REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 59 OF 2017

J C K.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment and orders of the Chief Magistrates Court at Eldoret delivered on the 27th day of February 2017 in Eldoret Chief Magistrate's Court Criminal Case No.149 of 2016 by Hon. H. O. Barasa, Principal Magistrate)

JUDGMENT

[1] This is an appeal that was lodged herein on **7 June 2017** by the Appellant, **JCK**, against the Judgment of the Learned Principal Magistrate, **Hon. H. O. Barasa**, in **Criminal Case No. 149 of 2016**. The Appellant had been charged with the offence of Incest by a Male contrary to **Section 20(1)** of the **Sexual Offences Act**, **No. 3 of 2006**. He was charged in the alternative with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The Appellant had denied the charges which were allegedly committed between **9 April 2016** and **21 June 2016.**

[2] The Appellant was taken through the trial process and in a Judgment delivered on **27 February 2017**, the Appellant was found guilty of the offence of Defilement, was convicted thereof and sentenced to serve 15 years imprisonment. Being aggrieved by his conviction and sentence, the Appellant, through the law firm of **M/s Nyaundi, Tuiyott& Company Advocates,** preferred this appeal on the following grounds:

> **[a]** The Learned Magistrate erred in law and fact by convicting the Appellant on the basis of insufficient grounds;
>
> **[b]** The Learned Magistrate erred in law and in fact by convicting the Appellant when the case against him was not proved beyond reasonable doubt;
>
> **[c]** The Learned Magistrate erred in law and fact by convicting the Appellant yet he was neither medically examined nor his DNA profiled;
>
> **[d]** The Learned Magistrate erred in law and in fact by not considering the Appellant's defence.

[3] Accordingly, the Appellant prayed that his appeal be allowed and the conviction quashed. The appeal was urged by **Mr. Akenga** on behalf of **Mr. Songok** for the Appellant. He relied on the Appellant's written submissions filed herein on **29 May 2018** and the authorities annexed thereto. It was the submission of Counsel that the Trial Magistrate fell into error in convicting the Appellant with the offence of Defilement, yet he was never charged with it; and that the substitution of the offence of Incest by a Male with the offence of Defilement was done in contravention of **Section 186** of the **Criminal Procedure Code;** and in disregard of the age bracket prescribed thereby.

[4] Counsel also took issue with the quality of evidence adduced before the lower court, contending that it was not only contradictory, but was also insufficient to sustain a conviction. According to Counsel the medical evidence adduced merely confirmed that the complainant and her age mates were of age and were already sexually active and therefore it could not be said that she had been defiled by the Appellant. Counsel accordingly urged the Court to allow the appeal. He relied on the cases of :

> **[a] Martin Charo vs. Republic [2016] eKLR**
>
> **[b] J.O.O. vs. Republic [2015] eKLR;** and

[5] Ms. Oduor for the State opposed the appeal contending that the Prosecution had called 5 witnesses before the lower court whose evidence was consistent, credible and well-corroborated; and that the Trial Magistrate convicted the Appellant of the offence of Defilement after satisfying himself that all the ingredients of the offence had been proved beyond reasonable doubt; that the Appellant was well known to the complainant; and that this was not the first time the complainant was defiled by the Appellant. She was also of the posturing that the Magistrate did consider the Appellant's defence but dismissed it as a mere denial; and therefore that there was no basis for the contention by the Appellant that his defence was never given consideration.

[6] On the substitution of the charge, **Ms. Oduor** relied on **Section 186** of the **Criminal Procedure Code** and argued that the Trial Magistrate clearly explained why the Appellant had been convicted of Defilement although he had not been charged with the offence. She similarly pointed out that, granted the provisions of **Section 124** of the **Evidence Act, Chapter 80 of the Laws of Kenya,** corroboration was not a requirement in this matter. She therefore prayed for the dismissal of the appeal.

[7] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by Learned Counsel. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa made this point thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[8] The Appellant had been charged with Incest by Male Contrary to **Section 20(1)** of the **Sexual Offences Act**; and the particulars were that on diverse dates between **9 April 2016** and **21 June 2016** at **[particulars withheld] Village** in **Eldoret East District** within **Uasin Gishu County**, being a male person, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of the complainant, a female child then aged 16 years who was to his knowledge his granddaughter. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the Sexual Offences Act.

[9] The Prosecution called a total of 5 witnesses before the lower court to prove the particulars of the charges and the Complainant testified as **PW1,** her mother **MCC** as **PW2,** and one of the complainant's teachers, **Florence Kosgei,** as **PW3. PW4** was **Dr. Eunice Temet** of Moi Teaching and Referral Hospital who produced the P.3 form on behalf of **Dr. Jane Yatich**. The Investigating Officer, **Corporal Arthur Mbeja** was the last prosecution witness. The totality of their evidence was that, while **PW3** was handling disciplinary issues at [particulars withheld] Primary School on **23 June 2016**, she got to learn that some of the female children had been engaging in sexual activities; and that the Complainant, who was one of the victims, got to confess that she had had sexual intercourse with her grandfather, who was also the school watchman. It was the evidence of **PW3** that she immediately reported the matter to the Complainant's parents, who, in turn, reported to the Police. The Complainant was consequently escorted to Moi Teaching and Referral Hospital for medical examination and was examined by **Dr. Yatich** and a P.3 form filled showing that she had healed hymenal tears.

[10] On the basis of the foregoing evidence, the Learned Trial Magistrate focused her attention on the provisions of **Section 20(1)** of the **Sexual Offences Act** and proceeded to set out the issues for determination to be:

[a] Whether the Appellant had sexual intercourse with the Complainant;

[b] Whether the Appellant was related to the Complainant;

[c] Whether the Complainant was a minor.

[11] The Trial Magistrate was of the view that whereas the offence of Incest by a Male had not been proved, there was sufficient evidence to prove the offence of Defilement under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**, beyond reasonable doubt. Accordingly, pursuant to **Section 186** of the **Criminal Procedure Code**, the Appellant was convicted of the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act.** On the basis of **Dominic Kibet Mwareng vs. Republic [2013] eKLR,** the Learned Magistrate was satisfied that the ingredients of the offence of Defilement had been proved; namely that there was penetration; and that the Complainant was a minor.

[12] Upon a re-evaluation of the evidence, I am satisfied that the Learned Magistrate was justified in coming to the conclusion that conclusion. Here is his analysis of the evidence:

> **"...In her evidence in chief, the complainant was firm that she had sexual intercourse with the accused who was well known to her since she was like a grandfather to her. Her evidence was consistent and was not shaken at all during cross-examination by the accused. A certificate of birth was produced in evidence which certificate showed that the complainant was 16 years old as at the time of the offence herein. There is no doubt that she knew what sexual intercourse means. I am convinced from her evidence that she knew what she was talking about. The Medical Report produced in evidence showed that indeed she was defiled and this basically confirmed that she was telling the court the truth. The accused alleged that the complainant's father framed him up for the offence because of the grudge he had against him. It is however significant to note that one of the complainant's teachers is the one who informed the complainant's parents that the complainant had been defiled by her relative. It cannot therefore be true that the complainant's father cooked up this case against the accused as he alleged in his defence...The Prosecution has successfully demonstrated that the complainant herein was a minor and that she was defiled by the accused who was well known to her..."**

[13] It is clear therefore that the evidence that was availed before the lower court merely showed that the Appellant is a close relative of the Complainant's father, and therefore was not a grandfather, strictly speaking, for purposes of **Section 20(1)** of the **Sexual Offences Act**. Thus, having found that the offence of incest could not be sustained by the evidence; and that the offence of Defilement had been proved beyond reasonable doubt against the Appellant, the Trial Magistrate was perfectly entitled, by dint of **Section 186** of the Criminal Procedure Code, to convict him of the proved offence of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The pertinent sub-sections of **Section 8** of the **Sexual Offences Act** provide as follows:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(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.**

[14] It is instructive that the **Sexual Offences Act**, which is the latter legislation, subsequently expanded the scope of offence of Defilement beyond what had been envisaged by **Section 186** of the **Criminal Procedure Code,** and is taken to have impliedly expanded the scope of **Section 186** of the **Criminal Procedure Code** as well. It is therefore immaterial that **Section 186** of the Criminal Procedure Code is specific to the age of 14 years. The bottom-line is that the Court had the requisite power, by dint of **Section 186** of the **Criminal Procedure Code**, to convict for any offence of Defilement as defined and proved under the **Sexual Offences Act**; which is what it did. The impugned decision further shows that the lower court took into consideration the defence that was offered by the Appellant in coming to its conclusion. Hence, his allegations that the Complainant's father framed him on account of a grudge were considered but found baseless. That decision cannot be faulted either, for it was premised on sound evidence.

[15] I do note that in Ground 3 of his Petition of Appeal, the Appellant faulted the Trial Magistrate for convicting him yet he was not medically examined or his DNA profiled. It is however instructive that whereas Section 36 of the Sexual Offences Act provides for DNA testing, that provision is not mandatory. In **Evans WamalwaSimiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."**

[16] Accordingly, I would share the viewpoint taken by the Court in **AML v Republic [2012] eKLR** the that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

I therefore find no merit in that ground.

[17] The case of **Martin Charo vs. Republic (supra**) was cited to support the argument that the Complainant was already sexually active and was therefore that this was not a case of defilement. I understood the Appellant to be arguing that the Complainant had already been deflowered anyway, hence the healed hymen by the time of examination; and therefore that she had no basis for lodging a complaint of defilement. I however have no hesitation in rejecting that argument given the clear provisions of **Section 8** of the **Sexual Offences Act.** Any act that causes penetration of the genital organ of a child amounts to defilement and is therefore reprehensible. It is immaterial whether it is the first such act or acts committed subsequent to a victim's deflowering.

[18] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1**) as read with **Section 8(4)** of the **Sexual Offences Act** was based on sound evidence. and that his sentence of 15 years is not only lawful but is also well deserved. I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2018

OLGA SEWE

JUDGE