REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.111 OF 2016

(An Appeal arising out of the conviction and sentence of C.N. Ondieki - RM

delivered on 23rd February 2016 in Kibera CMC. CR. Case No.313 of 2013)

JOSEPH WAMBUA BAHATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joseph Wambua Bahati was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 25th and 26th August 2012 within Nairobi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of D W, a girl aged fourteen (14) years. He was in the alternative charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same dates and in the same place, the Appellant unlawfully and intentionally touched the vagina of D W, a girl aged fourteen (14) years.

When the Appellant was arraigned before the trial magistrates' court, he pleaded not guilty to the charges. After full trial, he was convicted of the main charge of **defilement** and was sentenced to serve fourteen (14) years and eight (8) months imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed for an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him for the offence of defilement and yet there was no sufficient evidence to prove the charge. He was aggrieved that the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. He was further aggrieved by the sentence pronounced by the trial court citing that it was too excessive based on the circumstances of this case. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, Learned counsel, Mr. Mulandi appeared for the Appellant. Ms. Aluda, the Learned State Counsel represented the State. Mr. Mulandi submitted that the trial court record and the charge sheet differed with regards to the date that the Appellant was charged as well as the day he was arrested. He contended that the Appellant was charged on 20th January 2013; however the charge sheet indicated that he was charged on 28th January 2018. It was his submission that these facts exposed discrepancies in the dates in which the Appellant was charged. On the arrest of the Appellant, he submitted that the Appellant was taken to court after four (4) days of his arrest and for this reason his rights were violated. Counsel further submitted that the Appellant and the complainant used to live in the same compound. The houses were made of iron sheets and neighbours could hear what was happening in the other houses.

On the material dates, counsel submitted that the complainant testified that the incident took place at about 8.00 p.m. She further told the court that the wife of the Appellant was not present in those two days it was alleged the offence took place. Counsel contended that the complainant went to the Appellant's house, sat on the bed, undressed and then the incident took place. He argued that if indeed the incident took place at about 8.00 p.m., then *how comes the complainant did not raise alarm as neighbours could have heard her cry for help?* It was his submission that the complainant had voluntarily sex. He posed why the complainant never reported the incident upon the return of PW3 on 2nd September 2012; it was until 20th October 2012 when PW3 realized that she was not using the sanitary towels that she had bought for her. It was then that she told her aunt that she had sex with the Appellant. She was taken to Saola Clinic where a pregnancy test was done. It turned out positive. He relied in the case of **Martin Charo v Republic [2016] eKLR** where the High Court held thus;

> ***"…in my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship."***

Counsel contended that the DNA report produced by PW6 did not follow the right procedures when it was being undertaken. He argued that the samples of the subjects were taken at different hospitals and at difficult times. He averred that PW6 admitted that the samples were received at different dates. He went further to state that the DNA report confirmed the Appellant as the father of the complainant's child. He told the court that the defence objected to the way the DNA samples were taken and as a consequence the trial court ordered for a second DNA report. Counsel submitted that indeed a second DNA test was conducted in the presence of PW5 and the defence but the same was never availed in court. He posed that the failure to avail the second DNA report cast doubt on the entire proceedings.

It was his submission that the Appellant did not commit the offence preferred against him; he was a family man. He cited the case of **Boniface Kyalo Mwololo v Republic [2016] eKLR** where the court held thus;

> ***"This court agrees with the prosecution and the victim that the DNA will settle once and for all who the father of the child that was a result of the alleged defilement is."***

He further relied in the case of **Eliud Ouma Agwara v Republic [2016] eKLR** where the court quoted the case of **Andrew Mulika Kithusi v republic [2014] eKLR** where L.N Mutende J quoted with approval from the case of **Bukenya v. Uganda [1992] E.A 549** thus:

> ***"…while the prosecution is not required to call a superfluity of witnesses, if evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case…"***

The learned counsel submitted that the age of the complainant was not proved to the required standard of proof beyond any reasonable doubt. He averred that the complainant at page 13 of the proceedings testified that she was eighteen (18) years. He further submitted that the report from Mbagathi Hospital did not give specific age of the minor but just stated that the complainant was under eighteen (18) years. He contended that no documentary evidence was produced to establish the age of the minor. He cited the case of **Eliud Ouma Agwara v Republic [2016] eKLR** where the court stated thus:

> ***"I therefore find and hold age of a victim is one of the essential ingredients of an offence under The Sexual Offences Act as the charging Section under the said Act and the sentence is pegged on the age of the victim especially in offences related to defilement. That without proof of age as required the sentence to be meted would be difficult to determine and would be a matter of conjunctive which would not stand as it would be against the law which provides minimum sentence in defilement matters, which is based on the age of a given victim. Age is therefore necessary for an offence of defilement to be proved beyond reasonable doubt as required in criminal cases and for meting the appropriate sentence."***

Counsel further relied in the case of **Jackson Mwanzia Musembi v Republic [2017] eKLR** and **Francis Muthee Mwangi v Republic [2016] eKLR** to emphasize on the weight the element of age holds in sentencing with regards to sexual offences. Counsel argued that the Appellant was being framed by the complainant's family because he had raised a complaint against PW3 for brewing chang'aa. Finally, he submitted that the burden of proof imposed on the prosecution was not discharged to the required standard of proof beyond any reasonable doubt. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Learned Counsel for the State, Ms. Aluda opposed the Appellant's appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. According to the learned state counsel, all the essential elements requiring proof beyond reasonable doubt in the offence of defilement were established. She submitted that the prosecution led evidence during trial to show how the Appellant sexually assaulted the complainant. She contended that prosecution witnesses adduced consistent and corroborated evidence. She averred that the issue of age was sufficiently proved via a P3 form which indicated that the complainant was a minor of fourteen (14) years; she relied in the case of **Jackson Mwanzia Musembi v Republic [2017] eKLR**. She submitted that the complainant conceived as a result of the defilement indecent. She postulated that a DNA test was conducted which confirmed the Appellant as the father of the child. However, the defence demanded for a second DNA test but the DNA report was never availed in court. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and reevaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion regarding the demeanour of the said witnesses (see **Okeno -vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the main **charge of defilement** to the required standard of proof beyond any reasonable doubt.

The facts of the case are as discerned by the court are as follows. The complainant in this case PW1, D W, was at the time a child aged fourteen (14) years. She was a standard six pupil at Mbagathi Primary School. She used to live with her Aunt. Her age was confirmed by PW4 who confirmed through a P3 form that the complainant was a child aged fourteen (14) years at the time of the incident. The P3 form

was produced as ***Prosecution's Exhibit No.3.*** According to the complainant's testimony, on 25th August 2012, while alone at home, the Appellant called her to his house at about 8.00 p.m. Both the Appellant and the complainant lived in the same compound. Then, the Appellant asked the complainant if she could have sex. The complainant replied in the affirmative. They both removed their clothes. The Appellant then asked the complainant to open her legs apart; he then placed his penis inside the complainant's vagina. It was her testimony that she did not feel pain. The following day 26th August 2012, the same incident took place at about the same time and in the same place. Her aunt, PW3 returned on 2nd September 2012. She did not inform her about the incident. After a while PW3 noted that the complainant was not using the sanitary towels she had bought for her. After interrogation, she gave an account of what had transpired on the material dates. She was taken to Saola Clinic where she was tested for pregnancy. It was positive. Later she was taken for a second pregnancy test at Mbagathi Hospital and the test confirmed that she was indeed pregnant. She was then taken to Kilimani Police Station where she recorded her statement.

PW2, J W testified that on 17th August, 2012 she had travelled to Embu together with her two daughters. They stayed in Embu for two weeks. She told the court that she left the complainant alone at her house but had requested the neighbours to check on her while they were away. When they had returned from Embu, her daughter called her on 17th October, 2012 to inform her that the complainant's behaviour was suspicious. On 20th October 2012, the complainant confessed to PW3 that she had sex with the Appellant on two occassions. She was then taken to the hospital for examination. She was pregnant. The matter was reported to the police station.

PW3, G W K testified that the complainant was left at her house while they were away in Embu. She told the court that they came back on 2nd September 2012 because schools were to open the following day. On 8th October 2012, she discovered that the complainant was not using her sanitary towels. She informed PW2 who investigated the matter. On 20th October 2012 it was confirmed that she was pregnant. The matter was reported to the police station where she recorded her statement.

PW4, Dr. Joseph Maundu testified that the complainant was a child aged fourteen (14) years. On 8th November 2012, he examined the complainant and noted that she had normal genitalia; there were no bruises, no tears but the hymen was broken and she had a white discharge in her vagina. He produced the P3 form as ***Prosecution's Exhibit No.3.***On 4th June 2013, the Appellant was examined and his genitalia were normal. He produced the P3 form as ***Prosecution's Exhibit No. 5.***

PW5, Jane Chepchumba was the investigating officer in this case. She testified that the Post Rape Care (PRC) form was filled at Kenyatta National Hospital. She produced it as ***Prosecution's Exhibit No.1.*** She told the court that on 4th June 2013, she took the Appellant to Nairobi Women's Hospital where his blood sample was taken for a DNA test. The blood sample of the child was taken at Kenyatta National Hospital. She filled a Memo form and forwarded the samples to the Government Chemist. She produced the Memo form as ***Prosecution's Exhibit No.6.*** The blood sample of the mother was taken on 5th June 2013. According to the analysis, there was 99.9% chance that the Appellant was the father of the child born by the complainant.

PW6, Anne Wangeci Nderitu worked at the Government Chemist laboratory. On 4th and 6th June 2013 she received the blood samples of the complainant, the child and the Appellant. She testified that after analysis the examination indicated that there was 99.9% chance that the Appellant was the father of the child. She produced the DNA report as ***Prosecution's Exhibit No. 7.***

When the Appellant was put on his defence, he denied committing the offence. He told the court that he was framed because he constantly complained about the chang'aa brewing business that was carried out by PW3.He told the court that the blood samples of the child and the complainant were taken in his absence. He told the court that his wife was in the house the whole time the offence is alleged to have been committed. He pleaded his innocence.

Upon re-evaluating the facts of this case and upon considering the submission made by the parties, it was clear to the court that for the prosecution to prove its case on the charge of defilement of a minor, it was required to establish that there was penetration, the complainant was a minor and the Appellant was indeed the perpetrator of the offence.

In the present appeal, the Appellant took issue with the manner in which he was arrested and the period of time he spent in custody before he was arraigned before court to answer to the charges preferred against him. He was aggrieved with the fact that he had been detained for a period of four (4) days from 24th January 2013 to 28th January 2013 before being arraigned in court. Whereas the Appellant may have a valid complaint in regard to the period that he was detained before he was arraigned in court, it is now settled that where an accused person establishes that he was detained beyond the statutory period before being brought to court, his remedy lies in filing a case for damages and not in having the charges brought against him terminated. This court therefore holds that nothing turns on this ground of appeal.

In regard to whether there was penetration, PW3 the guardian of the complainant testified that about a month after she had returned from her rural home, she noticed that the complainant was not using her sanitary pads. This raised alarm bells. She asked her daughter to inquire from the complainant what could be the problem. After sometime, the complainant admitted that she had had sex with the Appellant. The Appellant was a neighbour and was known to PW3. The complainant was taken to hospital where it was established that she was pregnant. From her testimony, it was clear that the complainant indeed had sexual intercourse with the Appellant. The Appellant submitted that the complainant's testimony established that she had **"consensual"** sex with him. The complainant's pregnancy went to full term. She gave birth to a child. She was examined by Dr. Maundu at the Police Surgery who confirmed that indeed the complainant had been penetrated. This court therefore holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the complainant was penetrated.

The Appellant argued that the age of the complainant was not established to the required standard of proof. He submitted that in some part of the proceedings, it was indicated that the complainant was eighteen (18) years old. It was however the prosecution's case that it had established by the P3 form that was established that the Appellant was aged fourteen (14) years at the time of the sexual intercourse. On re-evaluation of this evidence, this court holds that whereas various courts have held that the best evidence to establish the age of the victim is documentary evidence in form of a birth certificate, baptismal card, birth notification or post-natal clinic attendance card, it has also been

held that the prosecution may establish the age of the victim by medical examination through age assessment or in the medical reports produced before court. In the present appeal, the complainant was seen by the doctor who noted in the P3 form that the complainant's age was fourteen (14) years at the time of the sexual intercourse. This court has carefully perused the proceedings of the trial court. There was no evidence to suggest that the complainant was aged eighteen (18) years at the time of the sexual intercourse as alleged by the Appellant. The court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the complainant was fourteen (14) years old at the time of the sexual intercourse.

As regard the identity of the perpetrator, it was the prosecution's case that the Appellant was a neighbour to the complainant's guardian. They lived together in the same compound. The complainant was well known to the Appellant prior to the sexual intercourse. The Appellant, in this appeal, first denies that he had sexual intercourse with the complainant but later states that if he had such sexual intercourse, then it was consensual and therefore no crime was committed. The complainant testified that while she was alone at her guardian's house, the Appellant invited her to his house where she had sexual intercourse with him on two consecutive days. From her testimony, it was apparent that it was a **"consensual"** sexual intercourse. The Appellant has cited several authorities to support his contention that he should not be held criminally liable for having consensual sexual intercourse with the complainant. On re-evaluation of this evidence, this court holds that defilement is a case of strict liability. A child (defined as any human being under the age of 18 years) has no legal capacity to consent to sexual intercourse. Where the prosecution establishes that the complainant was aged less than 18 years, then, the accused cannot raise the defence that the complainant consented to have sexual intercourse with him.

In this appeal, it was clear to this court that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the Appellant had sexual intercourse with the complainant who was a child at the time of the incident. If there was any doubt that the Appellant was the perpetrator of the sexual event, that doubt was erased by the DNA report which was produced before court which established that the Appellant was the father of the child that was given birth to by the complainant. Although the Appellant disputes this evidence, this court holds that even if the DNA evidence was to be discounted, the testimony of the complainant and her guardian, established that indeed the Appellant had sexual intercourse with complainant who was a child at the time. The trial court and this court on appeal believed the testimony of the complainant. She was telling the truth. The **Proviso** of **Section 124** of the **Evidence Act** applies.

The Appellant's appeal against conviction and sentence lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JUNE 2018

L. KIMARU

JUDGE