REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 148 OF 2016

(CORAM: R.E. ABURILI – J)

TOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. G. Adhiambo, SRM in Ukwala SRMC CR. Case No. 334 of 2015 delivered on 24.10.2018)

JUDGMENT

1. The appellant herein TOT was charged with the offence of **defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that on diverse dates between 1.1.2015 and 30.1.2015 the appellant while in Ugunja Sub-county within Siaya County intentionally caused his penis to penetrate the vagina of GAO name withheld a child aged 17 years old.

2. In the alternative charge the appellant faced the 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 offence are that on diverse dates between 1.1.2015 and 30.1.2015 the appellant while in Ugunja Sub- County within Siaya County intentionally touched the vagina of GAO a child aged 17 years with his penis.

3. The appellant denied both charges and the prosecution called four witnesses.

4. This being a first appeal, this court is obliged to subject the entire evidence adduced before the trial court to a fresh assessment and re-evaluation in order to arrive at its own independent conclusion bearing in mind the fact that it never saw or hear the witnesses as they testified. This is a principle of law espoused in **Okeno v Republic [1972] EA 32).**

5. Revisiting the trial court evidence, PW1 GAO testified that she is a resident of South Rambula and that she was a class 8 pupil at [Particulars Withheld] Primary School. She further stated that she was aged 17 years. She told the court that since the year 2014 the time she was testifying; the appellant was her boyfriend. She said that she used to go to the place where the appellant used to work and that the appellant used to request for sex but she said that she feared getting pregnant.

6. It was PW1's testimony that in the month of January 2015 she had unprotected sex with the appellant and she became pregnant. It was her further testimony that after that she missed her periods that month as well as in February 2015 and March 2015. She said that she disclosed her pregnancy to her sister who then told her to go to hospital where she was confirmed pregnant. She said that she relayed the information to the appellant but the appellant denied being responsible for the pregnancy. PW1 stated that the appellant went ahead to tell her that she had other boyfriends and that therefore he would have a DNA test done after the child is born to determine who was the father of the said child. She said that when her teachers noticed the pregnancy, they interrogated her and she confirmed to them that she was pregnant, upon which her parents were called to the school and informed of her pregnancy.

7. It was the further testimony of PW1 that after that her father reported the matter to the chief and that the appellant refused to reach any agreement with her father and that instead the appellant threatened her. She said that she started attending prenatal clinics. That later, the Assistant Chief met the appellant and arrested him. She said that she was then issued with a P3 Form at the Ugunja Police Station. She identified her P3 Form as PMFI 1a, which was filled at the Ambira Sub District Hospital. She identified her treatment notes as PMFI 1b and stated that she dated with the appellant from July 2014 to January 2015 during which period they had unprotected sex. She identified the appellant in open court.

8. On cross being cross examined by the appellant, PW1 reiterated her testimony in chief that the pregnancy belonged to the appellant and added that she never used to have sex with anybody. Further, she responded that she had sex with the appellant in January 2015.

9. PW2 **No. 234582 Inspector Carolyne Sanganyi** of Ugunja Police Station testified that she was the Deputy OCS Ugunja Police Station and recalled that on 10.7.2015 she was at the police station when the complainant and her father reported a case of defilement that they said

was committed against the complainant on unknown date in the month of January 2015 by a person well known to the complainant as TOT who had since gone underground but was spotted on that 10.7.2015.

10. The witness stated that the said TOT was escorted to Ugunja Police Station by the area Assistant Chief and she placed him in custody. She stated that she recorded the statements of the witnesses and accompanied the complainant to Ambira Sub county Hospital for examination and filling of the P3 Form. PW2 stated that on examination it was found that the complainant was 6 months pregnant and the P3 Form of the complainant was filled.

11. She said that later the complainant availed her birth certificate and she noted that the complainant was a juvenile aged 16 years at the time she was defiled. PW2 stated further that she found that the complainant was born on 20.7.1998. She identified the P3 Form of the complainant which P3 Form is dated 10.7.2015 as PMFI 1a.

12. It was her further testimony that later in the month of October 2015 the complainant gave birth to a baby girl and with the authority issued to her (PW2) by the court on 22.3.2016 she took the appellant, the complainant and the baby of the complainant to Ambira Sub county Hospital for collection of samples for DNA test. She stated that later on 29.3.2016 the samples collected from the appellant, complainant and the baby of the complainant were taken to the Government Chemist in Kisumu for analysis and the Government Analyst prepared a report dated 26.5.2016 which confirmed that the appellant TOT was the biological father of KJ, the child whose biological mother is GAO the complainant in the case.

13. PW2 produced the birth certificate of GAO showing her year of birth as 1998 as exhibit 2; the exhibit memo form dated 29th March 2016 for forwarding samples collected from the appellant, the complainant and the baby of the complainant as Exhibit 3a and the report from the Government Chemist dated 26.5.2016 as Exhibit 3b.

14. She identified the appellant herein as the person she charged and stated that she never knew the appellant before. She further produced the birth notification form issued on 2.10.2015 for baby KJ indicating that the baby was born on 1.10.2015, as Exhibit 4. She stated that the said baby was born by the complainant and sired by the appellant as per the report from the Government Chemist produced.

15. On cross examination by the appellant, PW2 reiterated her earlier testimony and added that a girl aged 16 years cannot fail to know the identity of the person who impregnated her. She said that the appellant went underground but later resurfaced thinking that the issue had been forgotten and was arrested by the Chief who brought him to the police station. She insisted that her testimony was truthful.

16. PW3 **Victor Odhiambo Achayo** a clinical officer working at the Ambira Sub county Hospital testified that he had worked as a clinical officer for six years and that he had attended court on behalf of his colleague Howard Okeyo whose handwriting and signature he was familiar with having worked with the said Howard Okeyo for over 5 years. The trial court noted that the appellant had no objection to PW3 testifying on behalf of his colleague who filled the P3 Form. PW3 stated that he had the treatment sheet and P3 Form of GA a female aged 17 years from Rambula who was given an outpatient No. 5542/2015 and whose complaint was that she was 6 months pregnant. PW3 stated that the said patient was in fair general condition, she was stable and she was calm.

17. He stated that the impression made was defilement. He said that all the tests done were non-reactive save for the pregnancy test which was positive. He said that the patient was given amoxil and paracetamol. He further stated that the state of the patient's clothing was not indicated on the P3 Form. He said that the history was that on 10/7/2015 the patient was taken to Ambira Sub county Hospital in the company of police officers for examination following an earlier vaginal intercourse. He said that on examination of the abdomen of the patient, a supra pubic mass was noted which was approximately 24 weeks. He said that they detected foetal heartbeats and foetal movements. He said that the foetus was in breech presentation and that the nature of the offence was defilement of an under 18 years old. He said that when he examined the genitalia the hymen was not intact and that no discharge blood or venereal infection was noted.

18. He said that on details of the specimen analysed the pregnancy test was positive and on urinalysis & HIV test being done, no positive findings were noted -that is, the results were negative. He said that the final remarks of the clinician were that clinical findings were indicators of an earlier vaginal penetration with eventual ejaculation of semen into the vaginal tract and subsequent development of pregnancy. He also stated that the P3 Form was signed by Howard Moya on 10.7.2015. He produced the treatment notes and P3 Form of GAO the complainant, both dated 10.7.2015 as P. exhibit 1a and 1b respectively.

19. On cross examination by the appellant PW3 said that he did not know the appellant and that he did not examine the appellant.

20. At the close of the prosecution case the trial court found that the appellant had a case to answer and placed him on his defence. The appellant gave his statement of defence on oath as DW1 and denied committing the offence. He stated that he was TOT, a resident of Rambula and that he was 17 years old. At that point, the prosecution counsel interjected and stated that the appellant was 18 years at the time of the arrest. The appellant stated that he knew the charges that he faced after the charges were read to him afresh I Kiswahili language. He denied knowing the girls (sic).

21. The appellant stated that he was heading to Ugunja from Rambula when he met an old man pushing a motorcycle. He said that the old man called him and arrested him then took him to the office of the Assistant Chief in Rambula. He said that the teachers were rung and told to avail the girls. He said further that the girls availed themselves and recorded their respective statements.

22. He said that he was then taken to Ugunja Police Station together with the girls but he was placed in cells for 2 days then he was brought to court on a Monday where charges were read to him.

23. On cross examination by the Prosecution Counsel, the appellant confirmed that he heard what the investigating officer told the court and that he heard the investigating officer say that the girl delivered a baby. He said that he read the DNA report but stated that he had no idea how it ended up that he was the one who sired the baby of the complainant. The trial court observed that the appellant smiled as he was

answering the question. The appellant also responded that the complainant was not known to him and further stated that he was arrested on the way for no reason. He stated that as he was testifying he was 17 years old and that the investigating officer never knew him before. He stated that the police did not ask him how old he was. He said that he was in remand at GK Prison Siaya meant for adults but he did not know that one could complain about his age. When asked why he kept quiet about his age from the year 2015, he insisted that he was not lying about his age.

24. The trial court ordered that the appellant be taken for age assessment to establish the age of the appellant as at January 2015. The age assessment report dated 29.8.2016 was later availed to court before delivery of the judgment indicating that as at 1st and 30th January 2015, the appellant was aged between 18 to 23 years.

25. In his judgment, the trial court after analysing the evidence for the prosecution and defence found that the prosecution had established the guilt of the appellant beyond reasonable doubt and convicted him accordingly. In mitigation, the appellant asked for forgiveness as he was an orphan and that his boss had never visited him in prison.

26. The trial court then ordered for a probation report which report dated 6th October 2016 revealed that the appellant had earlier on been charged with a similar offence which was Criminal Case No 636 of 2015 and which was coming up for mention on 12/10/2016 for Probation Officer's report. The trial record of 18th October 2016 shows that the appellant was later sentenced to serve 15 years' imprisonment by the same court but a different magistrate. This was after the trial magistrate had done all that she could to establish the age of the appellant and whether as at the time that he committed the offence, he was over 18 years. After satisfying herself that the appellant was an adult as at the time he committed the offence, she sentenced him to serve 15 years imprisonment.

27. It is against the above conviction and sentence meted out on 24th October 2016 that the appellant promptly filed his petition of appeal on 25th October 2016 setting out the following grounds of appeal:

> *1. THAT: I was charged with Defilement cases in Both Courts in Ukwala Law Courts and wish to appeal for both of them all at once;*
>
> *2. THAT: the learned trial Magistrate erred in law by failing to consider that the trial was based on shoddy investigation that was baseless and hence unsafe to uphold a sound conviction;*
>
> *3. THAT: the learned trial Magistrate erred in law and fact in convicting me despite the contradictions in both defilement cases herein;*
>
> *4. THAT: I was not accorded fair hearing all through the trials hence denied a chance to contact an advocate and enough time and facilities to prepare for a defence.*
>
> *5. THAT: I cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof hence habeas corpus.*

28. The appellant also filed written submissions which he wholly adopted as canvassing his appeal which was opposed by the Respondent represented by Senior Principal Prosecution Counsel Mr Okachi.

29. Mr Okachi submitted that the offence committed was serious, that the prosecution proved its case against the appellant beyond reasonable doubt, that the appellant's age was proved to be beyond 18 years hence he was not a minor, that the offence called for deterrent sentence and that there was no good ground to persuade the court to tamper with the trial court's decision. Counsel urged the court to dismiss the appeal.

30. In a rejoinder, the appellant submitted praying that the court reduces for him the sentence of 30 years because it is too harsh and that he had been convicted and sentenced in another case to serve 15 years. He stated that he will not make it in prison.

DETERMINATION

31. I have carefully considered the appeal herein, the evidence before the trial Court, submissions for and against the appeal and in my humble view, the issues for determination flow from the grounds of appeal and submissions filed by the appellant and adopted as canvassing the appeal herein.. I must however focus on the grounds of appeal as I observe that the submissions introduce some new grounds of appeal which were not framed. I nonetheless appreciate that the Appellant was non-represented and therefore he may not know the procedural requirements for Appellants to confine to the grounds of appeal as filed save with leave of Court for new grounds to be argued.

32. On **whether investigations were shoddy and baseless and therefore unsafe to convict the appellant** PW2 No. 234582 Inspector Caroline Sanganyi then working at Ugunja Police Station as Deputy OCS testified and stated that she received the report of defilement from the Complainant on 10.7.2015. She investigated the case and recorded statements from witnesses, received the Appellant and placed him in custody as he had been arrested by the area Chief collected all the documentary evidence including a Birth Certificate for the Complainant and issued her with a P.3 form, organized for samples of DNA on the child born of defilement to be taken to the Government Chemist and even produced the original DNA report showing that the Appellant was the child's father.

33. In my humble view, the case was properly investigated to the fullest and therefore the allegation that investigations were shoddy is or unsupported.

34. **On whether there were contradictions in the Prosecution's case, and whether the charge sheet was defective, t**he Appellant

submitted that the charge sheet was defective because it stated "**defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006." Instead" of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.**

35. I have considered this challenge and in my humble view, albeit the charge sheet was not amended to read as suggested by the Appellant, the defect was minor and curable under Section 382 of the Criminal procedure Code as it did not go to the root or substance of the case for the Prosecution. Such a defect is not material and does not in any way prejudice the Appellant. Accordingly, the ground of appeal fails.

36. On **the alleged contradictions and inconsistencies in the Prosecution's case,** the Appellant submitted that the Complainant testified that she started dating the Appellant in February 2014 up to February 2015 and that the Appellant was her boyfriend and she used to go to where he worked hence there was no evidence of force, threat or harm, abuse of power. That at 17 years, the sex that Complainant had was consensual and not orchestrated by force. That the two were lovers and that is why they arranged to meet for a rendezvous, to have sex hence PW1 consented to have sex and that the Appellant never forced himself on the Complainant. He cited **Section 42 of the Sexual Offences Act** to the effect that a person consents if she or he agrees by choice did have the freedom and capacity to make that choice.

37. He also cited **Section 43 of the Act** and submitted that there were no cohesive circumstances or false pretenses and fraudulent means.

38. The Appellant further submitted, wondering why PW1 agreed to have unprotected sex yet she feared getting pregnant. According to the Appellant, PW1 was not forced or threatened to have sex and that is why she never reported to the Police promptly.

39. The above submissions would have make sense if the offence with which the Appellant was charged is rape.

40. The Appellant was charged with the offence of defilement of a child aged 17 years. PW1 testified on 13.7.2015 and stated that she was aged 17 years and a class 8 pupil. PW2 testified and produced PW1's birth certificate as an exhibit showing that the Complainant was born on 20.7.1008. It follows that as at 1st January 2015 to 30th January 2015, when the Appellant was alleged to have defiled her, she was 17 years less 6 months to turn 18 years.

41. **Section 2 of the Children's Act** defines a child as any human being who is under the age of 18 years. **Section 8(1) of the Sexual Offences Act creates an offence of Defilement of a Child**. The offence is causing penetration with a Child. **Subsections (4)** stipulates that 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.

42. Under **Sub-Section 5**, it is a defence, if it is proved that the Child so defiled deceived the Accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence and that the Accused reasonably believed that the Child was over the age of 18 years.

43. However, such belief is to be determined having regard to all the circumstances, or including any steps the Accused persons took to ascertain the age of the Complainant.

44. I have however read the evidence adduced by the Appellant before the trial Court in defence and I find nowhere where the Appellant raised the defence under **Section 8(5) of the Sexual Offences Act**.

45. He denied knowing the Complainant. Even after DNA report showed that he was the father of the baby product of the alleged defilement of the Complainant, the Appellant in cross-examination stated that he did not know how he ended up being found to be the person who sired the baby of the Complainant and he was observed by the trial Court to have been smiling as he answered that question. He maintained not knowing the Complainant and stated that he was arrested for no reason.

46. It was at that point in cross-examination that the Appellant raised the issue of his age being 17 years.

47. Albeit the Appellant denied the offence and/or knowing the Complainant and her offspring, in his submissions before this Court he raises the defence of consent. However, as the Appellant did not raise the defence under **Section 8(5) of the Sexual Offences Ac**t and as neither did he dispute or the age of the Complainant which was proved by her birth certificate to be 12 years, I have no hesitation in finding that as the Complainant was aged 17 years at the time of the alleged offence, and therefore the question of consent does not arise. A child is incapable of consenting to have sexual relationships or encounters and it matters not, therefore that the Complainant had unprotected sex with the Appellant and/or that she was not coerced or threatened to do the act (sex) or that she took her time before reporting the incident instead of reporting it the same day that she was allegedly defiled.

48. The Appellant, in my humble view, failed to demonstrate that there were any contradictions in the Prosecution Evidence which contradictions were material, for this Court to disturb the conviction verdict entered by the trial Court. Accordingly, I find the ground of appeal devoid of substance.

49. On the ground that the Appellant was denied a fair hearing/trial, was denied a chance to contract an advocate and enough time and facilities to prepare for his defence, the Appellant submitted at length that his rights were violated and that there was scientific proof. That the medical evidence tendered by Mr. Haward a medical practitioner was perforated, shambolic and controverted P3 form signed on 10.7.2015. That albeit the alleged defilement took place during the month of January 2015, the Complainant was only examined after 6 months, which delay, according to the Appellant, affected the findings. That no spermatozoa was found on the vagina and that neither was the Complainant's outer genitalia (organ) tested and clarification of injuries given to be either (six) grievous harm. That some tests like VDRL were not done, that PW1 never Complained of any pain or difficulty on walking, that there was no fluid discharge such as blood, urine or any other tissues of the body, as there was 9 long standing relationship.

50. Clearly, the submission above are inconsistent with the ground of appeal. Nonetheless, the question is whether there was sufficient evidence to link the Appellant to the alleged offence. PW1 GAO testified without ***voire dire*** examination that she was 17 years old. **Section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** requires that evidence of children be subjected to ***voire dire*** examination to establish whether they are telling the truth or whether they understand the importance of taking an oath.

51. In this case, the trial Court took evidence of PW1 without subjecting her to ***voire dire*** examination. Did not prejudice the Appellant as PW1 was proved to be 17 years old hence not a child of tender years and more so, there was other evidence other than the evidence of PW1 which showed by way of DNA testing that the Appellant was the father of the child delivered by PW1 after the alleged sexual encounter with the Appellant.

52. PW1 testified that she was 17 years and that the Appellant was her boyfriend. She used to go where he worked and he used to request her for sex but she feared getting pregnant, after having unprotected sex in January 2015. Later she missed her menses. In February and March she told her sister who advised her to go to hospital and she was told she was pregnant. When she called the Appellant and broke the news to him he denied responsibility saying PW1 had other boyfriends and he told her that she should give birth and that the child should be subjected to DNA.

53. Her teacher in school noticed this and questioned her and she revealed. That is when her father reported to the Chief and Appellant was told to negotiate with him but he refused and threatened PW1. She was taken to hospital and started attending clinics. Her P3 form was filled. She stated that they had dated from February 2014 to February 2015. She identified the Appellant and in cross-examination she stated that the pregnancy was his.

54. That she had sex with him only not with anyone else. Further, that she had sex with him in January 2015.

55. PW2 Inspector Carolyne Sanganyi received the report of defilement of PW1 by the Appellant in January 2015 and that he had gone underground after the act but was arrested in July 2015 by the area Assistant Chief. She accompanied the Complainant to Ambira Hospital where she was examined and found to be six months pregnant. PW2 also produced a Birth Certificate for the Complainant showing that she was born on 20.7.1998.

56. PW2 also produced DNA results report from Government Chemist together with the exhibit memo showing that the child delivered by PW1 on 1.10.2015 was sired by the Appellant as his DNA samples had been taken for testing. She also produced the birth notification for the child born of the Complainant as exhibits.

57. PW3 Mr. Victor Odhiambo Achayo a Clinical Officer at Ambira Hospital produced the P3 form on behalf of Mr. Howard Moya who examined PW1 and found that she had a missing hymen and was 24 weeks pregnant. She reported having had earlier vaginal intercourse. She was a minor 17 years old. There were foetal heartbeats and movements. HIV & Urinalysis were negative. There was no venereal infection, no discharge, and no blood. He concluded that there was vaginal, penetration with eventual ejaculation of semen into the vaginal tract and subsequent development of pregnancy. The P3 is dated 10.7.2015.

58. The above evidence by the Prosecution witnesses was never controverted by any other credible evidence. It is therefore illogical for the Appellant to claim that the medical evidence was shambolic or that it contradicted P3 form. No contradictions have been mentioned. The DNA evidence was conclusive that the child subject was the product of sexual Intercourse between PW1 and the Appellant and the P3 further showed that the Complainant's hymen was broken indicative of sexual penetration of her vagina.

59. In my view, no other evidence was required to prove the offence of defilement, the Prosecution having established beyond any reasonable doubt that PW1 was a minor aged 17 years, that her vagina was penetrated into leading to pregnancy and DNA results showing that the Appellant sired the child, and PW1 having testified that the Appellant whom she had had sexual encounters for over one year was the person responsible for the pregnancy as proven by DNA test results. Furthermore, the appellant's social inquiry report by the probation officer shows that he stated that he committed the offence but did not know that having sex with a young girl was an offence and that neither did he know her age. He regretted the offence.

60. **On whether the Appellant's right to fair hearing was violated**, the Appellant has not demonstrated that his rights were violated and in which way. He did not ask for an advocate to represent him and was denied. The Court heard PW1 expeditiously for fear of interference and gave the Appellant the right to recall the witnesses.

61. The Appellant did not object to PW2 producing the DNA Results report and neither did he object to PW3 producing the P3 Form filled by Howard, PW3's colleague and workmate.

62. In my humble view, no prejudice was occasioned to the Appellant by the production of the stated exhibits by persons other than their makers as reasons were given by the prosecution and the Appellant was given an opportunity to object which he did not object hence the submission rejecting that evidence is an afterthought and uncalled for.

63. On allegation that the case was commenced speedily and that he had no time to prepare his defence, the Appellant had the opportunity to inform the Court that he was not ready for the trial to commence. He did not object to the trial proceeding expeditiously and when he was placed on his defence on 14.7.2016, the Court adjourned the defence hearing to 14.7.2016 when he stated that he was ready to defend himself. He gave his testimony on Oath saying he was 17 years old which prompted the trial Court to order for the age assessment report which revealed that the Appellant was aged between 18 and 23 years as at the time he is alleged to have committed the offence between 1 st January to 30th January 2016.

64. Accordingly, in the absence of any other evidence to the contrary, I find that the age of the Appellant was proved beyond reasonable doubt to be between 18 – 23 years as at the time he committed the offence.

65. On allegations that the sentence was unlawful because he, the Appellant was a minor, I hold that there was conclusive evidence that the Appellant was an adult and therefore the ground and submission is found to be devoid of merit. It is dismissed.

66. On the sentence meted out, the trial Court considered the circumstances of the offence, the age of the Complainant, mitigation by the Appellant, the fact that he was not a first offender and the prevalence of the offence and sentenced him to serve 15 years imprisonment which is the minimum stipulated in **Section 8 (4) of the Sexual Offences Act.** That sentence is lawful. However, in view of the Court of Appeal in **CRA 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR,** I find that the court has discretion in resentencing. I set aside the 15 years imprisonment and resentence the appellant to serve ten (10) years imprisonment. This court cannot set aside the other sentence of 15 years as the file subject of the conviction is not before this court for consideration.

67. In the premise, I find this appeal against conviction devoid of merit. The same is hereby dismissed. I uphold the conviction. I however exercise discretion and set aside the sentence of 15 years imprisonment and substitute it with a prison term of 10 years sentence to be calculated from the date of his arrest on 10/7/2015.

68. Orders accordingly.

Dated, Signed and Delivered at Siaya this 26th day of June, 2019.

R. E. ABURILI

JUDGE

In the presence of:

Mr Okachi SPPC for state

Appellant in person

CA: Brenda and Modestar