REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCRA NO. 2A OF 2018

PETER NYANGWARA......................................APPELLANT

=VRS=

REPUBLIC..RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. Njoki Kahara – Resident Magistrate delivered on the 8th day of January, 2018 in Keroka SRM CR No. 459 of 2017]

JUDGEMENT

In the Court below the Appellant was charged with defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

The particulars of the charge were that on diverse dates between November and December 2016 at a place called Masaba North Sub-county in Nyamira County he intentionally caused his penis to penetrate the vagina of V N a child aged 14 years.

He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act the particulars being that on diverse dates between November and December 2016, he intentionally the vagina of V N a child aged 14 years with his penis (note that what he intentionally did was not stated).

He pleaded not guilty to the charge but upon hearing and evaluating evidence from both sides the Trial Magistrate found there was evidence to prove the charge of defilement beyond reasonable doubt. She therefore convicted the Appellant and sentenced him to serve twenty years imprisonment. Being aggrieved he preferred this appeal. His Advocate listed the following grounds in the Petition of Appeal:-

1. "THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant of the offence of defilement notwithstanding that the evidence before the trial court, when properly analyzed and evaluated, did not support conviction.

2. THAT the trial magistrate erred in law and fact by failing to afford the appellant a fair trial.

3. THAT the Learned Trial Magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt.

4. THAT the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient evidence.

5. THAT the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.

6. THAT the learned trial magistrate erred in law fact in putting the appellant on his defence without the evidence from the arresting or investigating officer.

7. THAT the learned trial magistrate erred in law and fact in by giving a sentence which was harsh, excessive and not founded in law given that he never committed the alleged offence.

8. THAT learned trial magistrate failed to appreciate that the prosecution case was riddled with contradictions.

9. THAT the learned trial magistrate erred in law and fact by failing to evaluate, analyze and appreciate that the medical evidence was not enough to sustain a conviction.

10. THAT the learned trial magistrate erred in law and fact by failing to order for mental examination.

11. The learned trial magistrate erred in law and fact by convicting the appellant on a wrong section of the law; under section 215 of the criminal procedure code.

12. The learned trial magistrate erred in law and fact by failing to afford the appellant a fair trial proceeding to admit a document called a written statement which is strange in the criminal justice and instead of recording the evidence verbatim.

13. The learned trial magistrate erred in fact and law by failing to evaluate and analyse that the medical examination was done on the 5th day of June 2017 and therefore, at variance with the charge and particulars of the offence.

14. The learned trial magistrate erred in law and fact by failing to evaluate and consider that the complainant's evidence did not specifically mention how, when and where the appellant defiled her."

Directions were given that the appeal would be canvassed through written submissions and judgement was scheduled for 17th July 2018. However due to pressure of work the judgement was not ready and it was deferred to 24th July 2018. The delay in delivering the judgement is regretted.

As a first appellate court I have as is my duty considered and re-evaluated the evidence before the trial court while at the same time making provision for the fact that I did not see or hear the witnesses give evidence.

Briefly the prosecution's case was that sometimes in the year 2015 the Appellant approached the complainant who was fourteen years old to become his girlfriend and even promised to marry her. She agreed and they started having sexual relations. According to her they would sleep together in their grandmother's house and they would have sexual intercourse. This continued until November 2016 when she discovered that she was pregnant. Soon her mother found out and when it was confirmed at their local medical facility the matter was reported to the Assistant Chief. It was then that she revealed that she and the Appellant had been having sexual intercourse and that he was responsible for her pregnancy. The Appellant was then arrested and charged with this offence. To support their case the prosecution produced a birth certificate showing the complainant was born on 16th January 2003, a P3 Form indicating that penetration and ejaculation had taken place and notes taken during the complainant's ante-natal visits.

In his defence the accused raised an alibi – that at the material time he was away in college and that he was framed because of a land dispute.

I have evaluated the evidence by both sides carefully. The birth certificate produced as exhibit 1 confirms that the complainant was at all material times a child. The date of birth indicated in the certificate is 16th January 2003 meaning that she was twelve (12) years old in 2015, thirteen (13) years old in 2016 and fourteen (14) years old during the trial. The ante-natal notes and the report produced as exhibit 3 confirm that when she was seen at Keroka District Hospital on 26th May 2017 she was 8 months pregnant.

It is my finding therefore that there is proof beyond reasonable doubt that the complainant had sexual intercourse, got pregnant and gave birth. This in my view proves that she was in fact defiled. I am further satisfied that there is proof beyond reasonable doubt that the person who defiled her is the Appellant in this case. The complainant vividly narrated to this Court how the Appellant enticed her into having an "**affair**" with him in 2015. She testified that the **"affair"** continued into 2016 until the time she discovered she was pregnant. I did not see or hear her give evidence but I believed her because of the manner in which she remained steadfast. She knew the Appellant well as they were related and this is not something he did once and stopped but on several occasions. His defence that he was framed because of a land dispute is not convincing. Moreover as stated by the Trial Magistrate it was clearly an afterthought as it was never put to the prosecution witnesses during cross examination.

As for the allegation that he was away in college at the material time I can only echo the Trial Magistrate's finding that he was a day student and as such he had opportunity to commit this offence. The receipt which he himself tendered in evidence indicates that his stay in the college was as a commuter.

In his submissions Counsel for the Appellant has submitted that age and penetration alone should not be the main consideration for the offence of defilement. He submitted that the conduct of the complainant should play a fundamental role. He submitted that whereas in this case one can easily conclude that the complainant was defiled this Court should ask itself why she never reported the incident, was she threatened, how, how long the relationship took place and whether her parents were aware of it. He urged this Court to consider that it was neither the complainant nor her mother that reported the relationship and find that makes it suspicious that she did not know who defiled her. Counsel also submitted that there was no medical evidence to prove it was the Appellant who defiled the complainant. He also took issue with the fact that the Police Officer who investigated the case was not called as a witness and also the fact that the Appellant was convicted under Section 215 of the Criminal Procedure Code instead of Section 8 (3) of the Sexual Offences Act. He urged this Court to be persuaded by the decision of **Chitembwe J in Martin Charo =V= Republic Malindi Criminal Appeal No. 32 of 2015** and allow the appeal and quash the conviction.

The Trial Magistrate made it very clear that she had sentenced the Appellant under Section 8 (3) of the Sexual Offences Act. The argument that she convicted him under Section 215 of the Criminal Procedure Code is therefore not a basis to allow the appeal. To argue that medical evidence was required to prove the guilt of the Appellant is to ask for corroboration whereas the proviso to Section 124 of the Evidence Act provides that in Sexual Offences a Court can convict on the evidence of the victim alone provided it believes her and records the reasons for so doing. In her judgement the Trial Magistrate stated that she believed the complainant and gave reasons for believing her. There was no need therefore for corroboration in this case and lack of medical evidence is not fatal. Penetration as well as the age of the victim are the main ingredients in a charge of defilement. Once it is established that there was penetration and the victim was a child it is enough to prove defilement. I am not persuaded that there should be any other consideration as a child is incapable of giving consent. The only defence perhaps is that provided under Section 8 (5) (a) and (b) of the Sexual Offences Act which states:-

It is a defence to a charge under this section if—

(a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) The accused reasonably believed that the child was over the age of eighteen years.

The Appellant in this case did not raise any of the above defences at the trial and his case is therefore clearly distinguishable from that of Martin Charo =V= Republic (Suppra).

Accordingly the appeal has no merit and it is dismissed.

The sentence of twenty years imprisonment is lawful and it is upheld.

Dated, signed and Delivered at Nyamira this 26th day of July, 2018.

E. N. MAINA

JUDGE