REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 113 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 30 of 2014 of Chief Magistrate's Court at Kakamega)

MICHAEL AKHONYA……..…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. BS Khapoya, Senior Resident Magistrate, of defilement contrary to Section 8(1), as read with section 8(4), of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge against the appellant, which was framed as brought under section 8(1) as read with section 8(3), were that on diverse dates in the month of May 2013 at [particulars withheld] village, East Butsotso Location, Kakamega Central District within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of WO, a child aged seventeen (17) years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally touched the vagina of WO, a child aged seventeen (17) years, with his penis.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. WO, the complainant testified as PW1. She explained the appellant began to pester her for sex in June 2013. Then one day, which she did not disclose, save to say that there was a *harambee* at her school, he waylaid her as she came from school in the evening and threatened her with a knife, and forced her to go with him to his house where he defiled her in the course of the night. He kept the same routine the following week, waiting for her on her way from school, threatening her and then they would have sex in a sugar plantation. She made a report to her father on 13th June 2013, who then reported to the local Chief in late June. She was taken to hospital in March 2014 after she noticed that she was pregnant. On 24th March 2014, she was forced by the appellant to go to his home, and she agreed as he had already made her pregnant. She went back to her home on 26th March 2014. She delivered on 16th April 2014. During cross-examination she said the appellant forced her to go to his home in May 2013. She said that the appellant was the only man she had had sex with. TM, PW2, the father of PW1, confirmed that PW1 had informed her of the pestering by the appellant, and that he had reported the matter to her school and the police. She was found pregnant on 24th March 2014, after which she was traced at the appellant's home where she had been for three days. The matter was reported to the police, and PW1 was taken to hospital and was confirmed pregnant on 24th March 2014, after which she was traced at the appellant's home where she had been for three days.

5. Richard Kimutai Langat (PW3), was the government analyst who conducted a DNA analysis on samples from the appellant, PW1 and PW1's baby. His findings were that the baby had 50% DNA of the appellant and 50% for PW1. He prepared a report wherein he concluded that there was 99.9% likelihood that the appellant was the biological father of the baby. Bether Otieno (PW4) was the clinical officer who attended to the complainant on 28th March 2014 and prepared the Police Form 3 which was put in evidence. He concluded that the complainant had been defiled. Police Constable Cleophas Koech (PW5) gave evidence on behalf of the police officer who investigated the matter. He detailed all the steps that the police took after the initial report.

6. The court found that the appellant had a case to answer and put him on his defence. He gave an unsworn statement and was not cross-examined. He essentially denied committing the offence.

7. After reviewing the evidence, the trial court convicted the appellant of the main charge of defilement contrary to section 8(1), as read with section 8(4), of the Sexual Offences Act, and sentenced him to fifteen (15) years imprisonment.

8. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised several grounds of appeal, being that the

conviction was against the weight of the evidence and the evidence on record could not sustain a conviction; that the government analyst contradicted himself and the court erred in admitting in evidence the DNA report; that no court order was obtained to have the appellant appear before the government chemist at Kisumu for DNA sampling; that the investigating officer ought to have been called to testify on the collection of blood samples; that the court convicted on uncorroborated evidence of PW1; that there was insufficient proof of the age of PW1; that the prosecution witnesses' testimonies were riddled with contradictions and inconsistencies; that the trial court unjustifiably disregarded the defence of the appellant and shifted the burden of proof to him; and that the sentence imposed was excessive.

9. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant 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 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 conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

10. Directions were given that the appeal was to be canvassed by way of written submissions to be highlighted. There has been compliance. I have perused through the written submissions together with the authorities cited, and I have noted the arguments advanced.

11. On the ground that the conviction was against the weight of the evidence, I have noted from the testimony of PW1 that the sexual acts happened several times over a period of time. PW2, his father, confirmed that PW1 had reported to him about the harassment that she got from the appellant, and when she was confirmed pregnant she was established to have had spent the night at the home of the appellant. The medical evidence confirmed that PW1 had had sexual activity. The prosecution's case was not built wholly around the DNA test results, and the trial court properly convicted without the DNA evidence.

12. On whether the evidence of PW1 was corroborated, I wish to point out that sexual offences happen in secrecy, where only the complainant and the perpetrator or perpetrators are present. There would be no eyewitnesses. It is because of that background that the law requires corroboration of the evidence of the victim, to eliminate the possibility of fabrication of evidence, given that the cases really amount to the victim's word as against that of the accused. I find corroboration in the instance case in the evidence of PW2, to whom reports were made by PW1 shortly before the sexual contacts, and who took the trouble to report to PW1's school authorities and to the police. PW4, the clinical officer, examined PW1 and concluded that she had been sexually active. PW1's evidence was therefore clearly corroborated.

13. On the complainant's age, I note that PW1 stated that she was born on 27th November 1998, and then referred to a birth certificate allegedly dated sometime in June 2011 which allegedly indicated her date of birth as 20th October 1997. I have gone through the record of the trial court and the alleged birth certificate is not on record. When PW2, the father of PW1 testified, he did not state the age of PW1. Age is at the heart of the offence of defilement, for the offence is established only where it is demonstrated that the victim was underage. I do not think the trial court had sufficient proof of the age of the complainant, and therefore evidence that she was a juvenile as at the date of the commission of the offence.

14. On the DNA evidence, I note that the exhibit memorandum refers to blood samples. When PW3 gave evidence in chief he stated that his conclusions were founded on the blood samples. Yet on cross-examination he shifted ground, and said that the appellant's blood sample had clotted and he had to be taken to the laboratory for the taking of fresh samples, which took the form of a saliva sample. His DNA analysis was ostensibly based on the saliva sample and not blood sample, yet the report put in evidence makes no reference at all to the saliva sample. I would agree with the appellant that this evidence was shaky, and ought to have been handled with some measure of caution.

15. On the issue that his defence was not considered, I have perused the record of the trial court. I note that the trial court recited the unsworn testimony of the appellant. That would suggest that the trial court did consider the defence. I have taken note of the fact that the appellant gave an unsworn statement which shielded him from cross-examination, and therefore that testimony was not tested, and its weight cannot compare with the sworn testimonies from prosecution witnesses. I have read through the unsworn defence statement and I note that the same could not possibly displace the testimonies offered by the prosecution witnesses. I do not think anything turns on this.

16. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 30 of 2014 was unsafe. I shall accordingly quash the said conviction and set aside the sentence imposed. The appeal herein is hereby allowed. The appellant shall be set free unless he is otherwise lawfully held.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W. MUSYOKA

JUDGE