REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CRIMINAL APPEAL 50 OF 2014

T M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence of the Chief Magistrate's

Court at Machakos in Sexual Offences Case No. 11 of 2009 in the judgement of

Hon P.N. Gesora (Senior Principal Magistrate) delivered on 12/3/2014.]

JUDGMENT

Introduction

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on unknown date in June 2008 in Mwala District within Eastern province intentionally and unlawfully caused his penis to penetrate the vagina of ZNM a girl aged 16 years. He also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

2. The trial court convicted appellant on the main charge and sentenced him to serve 15 years imprisonment. The appellant was aggrieved by the trial court's decision, and he has appealed to this court against the conviction and sentence. As this is the first appellate court, it is bound to consider the entire evidence, evaluate it and reach an independent conclusion as to whether the conviction before trial court should be upheld bearing in mind that the court neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

The Prosecution's Case

3. PW1 the complainant ZNM testified that in the month of June 2008 she was a class 8 student at [particulars withheld] primary school. On a date she could not recall, a Wednesday she went home at 4:00pm and as she was going to wash her uniform a teacher by the name of T M K who was employed by the school board passed near their home going to a shop that was nearby. He saw her, called her and told her to meet him near the shop as he wanted to send her to school. The complainant complied and went to the shop but there were many people. The appellant told her to move aside and she went to an unfinished house. The appellant went to the unfinished house where the appellant pulled her to the ground and removed her biker and panty. The appellant removed his trouser to the knee, he lay on her and penetrated her vagina with his penis. He told her not to report the matter to anyone and promised to give her Ksh100/=. After 10 minutes, he went away and the complainant went home crying and her mother inquired why she was crying but the complainant never told her anything. In December of the same year the complainant discovered that she was pregnant but never told anyone. In January 2009 when she was to join Form 1, she informed her mother of her pregnancy. Her mother took her to Mango dispensary where she was examined and found to be expectant. On 23rd February, 2009 she gave birth to a baby girl "IM". They had reported the matter at Machakos Police Station and were referred to Masii Police Station. The appellant was arrested. She testified that when the incident occurred she was 16 years and alleged that the appellant was the father of her child. A pregnancy test, clinic card, P3 form, DNA report and birth certificate were marked for identification

4. PW 2 F N M a farmer testified that her daughter ZNM was in class 8 in the year 2008. In January 2009 when ZNM was to join form 1, she informed her that she was pregnant. The pregnancy was as a result of sexual intercourse she had with the appellant in the month of June 2008. PW2 took ZNM to Mango Dispensary where she was examined and found to be 8 months pregnant. On 29/1/2009 they reported the matter at the children's office Machakos and were referred to Machakos Police Station and subsequently referred to Masii Police Station where they recorded their statements. ZNM gave birth to a child IM on 29th February, 2009. The police arrested the appellant in the month of May 2009. It was her testimony that a DNA test was done on the ZNM child (IM) and the appellant. The samples were taken to Kenyatta National Hospital for testing. The same was positive that the appellant was the father of IM. The appellant was known to her, he was a

teacher at the school ZNM attended and that she used to see him in school when she attended meetings.

5. PW3 Henry Kiptoo Sang a government analyst based at the government chemist testified that his duties entailed analysis of human blood samples and specifically DNA to determine paternity. It was his testimony that on the 14th April 2010 he received blood samples of 3 people, the samples were marked as T M K, IM (child) and ZNM. The samples had been brought by PC Muthama of Masii Police Station together with an exhibit memo. The profiles generated part of the report and found out that half of the DNA found in the child sample originated from ZN and the other from T M K. He testified that there was a spelling error when typing the report and it indicated BM instead of "IM" but the same had been corrected. He produced the DNA report as exhibit 4.

6. PW4 Michael Ngili testified that he was a clinical officer working at Kaani Medical Clinic, produced the P3 form and, he examined PW1 on 8th of July 2009 and found evidence of penetration and that PW1 had conceived and later given birth to a child.

7. PW5 P M testified that PW1 was his daughter; that in January 2009 he received a call from his wife informing him that PW1 was pregnant. He travelled home and upon talking to PW1 she confirmed that the Appellant had impregnated her. They reported the incident to the children's department and were referred to Machakos Police Station and subsequently referred to Masii Police Station. The appellant was later arrested.

8. PW 6 PC David Mbugua was attached to Masii Police Station. On the 2nd February, 2009, he was assigned to investigate the case that had been initially reported at Machakos Children's office, Machakos Police Station and finally Masii Police Station. PW1 was expectant at the time and she was asked to bring the Appellant. The Appellant went to the Police Station and was released on bond to enable the complainant to give birth. Blood samples were taken to the government analyst to confirm that the appellant was the biological father of PW1's child. He obtained a birth certificate confirming that PW1 was 17 years old at the time. He produced clinic cards and birth certificate in evidence. The appellant was arrested and the charges herein preferred.

Defence Case

9. When put on his defence, the Appellant gave sworn evidence, in which he denied the offence and blamed the charges on a grudge with PW5, the complainant's father, who was not happy after the appellant managed to buy a plot that he was interested in. The appellant told the court that he was employed and worked as a teacher employed by the PTA, and he produced in evidence a letter of appointment from [particulars withheld] Primary school where he reported on 21st February 2008. He testified that PW1 was his student in 2008 and that he had once summoned her mother PW2 to school after he noticed that her performance had deteriorated. He confirmed to the court that he was summoned to Machakos level 5 hospital, where he went and found PW1 with a child, but he denied that his blood samples were taken.

Judgment of the trial court.

10. The trial magistrate held that the appellant had defiled the complainant leading her to give birth to a baby girl and convicted him in the main count and sentenced him to 15 years imprisonment.

The Appeal

11. The appellant through his advocate filled an appeal citing the following grounds;-

1. The learned magistrate erred in law and fact in proceeding to convict the appellant against the weight of evidence.

2. The learned magistrate erred in law and in fact in totally disregarding the appellants submissions placed before it.

3. The learned magistrate erred in-law and fact in shifting the burden of proof to the appellant while the prosecution had not proved its case beyond reasonable doubt.

4. The learned magistrate erred in law and fact by failing to comply with the mandatory provisions of section 200 of the criminal procedure code.

SUBMISSIONS

12. The Parties filed written submissions, respectively dated 22nd January 2016 and 9th March 2016 through M/S B. M. Mungáta & Co. Advocates for the appellant and Mr. Cliff Machogu, Prosecution Counsel for the DPP,

Issues for determination

13. The issues that arise for determination in this appeal are whether the offence of defilement was proved and if so whether the appellant was the perpetrator.

DETERMINATION.

The law

14. The definition of defilement in Section 8(1) of the Sexual Offences Act is given as ***"a person who commits an act of penetration with a***

child is guilty of an offence termed as defilement". The section shows the ingredients of defilement as penetration, age of the victim and the identification of the perpetrator of the act. Section 8(4) of the same act states that ***"a person who commits an act 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."*** Section 2 of the said Act defines penetration ***"as the partial or complete insertion of the genital organs of a person into the genital organs of another person''.***

Penetration

15. Evidence of penetration was adduced by PW1, PW3 and PW4. PW1 testified that on an unknown date in the month of June 2008 on a Wednesday at 4:00pm she was at home when the appellant who was her teacher passed near her home while on his way to the shops. The appellant called her and asked her to meet with him near the shop so that he could send her to school. She complied and the appellant led her to an unfinished house, held her and pulled her to the ground. He removed her biker and panty, removed his trouser to the knee and he lay on her and penetrated her vagina with his penis" she further testified that as a result of the sexual intercourse with the appellant she got pregnant and gave birth to a child "IM".

16. PW3 a government analyst who after conducting DNA Tests on 3 blood samples i.e the appellant, IM (a child) and ZNM (the complainant) confirmed in his findings in the DNA report, that "based on the above findings there are 99.99% more chances that T M K is the biological father to "IM" who is the daughter of "ZNM" . The DNA report findings corroborate the testimony of PW1 as to the fact that penetration occurred, and subsequently thereafter she conceived and gave birth to "IM". As discussed below, the DNA report is unreliable in view of denial by the appellant that his blood sample was ever taken and the failure by the prosecution to call the doctor who took the blood sample or the police officer who witnessed it.

17. The Mother and Child Health Booklet produced as exhibit 1, was issued on 15th September, 2009 by Mango Dispensary. In page 6 there in it shows that upon physical examination PW1 there was a foetal heart that was detected and foetal movement, a further proof of PW1's pregnancy. This proves that ***some*** penetration did occur leading to the conception but not necessarily that there was penetration for purpose of the offence charged in this case.

18. PW4 the clinical officer who examined the complainant PW1 on the 20th of July, 2009 found that he examined the complainant and found evidence of penetration but this was done over one year after the alleged incident and it cannot be taken to corroborate the complainant. However, as shown below the Court could, if satisfied, as here, that the complainant was telling the truth convict on the basis of the complainant's evidence only in terms of section 124 of the Evidence Act.

Age of the Victim

19. In sexual offences, the age of the victim is a crucial factor in establishing guilt as well as for purposes of sentencing. The significance of establishing the age of a victim of defilement was emphasized in ***Alfayo Gombe Okello v. Republic*** *(2010) eKLR where the Court Appeal held as follows:*

> **"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt."**

20. The age of the complainant in this case at the time of the offence was proved by the production of the certificate of birth. The birth certificate which was produced as exhibit 8 indicated the date of birth of the complainant as 30th March, 1992. A child health card belonging to the complainant was also produced as exhibit 7 which indicated the date of birth as 31st March 1992. There is a discrepancy as to the date of birth in the 2 documents. The difference of 24 hrs. is not so material as to raise doubts about the certainty of the complainant's age for purposes of proof of the defilement of the child and sentence purposes. The Child Health Card was the document indicating the birth and weight development and vaccinations at different intervals in the growth of the Child; it was the document first in time before the certificate of birth which was obtained later, and the Court takes the date of birth recorded in the Child Health Card that is 31/3/1992 as the correct date of birth. This is close enough to the date of the first vaccination (TB vaccination) for the child indicated as having been given on 3/4/1992. The complainant gave her age as 21 years when she testified before the court on 9/7/2012. The complainant's age was at 16 years within the age bracket of section 8 (4) of the Sexual Offences Act, which provides that –

> "(4) 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."

Identity of the perpetrator

21. The appellant was well known to the complainant as he was her teacher this fact was conceded by the appellant in his sworn defence. Therefore, the complainant and the appellant were not strangers to each other and further the incident occurred at 4:00pm therefore there is no doubt that the complainant properly identified the appellant through recognition. The Defence exhibit No. 1 handwritten letter of offer of employment at [particulars withheld] Primary school by the Parents teachers Association (PTA) dated 10th January 2008 calling on the appellant to report on 21/2/2008 does not, besides it informality, support his allegation that he was not in the employment of [particulars withheld] Primary School in June 2008 when he is alleged to have defiled the complainant a pupil at the School. It does not show when if at all he left the school. It is only a letter of offer without indication whether he had taken up the offer. And he testified that he kept "moving from one school to another where pay was good" and also said this:

> "I was the complainant's teacher in 2008 [at] [particulars withheld] Primary School. Her performance had deteriorated and when I enquired I realised that she was skipping lessons. I summoned her mother to school and informed her about. She was bitter and

sided with the girl."

Against the weight of the Prosecution evidence on this point, I find that the appellant as testified by PW1 a teacher at the complainant's school at the material time, a matter which goes to her truthfulness as a witness.

22. The DNA report linked the appellant as the father to the complainant's child. The DNA report postulates in issues relating to genetic inheritance that" **Every person inherits half of their DNA from their biological mother and the other half from their biological father. By examining the DNA from a person and their parents it is possible to determine the elements of DNA gained from their biological mother and those gained from their biological father".**

23. However, the appellant in his sworn defence testified that he was summoned by a police officer to go to Machakos level 5, upon reaching the hospital he found the complainant and a child there. He denied that blood samples were taken from him for analysis but did not testify as to why he was summoned and what took place when he was at the hospital. From the trial court record the prosecution made an application on the 16th of March 2010 for DNA tests to be carried out. The application was opposed by Mr. Mung'ata the appellant's Counsel. The trial court allowed the application and ordered the appellant, complainant and her child to visit the investigating officer at Masii Police Station at an appropriate date in order for them to be taken to the hospital to undergo DNA testing.

24. Although PW2's testimony was that samples of blood were taken from the appellant, the complainant and the child at Machakos Level 5 hospital, PW3 the government analyst who analysed the blood samples marked as belonging to the appellant, the complainant and the child, of course did not take the samples and could not confirm that a blood sample was indeed taken from the appellant. In the circumstances where the appellant denied having had any blood sample taken from him, it was incumbent for the Prosecution to prove the same by calling the doctor who took the samples. It cannot be assumed, merely because the appellant honoured the summons by the police to go to hospital, that blood sample had been taken from him. It is was for the prosecution to prove this fact so as to establish the link between the blood samples to the persons involved in the DNA testing and to the results of the analysis of the Samples.

25. The failure by the prosecution to call the police officer who was present when the DNA samples were taken or the doctor who took the samples as a witness, as raised in the appellant's submission while not fatal to the prosecution's case in other respects does affect the credibility of the DNA evidence. Section 143 of the Evidence Act provides that –

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

But it does raise a reasonable doubt because it was raised in cross-examination of the Prosecution witness PW6 before close of the Prosecution's case with ample opportunity to call such a witness. In addition, when the same issue was raised in the defence testimony, the prosecution could also call evidence under section 212 of the Criminal Procedure Code as shown below.

26. The issue of taking of blood samples from the appellant was raised in the cross-examination by Counsel for the appellant of the Investigating Officer (PW6). The Investigating Officer said that the appellant's blood sample was taken but he had not been present when that was done. The appellant denies that his blood sample was ever taken for purposes of the DNA testing. Despite this cross-examination of the Investigation Officer (PW6) last Prosecution Witness and the defence evidence of the appellant raising the question of his blood samples ever being taken, the prosecution did not apply as it could have to call for rebuttal evidence under section 212 of the criminal Procedure Code which provides as follows:

> **"212. Evidence in reply**
>
> *If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."*

27. I think that a reasonable doubt is raised as to whether the blood samples presented to PW3 for DNA testing included the appellant's sample. Accordingly, the DNA report linking the appellant and the complainant's child as proof of the charge of defilement herein is untrustworthy and therefore rejected.

Proof of defilement not dependent on DNA test

28. But a defilement charge shall not be proved by the evidence of DNA link between an accused and the child of the complainant he is alleged to have defiled. There may be other evidence pointing to the involvement of the accused upon which must to convict, if by that evidence the accused's guilt is proved to the required standard of beyond reasonable doubt.

29. PW1 described the act for which the appellant was charged as follows:

> He came to that unfinished house and he held me and pulled me to the ground and he removed my biker and panty. He removed his trouser to the knee and he lay on me and penetrated my vagina with his penis. He told me not to report the matter to any one and he promised to give me 100/-. After 10 minutes he went away and I went home."

30. There is nothing in the cross-examination by Counsel for the appellant that reduces the cogency of her testimony and the alleged grudge between the appellant and her father over a plot of land which the appellant beat the father in buying, whether accepted or not, does not remove the cogency of her testimony, which is supported by the evidence of her conception and delivery of baby in February 2009.

31. In as much as the appellate court is required to defer to the trial court which heard the testimony and saw the demeanor of a witness, I

would consider that this is a fitting case for the invocation of the Proviso section 124 of the Evidence Act, the complainant being the only witness of the act of defilement and she being consistent and unshaken in cross-examination of her evidence. Section 124 of the Evidence Act provides as follows:

> "**124. Corroboration required in criminal cases**
>
> 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.**
>
> [Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]"

32. The appellant's contention that the case was a frame up as a result of grudge between him and the complainant's father after the appellant purchased a plot that he was interested in. This allegation was only brought out when the appellant was giving his defence. The appellant through his advocate never cross- examined the complainant's father who testified as PW5 about the issue of the purchase of the alleged plot and the existence of a grudge between them. No allegation of grudge was made against the complainant and no reason could be ascribed to why the complainant who testified as an adult at 20 years, without possibility of influence by her father against whom grudge was alleged, would lie against the accused. I find this defence as an afterthought.

33. The issue of the failure of the trial court to comply with section 200 of the CPC has been raised by the appellant was not well founded. The trial court record indicates that the appellant was arraigned in court on the 6th of May 2009, the case came up for hearing several times before Hon. S. Gacheru (RM) but did not take off. The trial magistrate was transferred, the case was subsequently re-allocated to Hon. PN Gesora (SPM) and who heard the evidence of all the witnesses and rendered the judgement herein. Compliance with section 200 of the CPC was well canvassed by the Court of Appeal in ***David Kimani Njuguna Vs. Republic*** Nyeri Cra No. 294 of 2010 made the following observation:-

> **"In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind Section 200 of the CPC more than thirty years ago in Ndegwa –Vs- Republic [1985] 534 where it held that:**
>
> **1. The provision of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.**
>
> **2. The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started** *de novo*. ***Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.***
>
> **3. No rule of natural justice, statutory protection, and evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.**
>
> **4. The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.**
>
> **5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."**

34. Following the same observation of the Court of Appeal, this court finds that compliance with Section 200 CPC was not necessary as trial magistrate took over the case before his predecessor had commenced hearing of the evidence. The trial magistrate, therefore, had the full benefit of seeing, hearing, assessing and gauging the demeanour and credibility of all the witnesses. The previous trial court (S. Gacheru, RM) had only ruled on 16/2/2010 allowing an application by the prosecution seeking DNA testing. The appellant did not suffer any prejudice by change of trial court.

35. The amendments to the charge were considered by the trial court and granted well before the prosecution closed its case as permitted under section 214 of the Criminal Procedure Code and the appellant was able to be recalled for cross-examination by the prosecution witnesses on the basis of the amended charge and no prejudice was suffered by the appellant.

36. The Court only disagrees with the trial court when it shifts the burden of proof to the accused by requiring him to undergo a fresh DNA testing to demonstrate the allegedly faulty results thereon as follows:

> "There was a DNA test that was conducted and the result revealed that accused was the biological father of the child that PW1 gave

birth to. Although accused denied having given out samples he conceded to having been summoned to Machakos Level 5 where he met the complainant and the child. He however does not state what he did there and how he left the facility.

Now that the DNA test has been done as part of the investigations by the police and if accused disagreed with them nothing would have been easy for him to undergo a test to controvert the findings made by the earlier test. This would not have infringed on his constitutional rights as he would be subjecting himself to the process voluntarily and the same would form part of his defence.

It is never the duty of an accused to prove his innocence! The legal burden of proof in criminal cases remains with the prosecution and never shifts.

Orders

37. Accordingly, for the reasons set out above, the Court finds no merit in the appeal and it is consequently dismissed.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2018

KEMEI J.

JUDGE

APPEARANCES:

M/S B. M. Mungáta & Co. Advocates for the Appellant.

Mr. Cliff Machogu, Prosecution Counsel for the DPP.