



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 26 OF 2019

BETWEEN

ALFRED SIGEI ALIAS NINJA.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. M. Oanda, PM dated 15th February 2019 at the Magistrates Court in Kilgoris in Criminal Case No. 7 of 2018)

JUDGMENT

1. The appellant, **ALFRED SIGEI NINJA**, was charged, convicted and sentenced 20 years' imprisonment for the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act** ("the Act"). It was alleged that on 25th August 2017 at around 3.00pm in [particulars withheld] Location within Transmara Sub-county of Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of FCR, a child aged 13 years.
2. Before I proceed to consider the grounds of appeal, I remind myself of the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. The court must bear in mind that it neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.
3. After a voire dire, FCR (PW 1), testified that at the material time she was in Class 7 and on 25th August 2017 at about 2.00pm, the appellant called her and took her to a certain lodge. She told the court that, "[The appellant] laid me on the bed. He removed his pants and asked to remove mine and I did that. We then had sex." She also testified that she had sex with someone else previously and that after the three days, the appellant called her to a forest where they had sex and she returned home. She further testified that the appellant called for a third time and they had sex once again in a forest. She later realized that she was pregnant when she stopped having her periods. She told the court that after the appellant realized she was pregnant, he stooped receiving her calls. She was tested on 2nd August 2017 and found to be pregnant. At the time of the hearing, she was 7 months pregnant. When cross-examined by counsel for the appellant, she stated that the appellant was well known to her and that she had had sexual intercourse with another person in June 2017.
4. The child's mother, PW 2, testified that the child was born in 2005. She found out that she was pregnant on or about 12th January 2019. She told the court that PW 1 told her that it was the appellant who impregnated her. She did not know the appellant before. PW 1's father, PW 3, testified that PW 2 told him that PW 1 was pregnant and when he spoke to her she disclosed that the appellant was the one who impregnated her. He told the court he used to know the accused.
5. The investigating officer, PW 5, testified the incident of defilement was reported on 15th January 2018. She recorded statements and issued the P3 form. The clinical officer, PW 4, who produced the P3 medical form on behalf of another officer who examined PW 1 on 16th January 2018 and the tests confirmed that she was pregnant. He did not see any injuries on her private parts and her genitalia were normal.
6. In his unsworn statement, the appellant told the court about his arrest in August 2017. He denied that he knew PW 1 or that he caused her pregnancy. He told the court that the prosecution had not proved its case.
7. After considering the evidence, the trial magistrate was satisfied that the prosecution had proved the offence beyond reasonable doubt and convicted the appellant who now appeals against the conviction and sentence. The thrust of his petition of appeal is that the prosecution did not prove the case beyond reasonable doubt. Counsel for the accused pointed out that the trial magistrate erred in relying on the fact that the appellant impregnated PW 1 when the evidence did not support such a conclusion. He submitted that PW 1 testimony was inconsistent. Although she testified that she stopped having her periods after she had sex with the appellant on 25th August 2018, she told the court she

found out she was pregnant on 2nd August 2018.

8. Counsel submitted that the prosecution case was weakened by the fact that PW 1 only reported that she had been sexually assaulted 5 months after the incident yet no explanation was tendered by the prosecution to explain such delay. Counsel submitted that the appellant was entitled to an acquittal because the evidence also showed that PW 1's conduct was such that she could have been an adult at the time the incident took place.

9. In response, counsel for the respondent submitted that the prosecution proved its case as the evidence of penetration was proved by the testimony of PW 1 and the fact that she had sexual intercourse with another person or that she was pregnant was not material to the charge against the appellant.

10. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

11. The key testimony implicating the appellant was the sworn testimony of a child. Under the proviso to **section 154** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the trial court may convict an accused in sexual offences on the basis of the uncorroborated testimony of a child if, for reasons to be recorded, the court is satisfied that the victim is telling the truth.

12. There was no doubt that PW 1 was subjected to an act of penetration and that her age was established by production of the birth certificate which showed she was 14 years old. The issue was whether the appellant was the person who did felonious act. On this issue the trial magistrate concluded as follows;

The next question to grapple with is whether the accused herein is culpable or not. The minor's testimony was that she had sex even before she met the accused person herein but she continued to state that she stopped seeing her menses after she had sex with the accused person. In my view this removes the doubt as to who impregnated her. According to her, it is the accused herein and this Court has not reason to doubt her.

13. I agree with the appellant's counsel submission that the trial court laid too much emphasis on the issue of pregnancy when the essence of the offence of defilement is whether that accused committed an act of penetration. The trial magistrate did not consider this aspect of the case and did not give any reasons whether and why he believed the child was telling the truth in order to bring the case within the purview of the proviso to **section 154** of the **Evidence Act** which entitled the court to convict without looking for corroborative evidence.

14. Had the trial magistrate considered this fact, he no doubt would have asked the question why PW 1 took too long to report the appellant's felonious act. This issue goes to the veracity of PW 1's evidence upon which the conviction stands and falls. I cannot therefore say that the conviction is safe.

15. For the aforesaid reasons, I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KISII on this 28th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Ochoki, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.