REPUBLIC OF KENYA

IN THE HIGH COUR OF KENYA AT KAKAMEGA

CRIMINAL APPEAL CASE NO. 39 OF 2017

BRAMWEL KASIM SHABAN ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(from the original conviction and sentence by E. Malesi, SRM,in Kakamega C.M's Court S.O Case No. 28 of 2016)

J U D G M E N T

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act, Act No. 3 of 2006 and sentenced to serve twenty years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal.

2. The appellant attacks the judgment of the trial magistrate on the grounds that:-

(1) The age of the complainant was not proved

(2) There was no medical evidence to connect him with the offence

(3) The trial court shifted the burden of prove to the appellant and that

(4) The trial court failed to consider the gravity of the offence and assign him an advocate as required by section 50(2) (h) of the constitution.

3.The particulars of the offence against the appellant were that on diverse dates between 1st January, 2016 and 26th February,2016 within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of M.W.K(herein referred to as the complainant) a child aged 15 years .

4. The prosecution case was that at the material time the complainant was a pupil [Particulars withheld] primary School. The appellant was operating a shop at Nakochi junction. That on the 1st January, 2017, the complainant was on the way to watch athletics at [Particulars withheld] Primary School when she met the appellant. Previously she had been meeting him at the shops. The appellant convinced her to accompany him to his house. They went to his house. They had sexual intercourse. The complainant then went home.

5. That on the night of 25/26th February, 2016, the complainant and her brothers H Pw2 and T PW3 were attending a funeral vigil in their neighbourhood. At 10 pm the complainant met the appellant in the funeral. The appellant took her to his house. They had sexual intercourse again. Later the complainant's brothers realized that the complainant was missing from the funeral. They received information that she had left with the appellant. They went to the shop of the appellant. They heard the voice of the complainant in the house. The matter was reported to the area assistant chief and to the police. Sgt Emai PW5 of Harande police post went to the place at 1 am. He found a crowd surrounding the shop of the appellant .He asked the appellant to open the door. He did so. They found the appellant and the complainant in the shop. He took them to the police post. They were later picked by Sgt Njonjo Pw6 of Navakholo police Station who escorted them to Navakholo sub-county hospital. Some tests were conducted on the girl and she was found to be pregnant. A P3 form was completed by a clinical officer PW4.

6. Sgt Njonjo investigated the case. He obtained a baptism card from the parents of the girl that indicated that she was born on 1/2/2002. He also obtained a letter from her school indicating that she was a class 7 pupil at [Particulars withheld] Primary school. He then charged the appellant with the offence of defilement. He denied the charge. During the hearing the clinical officer produced the P3 form and the treatment notes as exhibits,PExh 1 and 2 respectively. The investigating officer PW6 produced the baptism card and the letter from the school as exhibits, P Exh 3 (a) and (b) respectively.

7. When placed to his defence the appellant gave sworn evidence in which he stated that on the evening of 25/2/16 he was at his shop. There was a funeral in the neighbourhood. That he closed the shop at 7.30 pm but continued to open the door to the shop and sell to the people who were attending the funeral. Later he heard some movement outside the shop. He went outside and found PW3. He asked him what he was doing outside the shop. He said that he was going to attend the funeral. He went back into the shop. Soon after there was a knock on the door. He opened and found it was PW3 who said that he wanted to buy " PK" chewing gum. He told him he did not have it. He went away. He came back later and identified himself. He opened the door. Pw3 told him that he was looking for his sister who had disappeared from home. He told him that he did not know anything about it. PW3 went away but came back with a group of about 10 people. They forced him to open the door. He came out. One person entered into the house but did not find any girl inside. They went away and came back with PW1, the complainant and forced him and the girl into the shop. They locked the two of them inside the shop. A brother to his landlord called the assistant chief who went there and opened the door. The assistant chief called AP officers who came and rescued him. They took him to Kharanda Ap camp.

8. The appellant did not call any witness in the case.

9. The learned trial magistrate found that the oral evidence of the complainant proved that the appellant penetrated the complainant with his penis. That the fact that medical evidence indicated that the complainant was pregnant was sufficient prove of penetration. Further that the baptismal card proved that the complainant was aged 15 years at the time that the offence was committed. That the appellant was a shop-keeper who was well known to the complainant. That he was caught in the act and found in his shop together with the complainant. The magistrate declined to believe the evidence that it is the crowd that locked him and the complainant in the shop. The magistrate found that the charge was proved beyond all reasonable doubt and convicted the appellant.

10. This is a first appeal. It is duty of a first appellate court to look at the evidence presented before the trial court afresh, revaluate and re-examine the same and reach its own conclusions. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant – See ***Kinyanjui Vs Republic***(2004) 2 KLR 364.

11. The appellant filed written submissions. The state did not make any submissions but opposed the appeal and relied on the record of the lower court.

12. The appellant contends that the medical evidence that was used to convict him was not conclusive and did not offer a nexus between him and the complainant. Further that there was no DNA report produced to connect him with the pregnancy of the complainant.

13. There is no requirement in law that defilement can only be proved by production of medical evidence that tends to connect an accused person with the commission of the offence. The trial court was a live to this fact and cited the decision in **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010 (** as cited in **Owour Odhiambo Vs Republic(2015) eKLR)** where the Court of Appeal held that:

> ***"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

Similarly in **AML Vs R (2012) eKLR** the same court held that:

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

There was conclusive medical evidence that the complainant was pregnant. It was not necessary to adduce DNA evidence to connect the appellant with the pregnancy. The prosecution could still prove the act of defilement by oral evidence.

14. The appellant contends that the trial court convicted him without ascertaining the actual age of the complainant in that there was no birth certificate or age assessment report tendered in evidence to prove that fact.

15. The age of a person may be proved by various methods. In **Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015** (cited in **Edwin Nyambaso Onsongo Vs Republic (2016) eKLR, the Court of Appeal held that:-**

> ***"…the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ".. we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age , it has to be credible and reliable."***

Rule 4 of the Sexual offence Rules of Court, 2014 states that when determining the age of a person, the court may take into account evidence of the age of the person that may be contained in a birth certificate, any school document or a baptismal card or similar document.

16. In this case a baptismal card was produced that proved that the complainant was born on 1/2/2012. The document was sufficient evidence to prove the age of the complainant.

17. The appellant contended that the trial court shifted the burden of prove to him. The appellant did not elaborate how this was the case. I

have gone through the judgment of the trial court and I have not found any inkling that the trial court shifted the burden of proof to the appellant.

18. The appellant submitted that the prosecution failed to call as witnesses some people who were mentioned by other witnesses during the trial. These were a boy by name Stephen who was said by PW3 to have seen the appellant going away with the complainant, the assistant chief, the village elder and the parents of the complainant who were said to have gone to the scene on the day that he was arrested.

19. The question is whether these people who were not called as witnesses were crucial witnesses in the case without whose evidence an inference may be made that failure to call them meant that their evidence was adverse to the prosecution case. The prosecution called three witnesses who saw the complainant being removed from the house of the appellant. These were the two brothers of the complainant PW2 and 3, and the administration policeman PW5. The evidence of the three witnesses was sufficient to prove the fact that was in issue. The evidence of the other witnesses would only have been necessary if the evidence of those who testified was insufficient to prove the fact. There was no basis for holding that the only reason why the people were not called as witnesses is because if called their evidence would have been adverse to the prosecution case.

20. The appellant stated that the trial court erred in rejecting his defence. The accused claimed in his defence that it the prosecution witnesses themselves who brought the complainant and locked him and her in his house. The trial magistrate did not believe the defence. When he was cross- examining the witnesses the appellant did not ask any of them whether they are the ones who locked the complainant in his house. The defence in that case can only have been an afterthought. The trial magistrate was in the premises correct in dismissing the defence.

21. The appellant stated that the trial court failed to consider the gravity of the offence and as such assign him an advocate as required under article 50 2(h) of the constitution. The article states that:

> ***"every accused person has the right to a fair trial which includes the right to have an advocate assigned to him by the state and at state expense if substantial injustice would otherwise result and to be informed of this right promptly".***

In ***Republic Vs Karisa Chengo & 2 others(2017) eKLR***, the Supreme Court held that the right to legal representation is not open ended but is only available " if substantial injustice would otherwise result." The appellant did not show that there were complex issues of law in the case to the extent that there would be substantial injustice if an advocate was not allocated to him. Though the trial court did not comply with the provisions of article 50 2(h) of the constitution, I find that the non-compliance did not occasion a failure of justice.

22. Upon keenly examining the evidence adduced before the lower court, I find that the appellant was convicted on cogent and credible evidence. The appellant was found with the complainant in his house. The fact that the two were found locked in a house leds credence to the evidence of the complainant that they were engaging in sexual intercourse. It was proved that the complainant was under the age of 18 years. The charge of defilement therefore had been proved beyond reasonable doubt. The conviction is thereby upheld.

23. The charge sheet recorded the age of the complainant as 15 years. The complainant testified in court on 10/5/16 during which time she gave her age as 15 years. Her 31 year old brother PW3 testified in court on 27/6/16 and said that the girl was at that time aged 14 years. The clinical officer Pw4 stated that the girl was aged between 13 and 14 years. The estimated age that he record in part 11 section " C" of the P3 from was 14 years. The baptismal card indicated that she was born on 1/2/2002. That would therefore make her age as of 26/2/16 to be 14 years. This corresponds with the evidence of PW3 that the girl was aged 14 years. The trial magistrate stated that the girl was in her fifteen year at the time of the commission of the offence. This was erroneous. The complainant was aged 14 years at the time of the commission of the offence.

24. The appellant was charged under section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. Section 8(3) provides that :-

> ***" A person who commits an offence with a child between the age of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

25. The appellant was sentenced to a prison term of 20 years for defiling a child said to be aged 15 years when the actual age of the child was 14 years. The error in the age of the complainant did not occasion a failure of justice as the sentence for defiling a child aged 14 years and 15 years is the same at 20 years. The sentence is thereby upheld.

In the foregoing the appeal on conviction and sentence is bereft of merit and is accordingly dismissed.

Delivered, dated and signed at Kakamega this 27th day of September, 2018 .

J. NJAGI

JUDGE

In the presence of

Appellant ……appearing in person

Ngetich ……for state

George ..……court assistant

14 days right of appeal.