



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL APPEAL NO. 62 OF 2018**

**CMM.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. The Appellant was charged with offence of Defilement of a child Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006.
2. Particulars being that on the 3<sup>rd</sup> day of May, 2013 within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of WKM, a child aged 14 years.
3. The Appellant was alternatively charged with offence of Indecent Act of a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. Particulars being that on the 3<sup>rd</sup> day of May, 2013 within Makueni County did unlawfully and indecently act by touching the vagina of WKM, a child aged 14 years.
5. He was convicted and sentenced to serve 20 years imprisonment.
6. Being aggrieved by the aforesaid decision, he lodged an appeal and set out 4 grounds of appeal. He later amended the same and set out in amended petition 9 grounds namely:-

a. ***That*** the magistrate erred both in law and fact by failing to observe that the court was duty bound to make an independent opinion in relation to the burden of prove and not to make an independent opinion in relation to the burden of prove and to shift it to the appellant as there was no credible evidence to prove penetration.

b. ***That*** the learned trial magistrate erred in law and in fact in convicting the appellant against the prosecution evidence and when there was no evidence to connect the appellant to commission of the offence.

c. ***That*** the learned trial magistrate erred in law and in fact in convicting the appellant when there was no corroboration on the evidence of the complainant and without warning itself of the danger of acting on uncorroborated testimony of the complainant.

d. ***That*** the learned trial magistrate erred and misdirected himself in failing to find that the burden of proof in criminal cases is beyond reasonable doubt.

e. ***That*** the trial magistrate erred in shifting the burden of proof to the appellant and finding that he had a duty to discharge to court.

f. ***That*** the trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and as a result reached to a decision which was insupportable having regard to the entire evidence adduced.

g. ***That*** the trial magistrate erred in law and fact by convicting the appellant to twenty years without proof of the complainant's age.

h. ***That*** the trial court erred in law and in fact by relying on DNA results when the doctor who allegedly extracted it was never called as a prosecution witness.

i. ***That*** the trial court erred in law and in fact by not discrediting the evidence of the prosecution witnesses was full of contradictions and inconsistencies.

7. The parties agreed to file Submissions but only Appellant filed the same.

8. The prosecution tendered oral Submissions.

**Appellant's Submissions:**

9. Appellant submitted that, on age of complainant, same was not proved. There was no prove of age in any document. Only medical evidence produced was a P3 which stated the age 14 years. Thus sentence meted out was based on figure 14 years of age.

10. It was argued that, the age has to be proved beyond reasonable doubt. The doctor who did the DNA test was not called to testify on extracted blood sample. Only chemist who analysed it testified and produced the same.

11. The security of the sample was not ensured from extraction to the destination. Tampering of sample was raised. Doctor should have been called to testify on DNA sample extract on its extract, storage and transfer.

12. The prosecution failed to call crucial witness. The court relied on uncorroborated evidence section 124 Evidence Act. There were material inconsistencies in prosecution case. Look at PW1 and PW2 testimonies.

13. The court shifted the burden to the appellant and dismissed defence as mere denial. Appellant testified that on material day he came from school late and was corroborated by his father's statement. He was a day scholar then.

14. However it was alleged the incident was around 6 pm. Appellant would not have involved with the incident at 6 pm. The burden of prove is always on the prosecution in criminal cases. Appellant conviction cannot stand. Appeal should be allowed.

**Prosecution's Submissions:**

15. The state discharged this onus. The trial was free from the error. The trial court was satisfied of the evidence on record. Even before DNA conducted, PW1 evidence had been taken. She was credible. She stated her date of birth 5/5/10 and age 14 years. The court observed her demeanor. Trial court captured above. Court should find age was properly proved.

16. On handling on the samples, same they were properly handled. The same were forwarded to government chemist. Officer took oath on dealing with the matter. Court should analyze entire evidence wholly by prosecution and defense. The PW1 and DNA report were congruent on this point.

17. On corroboration issue, PW1, PW2 and others were congruent. DNA was 99.999%positive.

**Duty of the first Appellate Court:**

18. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

**Evidence Tendered:**

19. It is the evidence of the complainant that on 03/05/2013 at around 6.00 p.m. she went to fetch water in a dam near her home and found the accused herding cattle near the dam. The complainant knew the accused very well as he was a cousin of her dad. Once the two met the accused is said to have held the complainant by the hand whom he pulled towards a fence.

20. The accused then lifted the complainant's skirt upwards, removed her biker and panty and had sex with her. It is the evidence of the complainant that she did not scream and once the accused was done with her he told her to proceed and fetch the water which she had gone to the dam to get. The accused further told the complainant not to tell anyone what had happened lest she was beaten by the accused.

21. It is the evidence of the complainant that she put on her panty and biker and proceeded to fetch water which she took home. The complainant who says she had not had sex before the incident says that she bled from her genitalia and could see a mucus like substance oozing from her vagina.

22. Once home the complainant took a bath, had a dinner and slept without reporting the incident to anyone. The complainant says she could not scream after the accused held her tight and threatened her. In the month of August 2013 the complainant who was apparently pregnant was taken to hospital by her mother and when subjected to a pregnancy test it turned out positive.

23. When asked as to who was responsible for her pregnancy the complainant named the accused. The accused then denied defiling the

complainant as alleged. The complainants' pregnancy was further confirmed at Makueni County Referral Hospital (MCRH) where her P3 was filled.

24. On 07/02/2014 the complainant gave birth to a bouncing baby boy whom she named EM. The complainant told the court that the accused was the father of her child. The complainant was later asked to take her child to "MCRH" for a paternity test. On cross examination the complainant told the court that the accused was then a Form 3 student at [Particulars Withheld] Secondary School.

25. The complainant gave her date of birth as being 05/10/1999. It is her evidence that the accused threatened to beat her if she screamed. The complainant further told the court that she had not slept with any man prior to the incident of 03/05/2013 and that she did not sleep with any other man other than the accused after the incident.

26. The complainant's mother who testified as PW2 told the court that she examined the complainant on 27/08/2013 who appeared to her to be pregnant. She was then appearing weak, sleeping for long hours and was choosy on the food she ate. PW2 decided to take the complainant for a pregnancy test which turned out positive.

27. When PW2 asked the complainant as to who was responsible for her pregnancy she named the accused who is a cousin to PW2's husband and whose home is some fifty (50) meters from the home of PW2. No. 51100 PC Joshua Wambua interviewed the complainant on 30/08/2013 who told him that she had sex with the accused on 03/05/2013 after the accused sweet talked her into it.

28. PC Wambua who testified as PW3 decided to arrest the accused whom he charged with the present offence. And once the complainant gave birth, PW3 took blood samples from the accused and the child for D.N.A test. PW3 forwarded the samples to the Government Chemist and he produced the exhibit memo which accompanied the samples to the Government Chemist as an exhibit.

29. PW3 later received a report from the Government Chemist showing that the complainant's child was fathered by the accused. It is the evidence of PW3 that the blood samples were properly taken by a doctor, preserved and forwarded to the chemist in good condition.

30. PW4 told the court that she is a Government Analyst of more than 21 years standing. She is holder of a Bachelor of Science degree in Chemistry from the University of Nairobi. On 14/05/2014, PW4 received the complainant's blood samples, those of her child and that of the accused with a request to determine the paternity of the complainant's child.

31. PW4 conducted tests which revealed that there were 99.99% chances that the accused fathered the complainant's child. PW4 produced her report dated 22/07/2014 as an exhibit which contains at the back the D.N.A profiles of the accused, the complainant and her child.

32. PW5 examined the complainant on 31/08/2013 whom he found to be three (3) months pregnant. PW5 produced the complainants' P3 treatment card and post rape care (PRC) form which were duly filled as exhibits. Given the age of the complainant and the fact that she was pregnant PW5 concluded that she had been defiled.

33. The complainant's birth certificate shows that she was born on 05/05/2010 which puts her age at 14 years as at 03/05/2013. Her age has been estimated at 14 years as per the complainant's P3 which was filled by PW5.

34. When placed on his defence the accused decided/chose to give an unsworn statement of defence.

35. The accused told the court that he is twenty years (20) old and had just completed his secondary education. At the time he is alleged to have defiled the complainant, the accused was still a high school student. It is the evidence of the accused that the complainant is close relative whom he had known for a long time.

36. The accused denied the prosecution's allegations that he defiled the complainant. The accused told the court that he is a cousin to the complainant's father and could not have had sex with the complainant as it is culturally disallowed.

37. It is the evidence for the accused that the DNA results might have turned out positive because he is a blood relative of the complainant.

38. It is the evidence of the accused that the complainant implicated him for her pregnancy after she was beaten while being questioned.

39. The accused called his parents as witnesses. Their evidence dwelt at large on the discovery of the complainant's pregnancy and the subsequent arrest of the accused.

## **ISSUES**

### **Analysis and Determination:**

40. After through evidence and submissions on record, I find the sole issue is; ***whether prosecution proved its case beyond reasonable doubt?***

41. It is apparent that the complainant who was a minor aged 14 years engaged in sex in the month of May, 2013. By then she was Standard 7 pupil at [Particulars Withheld] Primary School.

42. It is the evidence of the complainant that she was held by force and defiled by the accused on 03/05/2013 who threatened her not to reveal what had happened. It was only in the month of August, 2013 that the complainant's mother suspected that the complainant was

pregnant which suspicion was confirmed when PW5 examined the complainant on 31/08/2013.

43. It was then that the complainant mentioned the accused as the person responsible for her pregnancy. The DNA test conducted by PW4 to ascertain the paternity of the complainant's child has shown a 99.99% chances that the accused is the father.

44. This is scientific proof that the accused fathered the complainant's child. It follows that the accused must have had sex with the complainant prior to the child's birth.

45. The conception of the child as determined by PW5 who found her to be 3 months pregnant in August, 2013 matches the period when the complainant alleges she was defiled by the accused.

46. The prosecution has adduced full proof evidence linking the accused to the complainant's defilement. The prosecution has similarly proved the complainant's age through the production of her birth certificate and P3.

47. The accused's defense was a statement of mere denial and which merited to be dismissed the same as being inconsequential. This was so because he never impugned evidence on age or raise authenticity of the birth certificate produced .He did not dispute DNA test results nor seek for another DNA test to be re-done if he doubted the integrity of the one produced in court.

48. Instead he justified by saying since he was a close relative of the complainant, the result could be so.

49. That was a very naïve view as it could not be scientifically supported.

50. On DNA paternity testing there are pieces of materials From **Wikipedia, the free encyclopedia** to wit;

***“DNA paternity testing is the use of DNA profiling (known as genetic fingerprinting) to determine whether two individuals are biologically parent and child. A test establishes genetic proof whether a man is the biological father of an individual, and a maternity test establishes whether a woman is the biological mother of an individual. Tests can also determine the likelihood of someone being a biological grandparent to a grandchild.....Paternity testing can now also be performed while the woman is still pregnant from a blood draw.”***

51. **An Article by Wikipedia a study by DNA Clinics in 2016;** opined that;

***”DNA testing is currently the most advanced and accurate technology to determine parentage. In a DNA parentage test, the result (called the 'probability of parentage').....is 0% when the alleged parent is not biologically related to the child and the probability of parentage is typically 99.99% when the alleged parent is biologically related to the child”***

52. From the aforesaid analysis the court finds that the prosecution proved its case beyond reasonable doubt and thus finds that the appeal has no merit. The court therefore makes the following orders;

***a. Appeal is dismissed, conviction is affirmed and sentence confirmed.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

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**C. KARIUKI**

**JUDGE**