainant was an adult and was entitled to an acquittal in the light of **Section 111 of the Evidence Act.** The appellant further submits that the prosecution did not prove the charge beyond any reasonable doubts as it failed to carry out a DNA test to ascertain the paternity of the child. He relies on **Section 36(1) of the Sexual Offences Act** and the Court of Appeal decision in the case of ***Robert Murungi Mumbi -v- Republic Criminal Appeal No. 52 of 2014.***

Williamson Sowa Mwanga -v- Republic Criminal Appeal No.109/2014. It was stated that;

> ***" Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests including for D.N.A test to establish linkage between the accused person and the offence."***

That the appellant denied that he is the one who made the complainant pregnant and his defence was not dislodged as the prosecution failed to establish through a D.N.A test that he was the father of the complainant's child. He further submits that the complainant behaved like an adult and relies on the case of ***Martin Charo -vs- Republic H.C. CR. Appeal No.32/2015, Justice Chitembwe*** which is a persuasive decision.

Finally the appellant submits that the trial magistrate failed to consider his defence .

For the State it was submitted that contrary to the grounds of appeal raised by the appellant, the evidence adduced was sufficient to sustain the conviction. That the evidence adduced was clear, candid and consistent. The same was corroborated and was reliable. It is submitted that the evidence of the complainant was sufficient and the court could rely on it to convict.

On the question of D.N.A test the State submits that it was not necessary as the complainant was clear as to who was the father of her unborn child. That the appellant was identified by recognition and there was no allegation as to there being a possibility that the complainant was defiled by another person. He further submitted that penetration is proved by evidence and not by DNA test, he relies on the case ***of A.M -V- Republic (2012) eKLR,*** Court of Appeal and submits that there was enough evidence to link the appellant to the offence.

It is further submitted that the appellant raised the issue of being framed in his defence and had not cross-examined the witnesses on the subject. That the defence was well considered and found wanting.

On the sentence, the State conceded that it was harsh and in line with ***Francis Kioko Muruatetu and Another -vs- Republic (2017) eKLR*** urged the court to interfere with sentence.

4. I have considered the proceedings before the trial court, the grounds of the appeal and the submissions. This is a 1st appeal. The law places a duty on this court to re-evaluate and consider the evidence afresh and come up with its own independent finding **Section 347 of the Criminal Procedure Code** provides:-

> ***" Save as in this part provided-***

A person convicted on a trial held in a sub-ordinate court of the first or second class may appeal to the High Court and an appeal to the High Court may be on a matter of fact as well as on a matter of law."

This means that High Court has jurisdiction to hear and determine an appeal from the Sub-ordinate Court on both points of law and facts. The Court of Appeal in the case of ***Kiilu & Another -vs- Republic (2005)1 KLR 174*** stated as follows:-

" An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

It is not the function of a first appellate court to merely 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 also the holding in ***Okeno -v- Republic (1972) E.A 32.***

In this case there are only two issues which arises for determination.

These are:-

1) Defence under section 8(5) of the Sexual Offences Act

2) Whether the charge was proved beyond any reasonable doubts.

1) Defence under Section 8(5) of the Sexual Offences Act

The appellant was charged under **Section 8(1) and (4) of the Sexual Offences Act**.

The particulars of the chance are that on diverse dates of August 2018 at Kagumo area in Tharaka Nithi County intentionally caused his penis to penetrate the vagina of CN a child aged 17 years. The elements that the prosecution was expected to prove were:-

a) Penetration.

b) Age of the complainant

c) Perpetrator.

The prosecution adduced evidence which proved that there was penetration. The complainant's evidence was corroborated by the medical evidence tendered by PW3-

The witness confirmed she examined that the complainant on allegation that she had engaged in sexual intercourse over a period of time. She confirmed that the complainant was pregnant which was evidence of penetration. It has now been well established that evidence of defilement or rape need not be proved by medical evidence or D.N.A. This is provided under **Section 124 of the Evidence Act** which provides:-

" Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that 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."

The court of appeal in the case of ***A M L Versus Republic (2012) eKLR*** where the court stated that :-

" The fact of rape or defilement is not proved by D.N.A test but by way of evidence"

Further the court of appeal in the case of ***Kassim Ali Versus Republic Criminal Appeal No. 84 of 2005,*** it was stated that:-

" The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence".

In this case penetration was proved by the testimony of the complainant and though the charge could be proved by way of evidence, the prosecution tendered evidence which corroborated the testimony of the complainant. I find that from the defence and submission the appellant has not disputed the fact of penetration. He has taken issue that it was not proved that he is the one who penetrated the complainant.

I find that penetration was proved.

5. On the age of the complainant, the prosecution produced a birth certificate showing that the complainant was born on 2nd September 2000. In sexual offences age of the victim must be proved sufficiently with production of birth certificate, age assessment or other documents showing the age of the victim. This is because the age of the victim of defilement is a critical component which must be proved beyond any reasonable doubts. The Court of Appeal in the case of ***Kaingu Elias Kasono -V- Republic C.A Malindi, Criminal Appeal No. 54/2010,*** held that:-

> ***"Age of the victim of sexual assault under the sexual offences Act is critical component. It forms part of the change which must be proved in the same way as penetration in cases of rape and defilement.***
>
> ***It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will depend on the age of the victim."***

The charge of defilement requires prove of age as it is a serious offence which carries stiff sentences. The Sexual Offences Act provides that sexual relations with a child below the age of eighteen years constitutes the offence of defilement. The offence seeks to protect young girls from sexual predators and others bent on marrying off young girls who are underage. The relevant age of the victim to be considered is the age at the time the offence was committed not the age at the time of giving evidence. The offence was committed on diverse dates in August 2018. Although the complainant testified that she had engaged in sex with the appellant before August 2018, no charges were preferred and therefore the prosecution need to prove that the complainant was seventeen years as stated in the particulars of the charge in August 2018. The birth certificate shows that the complainant who was born on 2nd September 2000 was about eighteen (18) years old. There was no specific dated given in August. At best she was Seventeen years and eleven months. I find that the prosecution proved the age of the complainant to the required standard.

On the identity of the perpetrator I find that it was proved that the appellant was the perpetrator. The evidence of the complainant was straight and brief and was not challenged. There was nothing to cast doubt on her testimony. It is only the mother who can tell the father of her child. The testimony of the complainant was credible. The complainant said she was in intimate relationship with the appellant. He did not dispute that in cross-examination. The defence that he was framed was a mere denial. The allegation by the appellant that they had land disputes is a sham. It was raised too late in the day and was not put to the witnesses when they testified. Such a defence ought to be put to the witnesses so that they can have an opportunity to give their side. Failure to raise it when cross-examining the witnesses leads to the inevitable conclusion that it is an afterthought which cannot possibly be true. The appellant and complainant were neighbours. The complainant knew him very well. I find that the prosecution proved that the appellant was the perpetrator.

The appellant relied on **Section 36(1) of the Sexual Offences Act**. The section provides:

> ***" Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

In ***Robert Mutungi Mumbi Versus R, (Supra)*** The Court of Appeal reiterated that with regard to **Section 36(1)** -

> ***" Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical evidence on DNA evidence is not the only evidence by which commission of a sexual offence may be proved. "***

In ***George Kioji Versus Republic Criminal Appeal no. 270 of 2012*** Nyeri this court expressed itself thus on proof of 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 be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed 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 season for that believe,"***

From the foregoing, what the court has to determine is whether the evidence of the complainant is believable, failure to determine the paternity of the child was not fatal. The trial magistrate stated that he did not find the victim beating about the bush, she knew the accused well and her pregnancy and subsequent birth is sufficient evidence. There was no allegation that the complainant had a relationship with any other person. I find that the testimony of the complainant was credible and failure to conduct a D.N.A test to determine the paternity of the child was not fatal. There was sufficient credible evidence to prove that he was in a relationship with the complainant **Section 8 (5) & (6) of the Sexual Offences Act** provides :-

> ***" 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.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."***

This section requires that an accused person raises this defence at his trial. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under **Section 5 & 6 of Sexual Offences Act** the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond.

The appellant did not raise the defence during the trial. He has raised this defence on appeal. This ground is an afterthought. His defence was that he was framed. He cannot allege on appeal that he was deceived by the complainant. The defence cannot be considered at this stage. It is an afterthought. The ground must fail.

2. Proof beyond any reasonable doubts

It is a principle of criminal justice system that the prosecution bears the burden of proof in criminal cases and the burden never shifts. In this case I find that the prosecution tendered sufficient evidence from the four witnesses which was sufficient to prove the charge beyond any reasonable doubts. In the circumstances I find that the trial magistrate arrived at the inevitable conclusion that the appellant was guilty of the offence of defilement. Having evaluated the evidence I find that the charge against the appellant was proved beyond any reasonable doubts.

On sentence I note that the State conceded that the sentence was harsh. The appellant was sentenced to serve the minimum provided under the section. There were mitigating factors as it emerged that the complainant who had less than a month to celebrate her eighteenth birth day had engaged intimidate relationship with the appellant since the time she was in class seven and despite informing her mother action was only taken when she became pregnant. She was on borderline to become an adult. The appellant was 23 years old at the time. These matters were raised by the appellant. They can be considered in mitigation but the law prohibits sexual relationships with children who are below eighteen years. Having considered this mitigating factors which the trial magistrate failed to consider for the reason that the law provided for a minimum mandatory sentence, I will interfere with the discretion of the trial magistrate in sentencing. See the Supreme Court of Kenya decision in ***Francis Karioko Muruatetu & Another -V- Republic (2017) eKLR.***

The sentence was manifestly harsh and excessive in view of the circumstances of this case. I will therefore set aside the mandatory sentence of fifteen years passed by the trial magistrate and substitute it with imprisonment for five years from the date the sentence was imposed. I find that the appeal is without merits and is dismissed.

Dated, signed and delivered at Chuka this 19h day of November 2020.

L.W. GITARI

JUDGE