



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 21 OF 2015

JOSEPH KITE KOSGEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court at Eldoret (Hon. P.W. Mbulikah, RM) delivered on the 12th day of February 2015 in Eldoret Chief Magistrate's Court Criminal Case No. 802 of 2012)

JUDGMENT

[1] The Appellant herein was the Accused Person in **Eldoret Chief Magistrate's Criminal Case No. 802 of 2012**. He was charged therein 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 allegation against him was that on diverse dates between **12th and 16th February 2012** at [particulars withheld] in Eldoret District within the Rift Valley Province, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of **DK**, a child aged 14 years. In the alternative, the Appellant was charged with the offence of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act**, in that, on diverse dates between the **12th and 16th February 2012** in Eldoret District within the Rift Valley Province, he intentionally and unlawfully allowed his genital organ (penis) to come into contact with the genital organ (vagina) of **DK**, a child aged 14 years.

[2] The Appellant denied the charges and after trial of the facts, in which the lower court heard six Prosecution Witnesses as well as the defence offered by the Appellant, the lower court found the Appellant guilty of the offence of Defilement as laid in the substantive count; convicted thereof, and sentenced him to serve 20 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **23 February 2015** on the following grounds:

- [a] That the Learned Trial Magistrate erred in law and fact by convicting him on the basis of a P3 Form which had no incriminating evidence;
- [b] That the Learned Trial Magistrate erred in law and fact by relying on medical evidence that did not support the charge;
- [c] That the Learned Trial Magistrate erred in both law and fact by sentencing him on the basis of inconclusive facts;
- [d] That the trial court relied on the uncorroborated evidence of a single witness;
- [e] That the Learned Trial Magistrate erred in law and fact by holding that he defiled the minor yet the circumstances prevailing during the said offence were not favourable to prove that he was indeed at the scene of crime and actually committed the offence;
- [f] That the Learned Trial Magistrate erred in both law and fact by convicting and sentencing him on the basis of evidence that did not establish his guilt to the required standard of proof.

Hence, the Appellant prayed that his appeal be allowed, the conviction quashed, and the sentence set aside.

[3] With leave of the Court, the Appellant filed Amended Grounds of Appeal pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, contending that the trial court erred in law and fact when it convicted him:

- [a] when the age bracket of **Section 8(3)** of the **Sexual Offences Act** was not proved at all;

- [b] on penetration which was not ascertained as the law requires;
- [c] on the Complainant's evidence which was not credible;
- [d] without appreciating that his rights to a fair trial had been violated;
- [e] and failed to find that the purported doctors were incompetent;
- [f] and failed to consider **Section 36** of the **Sexual Offences Act** had not been complied with;
- [g] on medical evidence which was devoid of merit;
- [h] on a sham evidence of the Complainant;
- [i] on biased evidence when it failed to allow his application for the hearing to commence *de novo*, considering that he had not been supplied with witness statements in good time;
- [j] by disregarding his defence without cogent reasons and thus shifted the burden of proof to the defence.

[4] The Appellant relied on the written submissions filed by him on **3 July 2018**, along with his Amended Grounds of Appeal. He fashioned his arguments under six of the Amended Grounds of Appeal; namely, that neither the age of the Complainant nor penetration had been proved; that the Complainant was not a credible witness; that his rights to a fair trial had been violated; and that the two purported doctors were incompetent. He also took issue with the fact that he had not been taken for medical examination in accord with **Section 36** of the **Sexual Offences Act**.

[5] **Ms. Mokuu** Learned Counsel for the State opposed the appeal. She was of the view that the evidence presented before the trial court proved all the essential ingredients of the main charge beyond reasonable doubt, pointing out that the Complainant's father produced the Birth Certificate to ascertain that the Complainant was indeed a minor; that the two doctors who testified before the lower court established that penetration had indeed taken place and that the Complainant's hymen had been torn at position 6.00 o'clock. She also defended the Complainant and argued that she was a credible and therefore reliable witness; and that her evidence was corroborated by the medical evidence as well as the evidence adduced by her parents. In her submission, the sum total of that evidence proved beyond reasonable doubt that the Complainant was a minor; that penetration had occurred; and that the Appellant had been duly identified by the Complainant as the offender.

[6] On whether the Appellant was accorded a fair trial, it was the submission of **Ms. Mokuu** that the record of the lower court shows that he was supplied with witness statements; that he was granted all the adjournments he asked for to enable him read the witness statements and prepare for the trial. While conceding that the Appellant's request for a *de novo* hearing was declined by the lower court, it was the submission of **Ms. Mokuu** that he was nevertheless allowed to further cross-examine and did further cross-examine the two witnesses who had testified prior to his being supplied with witness statements; namely the Complainant and the doctor. She further submitted that the Appellant's *alibi* defence was similarly taken into consideration but correctly rejected on the basis of the credible prosecution evidence that placed him at the scene of the crime. Accordingly, **Ms. Mokuu** urged the Court to find that the Prosecution had proved its case beyond reasonable doubt and that the Appellant's conviction was founded on sound and cogent evidence. She accordingly urged for the dismissal of the appeal and for the conviction and sentence to be upheld.

[7] The Court has given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

"An appellant on 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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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..."

[8] The evidence adduced before the lower court by the Prosecution was that, **D.K.**, a 13 year old minor at the time, was in Class 8 at [particulars withheld] Primary School. On the **12 February 2012**, she was at home when the Appellant visited and encouraged her to accompany him to his home. She did not find any reason for concern as she was accompanied by her friends **EW** and **F**. She was frank enough to disclose that the Appellant was her boyfriend; and that on arrival at the local centre, she parted ways with her friends and went with the Appellant to his house at [particulars withheld]. Left alone, the Appellant insisted on them having sex and despite her protestations, the Appellant overpowered her and forced her to have sexual intercourse with him. As she was afraid of her father, she continued to stay with the Appellant until **16 February 2012** when her mother went looking for her. The matter was reported to the Police as **Kapsoya Police Station**; she was then issued with a P.3 form by and was then taken to **Moi Teaching and Referral Hospital**, where she was examined by **Dr. Cynthia Kibet, PW1**.

[9] According to **PW1**, a medical officer then attached to **Moi Teaching and Referral Hospital**, the minor had a torn hymen and a whitish foul smelling vaginal discharge. Laboratory tests were done for HIV, pregnancy and syphilis but all were negative. Similarly a vaginal swab was taken which did not reveal any presence of spermatozoa. In her opinion, there was evidence of penetrative vaginal injury. She completed

the P3 Form on **20 February 2012** and produced it before the lower court as an exhibit. Thereafter, on **3 March 2014**, **Dr. Joseph Embenzi**, who had worked with **Dr. Kibet** at **Moi Teaching and Referral Hospital**, was called to testify on behalf of **Dr. Kibet**. Hence, his was basically a reiteration of the evidence of **Dr. Kibet**.

[10] **PW3** was the mother of the Complainant. She told the lower court that she had left the Complainant at home and went for a "chama" meeting at **Kapsoya**; but that on return she was nowhere to be found. She looked for her in vain for three days and, out of concern, had the matter reported to the Police. Eventually, she received information from members of the public that the girl had been seen in the company of an unknown boy; and that it was not until **16 February 2012** that she was able to locate her. That she found her in the house of the Appellant herein in the company of the Appellant. The Appellant was arrested and taken to **Kapsoya Police Station** while the Complainant was issued with a P3 Form and escorted to **Moi Teaching and Referral Hospital** for examination.

[11] The Complainant's father testified before the lower court as **PW5**. He confirmed the evidence of **PW3** that, after his wife located the Complainant, he was alerted; and that he went to the scene accompanied by police officers and arrested the Appellant. One of the arresting officers was **PC Bernard Simiyu (PW6)**. He was also the Investigating Officer herein. His evidence was that they escorted the Appellant to **Kapsoya Police Station** and, upon concluding his investigations, he was satisfied that there was sufficient evidence to have the Appellant charged, and that he was duly charged with the offence of defilement.

[12] On his part, the Appellant stated, in a sworn statement, that he travelled to **Lodwar** with his brother, **MW**, on **11 February 2012**; and that stayed there for one week on business before proceeding to **Kitale** on **18 February 2014**. He produced bus tickets as exhibits before the lower court and contended that he did not return to [particulars withheld] until the **19 February 2014**. According to him, on his way home, he met the Complainant's father at [particular withheld] and that he was with two other men; whereupon they proceeded to arrest him. According to him his arrest was actuated by the ill-feeling and a grudge harboured against him by the Complainant's father. He denied having known the Complainant before, or that he was arrested on **16 February 2012** in the circumstances set out by the Prosecution Witnesses.

[13] The foregoing being the summary of the evidence, the question to pose is whether the offence of Defilement with which the Appellant was charged and convicted was proved beyond reasonable doubt. **Section 8** of the **Sexual Offences Act**, pursuant to which the substantive charge was laid provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

[14] Accordingly, the Prosecution needed to prove the following essential ingredients:

[a] That the Complainant was, at the material time, a child for purposes of Section 8(3) of the Sexual Offences Act;

[b] That there was penetration of the Complainant's vagina;

[c] That the penetration was perpetrated by the Appellant.

[a] **On the age of the Complainant:**

[15] The evidence adduced before the lower court was to the effect that the Complainant was 13 years old going 14; her date of birth having been given as **12 June 1999**. Her father, **PW5**, produced the Complainant's Certificate of Birth before the lower court and it confirms that date. Although the Appellant made some effort, in his submissions, to challenge the Complainant's age, not much turns on those submissions. His argument was that the witnesses contradicted themselves as to whether the Complainant was aged 13 years or 14 years at the time. However, looking at the provisions of **Section 8(3)** of the **Sexual Offences Act**, it makes no difference whether the Complainant was 13 or 14 years old at the time; the age bracket specified there being between 12 and 15 years. In any case, **Rule 4** of the **Sexual Offences Rules of Court Rules, 2014**, is explicit that a Certificate of Birth is an acceptable method of proving the age of a child. It provides that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

[16] Moreover, it is now trite that the months following the last birthday, if any, do not count for purposes of determining the age of a child so long as they are less than one year. This was well explained by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** as hereunder:

"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."

[17] Accordingly, credible evidence was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2 and 8(3)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] On whether Penetration of the Complainant Occurred:

[18] The Complainant explained before the lower court how the Appellant, who she described as her boy friend, persuaded her to accompany him to his home; and that she agreed in the company of her three friends **EW** and **F**; but that on arrival at the local centre, she parted ways with her friends and went with the Appellant to his house at **[particulars withheld]** where the Appellant insisted on them having sex; and that despite her protestations, the Appellant overpowered her and forced her to have sexual intercourse with him. She added that she only extended her stay with the Appellant because she was afraid of her father.

[19] **Dr. Kibet** who examined her on **20 February 2012** was of the expert opinion that the girl had been subjected to penetration as evidenced by hymenal tears at positions 6 and 12 o'clock. The P3 Form which was filled by **Dr. Kibet (PW1)** was herein produced and commented on by both **Dr. Kibet** and **Dr. Embenzi (PW4)**. I note that in his written submissions, the Appellant took issue with the fact, which was conceded to by both **Dr. Kibet** and **Dr. Embenzi**, that no sperms were seen from the vaginal swabs taken from the Complainant; and that the type of weapon that caused the penetration was not specified in the P3 Form contrary to the allegations made by the Prosecution in the Charge Sheet. However, in **Mwangi vs. Republic [1984] KLR 595 at 603**, the Court of Appeal made it clear that:

The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact to the offence of rape..."

[20] It is noteworthy too that the testimony of the Complainant and the two doctors was also corroborated by the circumstantial evidence offered by her distraught parents, **PW3** and **PW5** that the Complainant went missing and was not traced until **16 February 2012** in spite of their frantic efforts. The evidence of **PW5** was that he found her in the Appellant's house cooking rice. That they had the matter reported to **Kapsoya Police Station** was confirmed by **PW6**. Hence, the Prosecution evidence in this regard was entirely uncontroverted, and was therefore cogent and credible. Accordingly, the lower court correctly came to the conclusion that penetration had been proved.

[c] On whether the penetration of the Complainant was perpetrated by the Appellant:

[21] As to the pertinent question whether the penetration of the Complainant was perpetrated by the Appellant, the Complainant's evidence was that she knew the Appellant before their meeting of **12 February 2012**. Similarly, the Complainant's mother testified that, upon being alerted by a member of the public as to the whereabouts of the Complainant, she went to the Appellant's house and found the two of them inside the Appellant's house. She added that the Appellant even tried to escape but she managed to push him back into the house and locked the door from outside using a padlock she had borrowed from a neighbouring house on the plot. She then called her husband, **PW5** and the Investigating Officer, **PW6**, to the scene. **PW3's** evidence was confirmed by **PW5** and **PW6** in connection with the circumstances surrounding the Appellant's arrest. It was in the light of the foregoing evidence that the lower court dismissed the *alibi* defence that the Appellant offered and concluded that it was a mere afterthought.

[22] I do note that, in his written submissions, the Appellant did urge the Court to find that there are reasons for concluding that that the Complainant was not a credible witness. He pointed out for instance that the Complainant alleged, without any proof at all, that he infected her with Hepatitis B and had to undergo treatment for several months. According to the Appellant, this was intended to merely excite disaffection against him. He also challenged the Complainant's contention that she was with **E W** and **F** on the ground that that account was contradicted by her father, **PW5**. However, a look at page 48 of the Record of Appeal shows the issue was not whether **F** left home in the company of her three friends, but whether **F** had attended the crusade at **Munyaka** on **12 February 2012**. Clearly therefore, some of the issues were taken by the Appellant out of context and do not bear the importance attached to them by the Appellant. It is in the same vein that I find spurious his submission that the two doctors, **PW1** and **PW4**, were incompetent doctors.

[23] Nevertheless, I have taken into consideration the submissions of the Appellant in connection with the Complainant's credibility as a witness. Indeed, it is trite that a witness whose evidence it is proposed to rely should not create an impression in the mind of the Court that he/she is not a straightforward person; or raise suspicion about his or her trustworthiness. (see **Ndungu Kimani vs. Republic [1979] KLR 282**). However, it is also instructive that, when it comes to credibility, this Court, as an appellate court, would defer to and be guided by the impression formed on the trial court by the witnesses. Hence, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570**, it was held, *inter alia*, that when the question arises which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses. The trial court saw the Complainant and believed her testimony in spite of the discrepancies cited by the Appellant. I find no reason to discredit her. Indeed the trial court did not have to look for corroboration of the Complainant's evidence, granted the proviso to **Section 124** of the **Evidence Act, Chapter 80** of the Laws of Kenya, though there was ample corroboration thereof as pointed out herein above.

[24] Regarding the contention of the Appellant that his right to a fair trial was violated by the lower court, in that his application to have the case heard *de novo* was rejected by the lower court without justifiable cause, it is noteworthy that he conceded that though the trial commenced before he could be supplied with the statements of the Prosecution Witnesses, the same were ultimately provided. Indeed the record shows that several adjournments were granted to him for this very reason. Hence, he suffered no prejudice from that failure. Moreover, though the lower court declined to hear the matter *de novo*, it did afford the Appellant an opportunity to cross-examine the two witnesses who had testified prior to his being given the Witness Statement. He therefore has no justifiable cause for complaint in that connection.

[25] The Appellant cited **Section 36** of the **Sexual Offences Act** to support his argument that failure by the Prosecution to have him undergo a DNA test was fatal to the Prosecution case, especially on account of the gravity of the Charges he was facing. It is however instructive that, whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

[26] Accordingly, it was unnecessary for DNA to be conducted in this case where the Appellant was arrested at the scene of crime as it were. Indeed, in AML vs. Republic [2012] eKLR the Court expressed the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

[27] I note that, at page 65 of the Record of Appeal, the lower court made a remark that

"The Defendant did not call a witness to collaborate his evidence and to confirm that indeed he was in Kakuma for the period he stated 11th February to 19th February, 2012..."

Obviously that was a misdirection. The Appellant was under no obligation to prove anything. Having raised an *alibi* defence, it was the duty of the Prosecution to not only displace that *alibi*, but also to satisfy the court beyond reasonable doubt that the Appellant was the culprit. (See Karanja vs. Republic [1983] KLR 501). However, it is manifest that the trial court did consider the defence and dismissed it as an afterthought; and therefore the misdirection did not occasion any failure of justice.

[28] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** was based on sound evidence, and that the sentence of 20 years imposed by the lower court is also lawful. I would accordingly affirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE