REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 117 OF 2016

COSMAS TOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 109 of 2014 in the Chief Magistrates Court at Eldoret by S. N. Telewa, Resident Magistrate dated 5th October 2016]

JUDGMENT

1. The *appellant* (**COSMAS TOO**) was charged with the offence of defilement Contrary to Section 8(1) (4) of the Sexual Offences Act No.3 of 2006, particulars being that on diverse dates between 10th February and 2nd March 2013 at **[particulars withheld]** village, **MEGUN** Location, within **UASIN GISHU** County, he intentionally caused his private part (penis) to penetrate the private part (vagina) of **NJ*** (a child aged 17 years). He denied the charge and after trial was sentenced to 15 years imprisonment.

2. NC told the trial court that she was born in 1996 and had a small child. It was her evidence that she got into an intimate relationship with the appellant in November 2012 and this remained until January 2013.

She initially used to visit him before eventually moving in to live with him.

3. When she got pregnant, the appellant's parents sent her back to her mother, and the matter was reported to police. She was sent to hospital where tests confirmed that she was pregnant. After delivery, no one from the appellant's side visited her, she and her mother reported the situation to the children's office at **LANGAS**; she explained that the appellant had disowned the pregnancy, yet before the incident, they loved each other and had no problem, infact the appellant had told her he would marry her.

4. On cross examination PW1 stated:

> ***"I visited him several times. At times I used to go alone, sometimes he would pick me. …There is a time I stayed there for one week, then he took me home. He told me that he was going to marry me. I was ready for marriage, had he agreed, I would have gotten married to him. He knows my age, I had my birth certificate … He has a case on maintenance of the child…"***

5. Her mother **J C** (PW2) told the trial court that one day her daughter (who at the time of testifying was 18 years old) left for school but never returned home. Eventually on 30th March, the appellant's parents brought her home saying they preferred she stays with them until she gives birth.

She reported the matter to police – according to her the appellant stated that the child was his and he would take care of, but he was not willing to take care of the child's mother. She presented PW1's birth certificate as exhibit to confirm her year of birth.

PW2 denied asking for 30,000/- so as to drop the case, nor did they discuss about marriage of the pair.

6. A I (PW3) a teacher at **[particulrs withheld]** Primary School within **UASIN GISHU** confirmed that PW1 was his student who failed to attend school, and he later learnt that the appellant was keeping her. She later resurfaced in January 2013.

Neither the Doctor nor the investigating officer testified.

7. Upon being placed on his sworn defence, the appellant told the trial court that he was born on 18th March 1996 and produced a copy of his birth certificate as D.Exh.1. He confirmed having been summoned by the Children's Officer over the issue of a child. When he was asked to maintain the child, he declined, saying the child was not his as there had been no relationship between him and ***NJ.***

"… I did not admit that the child was mine … Baby CC is not my child… I did not know NJ before.

8. The appellant's father was the defence witness (**ALBERT SONGOK**) he testified that **NJ** never lived in his compound although he could not tell whether perhaps the girl would sneak into his compound at night. **NICHOLAS TIROP** (**DW3**) an elder from the village who accompanied the appellant to the Children's Office told the trial court that **NJ** and her mother demanded Ksh.30,000/- as maintenance for the child.

9. The trial magistrate in his judgment was satisfied that **NJ's** age was proved by the birth certificate presented in court which showed she was born in 1996.

He was of the view that although the doctor did not testify, medical evidence was not necessary to prove penetration and held that the circumstances pointed to the appellant as the culprit as he was positively identified by PW1 in court. Further there was evidence from **NJ's** mother and school teacher that she had mysteriously vanished from home and school respectively and when questioned, she confirmed that she had been living with the appellant.

The defence by the appellant were rejected as mere denials.

10. The appellant contested the outcome of this decision on condensed grounds that:

a) The offence was not proved beyond any reasonable doubt,

b) In meting out sentence the trial magistrate failed to consider that the appellant was a minor.

11. At the hearing of the appeal, **MR OMBOTO** on behalf of the appellant submitted that sentencing the appellant who at the time was under 18 years was unlawful. Further there was no medical evidence to even confirm that **NJ** had been pregnant and delivered a baby, and no **DNA** was carried out to confirm that the baby was sired by the appellant.

12. In conceding the appeal, **MISS ODUOR** on behalf of the State agreed that the case was not proved beyond reasonable doubt as no P3 form or even a Doctor testified to confirm that there had been penetration or that **NJ** was pregnant. She also pointed out that in the absence of **DNA**, then the issue of paternity was left hanging, especially because the appellant had denied siring the baby.

13. She also conceded that out of the key ingredients of defilement, the only one which seemed to have a tiny toe to stand on was the claim that there had some relationship with the appellant.

14. Had there been proof of penetration? What evidence was there that **NJ** got pregnant between November 2012 and January/March 2013? When did she deliver the baby? These questions demanded an answer in the evidence, because if as it is claimed by March she had a baby, then logically and even medically that was a premature birth, and the foetal – formation as not even complete- this would definitely have required medical evidence to confirm the term of pregnancy and also whether indeed the appellant was responsible.

15. The question remained – what proof was there that **NJ** was pregnant? What evidence was there that she had given birth?

I concur with both counsel that this case did not meet the criminal standard of proof at all – conviction was unsafe and is quashed.

There is also the issue regarding the appellant's age – once he told the trial court that he was 17 years, then the most prudent step was to refer him for medical age assessment if the court doubted the credibility of the birth certificate which he proved. However in this instance the trial court appeared to have accepted the birth certificate presented by the appellant as proof of his age and even took note of that when meting sentence, yet went ahead to pronounce a 15 year sentence on him.

16. Section 190(1) of the Children Act provides places a restriction on imprisoning children placing them in a detention camp and the 15 year sentence offended this problem.

Section 191 (1) offers a host of option in dealing with child offenders, and when the trial court ought to have referred to.

Consequently this sentence was illegal and unjust – it is set aside. The appellant shall be set at liberty.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **ELDORET** this **26th** day of **September** 2018.

H. A. OMONDI

JUDGE