IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 33 OF 2019

(C0NSOLIDATED)

BETWEEN

PHILIP MURIMI NKARI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in SO Criminal Case Number 02 of 2017 in the Chief Magistrate's* Court at Thika *by Hon.* G. Omodho (SRM) on 28th March, 2019*)

JUDGMENT

Background

1. **PHILIP MURIMI NKARI** (***hereinafter referred to as the Appellant)*** has filed this appeal against his conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act (***hereinafter referred to as the Act***) and abduction with intent to confine contrary to section 259 of the same Act. The offences are alleged to have been committed between 08th November, 2016 and 28th December, 2016 against **SNW** a girl aged 14 years**.**

The prosecution's case

2. The prosecution called 4 witnesses in support of the charges. **PW1, SNW,** the complainant herein testified that she was 15 years old and in class 8 at [Particulars withheld] School. She recalled that she did not go to school on 07th November, 2016 and that the Appellant who was selling soap had visited their residential area and given her some soap although she did not have money. It was her evidence that Appellant visited her residential area again on 08th November, 2016 and went into their house and finding her alone defiled her. Complainant stated that she accompanied the Appellant to his house on 23rd December, 2016 where she stayed and was again defiled on 27th December, 2016. She stated that Appellant asked her to go back home on 28th December, 2016 and when she refused, he beat her up and took her to Nairobi on 29th December, 2016 and abandoned her there from where she was rescued by police. She stated that she did not know how Appellant was arrested. **PW2 NM** complainant's brother recalled that on 23rd December, 2016, he went to work and left complainant at home but didn't find her upon his return. He recalled that on 01st January, 2017, a man was arrested and he led him to where the complainant whom he said he had rescued from Nairobi Country Bus was and that later the Appellant was arrested. In cross-examination, he conceded that Appellant and complainant were not found together and that complainant was later discovered to be pregnant. He also conceded that she was informed by some women that Appellant had been with complainant in his house for two days. **PW3 PC LUCY M'MBEYE** stated he found Appellant in custody on 1st January, 2017 after he was arrested by members of public. She said she called a man who said she was with complainant in Kamukunji area and that the Appellant who was alleged to have defiled complainant on 23rd December, 2016 was later charged. She confirmed that complainant was pregnant. She produced certificate of birth which shows that she was born on 28th March, 2002 as **PEXH. 3**. **PW4 JUDY GITHU** a clinical officer examined complainant on 05th January, 2016 and found her with bruises in her vagina and perforated hymen. She produced treatment notes and the P3 form as **PEXH. 1** and **PEXH. 2** respectively.

3. The Appellant in his unsworn defence denied the charges. He denied being owner of cell phone number 0729032887 which complainant said belonged to the man that defiled her. He denied going to Nairobi and stated complainant was found with another man and that the prosecution did not conduct DNA to link him to complainant's pregnancy.

4. The trial court found the charges proved and sentenced Appellant to 15 years' imprisonment for defilement and 4 years' imprisonment for abduction.

The Appeal

4. Aggrieved by the conviction and sentences, the Appellant lodged the instant appeal on 29th April, 2019. From the grounds of appeal and written submissions by the appellant, I have deduced the following issues: -

1. That the prosecution case was not proved beyond any reasonable doubt

2. The prosecution did not call crucial witnesses

3. Defence was not considered

5. When the appeal came up for hearing on 13th September, 2019, the Appellant stated that he was wholly relying on his grounds of appeal and written submissions.

6. Mr. Kasyoka, learned State Counsel opposed the appeal and stated that the age of the victim, penetration and identity of the perpetrator had been proved beyond reasonable doubt. He also stated that the charge of abduction had been proved.

Analysis and Determination

7. This is the first appellant court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

8. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are the same rounds that the Appellant has raised in his appeal. These are:

i. Age of the victim.

ii. Penetration.

iii. Identity of the offender

Age of the victim.

9. The trial court found as a fact that the complainant's age had been proved by certificate of birth PEXH**. 3** which shows that she was 3 months' shy of 15 years. That the complainant's age was 14 as stated in the charge sheet was indeed proved.

Penetration

10. Concerning the question of penetration, the law under **Section 2** of **Sexual Offences Act** defines penetration to entail: -

> **"partial or complete insertion of a genital organ of a person into the genital organ of another person."**

11. The P3 form produced by **PW4**, a clinical officer shows that complainant had a perforated hymen and bruises in her genitalia. She was also pregnant. Penetration was certainly proved beyond a doubt.

Identity of the offender

12. Concerning the identity of the offender, complainant stated that she first met the Appellant on 07.12.16 and he defiled her for the first time on 08.12.16 and also gave her cell phone number 0729032887 where she could reach him. She also stated that she went to Appellant's house on 23.12.16 where she stayed and he again defiled her on 27.12.16.

13. Complainant was the only witness to the alleged defilement. Appellant denied the offence. There not being any corroboration of the allegations of defilement by the complainant, conviction may only be founded on a finding under section 124 of the Evidence Act, that the complainant victim of sexual offence was, for reasons to be recorded telling the truth as to the allegation of offence.

14. Section 124 of the Evidence act is in the following terms:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person**

for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

15. The trial court did not put on record any findings as to the believability of the complainant as to the allegation of defilement so as to justify reliance on her uncorroborated evidence. For its part, this court has a duty to point out glaring gaps, inconsistencies and contradictions in the prosecution case which makes it unsafe to convict thereon while acknowledging that it did not see or hear the witnesses.

16. Appellant faulted the prosecution for not calling crucial witnesses in support of its case.

17. **Section 143** of the Evidence Act, Chapter 80, Laws of Kenya

> **"No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."**

18. Further, in **Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005,** the Court of Appeal held,

> **"...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

19. The foregoing notwithstanding, a prosecution that fails to call crucial witnesses stands the risk of failing to prove the charges if doubts are raised by other evidence adduced in the trial as to the commission of the offence.

20. PW2 told court that he was informed by some women who were neighbors of the Appellant that they had seen complainant in Appellant's house. The said women were not called as witnesses.

21. Appellant denied that cell phone number 0729032887 which the complainant alleged was given to her by the person that defiled her was his. The investigating officer did not investigate that number to confirm if it indeed belonged to the Appellant.

22. Evidence on record disclosed that the complainant was found in Nairobi where she was staying in the house of a man who was neither named nor called as a witness. Evidence that the said man had rescued the complainant from Nairobi was not corroborated. It was similarly not disclosed for how long complainant had been in that man's house.

23. Complainant was not present when Appellant was arrested. The members of public that allegedly arrested the Appellant were not called to shed light on how the Appellant was identified and by whom and how he was linked to this case.

24. In applying **Bukenya & Others. v. Uganda (1972) EA 594,** the Court of Appeal in **Nguku v. R (1985) KLR 412** held that -

> **"Where a party fails to produce certain evidence, a presumption arises that the evidence if produced would be unfavourable to that party."**

25. It was therefore imperative on the part of the prosecution to call the women neighbors of the Appellant who had allegedly seen complainant in Appellant's house; to investigate if cell phone number 0729032887 really belonged to the Appellant; to conduct a DNA to confirm if Appellant was responsible for complainant's pregnancy and to call the man from whom complainant was found to explain the circumstances under which complainant was found in his custody.

26. By the prosecution's failure to call the aforementioned crucial witnesses, this court must presume that their evidence would have been adverse to the its case. The prosecution case was marred by numerous gaps that were left unexplained and for that reason, the conviction was unsafe.

27. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentences set aside and unless otherwise lawfully held, it is ordered that Appellant shall be released and set free forthwith.

DELIVERED AND SIGNED IN KIAMBU THIS *25th* DAY OF *October* 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Nancy

Appellant **- Present in person**

For the State **- Mr. Kasyoka**