REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.20 OF 2016

B K B…….....APPLICANT

VRS

REPUBLIC……..…….……..RESPONDENT

JUDGMENT

1. The appellant, BKB, was charged with 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. The particulars of the offence are that on diverse dates of November 2009 at unknown times in Kericho District within Rift Valley Province wilfully and unlawfully did cause his penis to penetrate the vagina of SAO a child aged 15 years.

2. The appellant had initially been charged with the offence of attempting to procure abortion contrary to section 158 of the Penal Code. On 5th July 2012, the prosecution applied and was allowed to substitute the charge sheet under which the accused was charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act, No. 3 of 2006 He was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

3. The trial of the accused, which had proceeded before Okuche, SRM, then commenced afresh before Ndururi, SRM and three witnesses testified. The matter was thereafter placed before Hon. Kiniale, SRM and direction were given that it starts *de novo*, again. In her judgment dated 16th August 2016, the trial court found the appellant guilty on the main count of defilement. She did not make any finding on the alternative charge. In sentencing the accused, the trial court found that he was entitled to the minimum sentence provided by law, and proceeded to sentence him to 15 years' imprisonment.

4. Aggrieved by both his conviction and sentence, the appellant filed the present appeal in which he raises the following grounds in his Amended Petition of Appeal dated 24th October 2016:

> ***1. That the learned trial magistrate erred in law and fact in convicting the appellant on evidence which did not meet the required standard in law.***
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> ***2. That the learned trial magistrate erred in law and fact by relying of (sic) extrinsic evidence that was not adduced during the trial.***
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> ***3. That the learned trial magistrate erred in law and facts introducing extraneous matters in dismissing the appellant's defence.***

5. The appeal was canvassed before me on 27th April 2017. The appellant was represented by his Learned Counsel, Mr. Miruka, while the state was represented by Learned Prosecution Counsel, Ms. Keli.

6. Mr. Miruka argued the three grounds of appeal together. He submitted, first, that the conviction of the appellant was not safe as the age of the complainant was not proved as required. It was his submission that the trial magistrate had confirmed this in her judgment. According to Learned Counsel, section 8 (1) and (4) of the Sexual Offences Act makes age essential and crucial to determine the guilt or innocence of the accused. In this case, the age of the complainant was not proved by the evidence that was adduced before the court. In his view, the appellant was serving an illegal sentence as age is at the core of the offence of defilement. Further, that no age assessment was done nor a birth certificate produced, and the parents of the complainant were not called to testify.

7. Counsel also complained that there were 3 charge sheets in court, all of which varied and bore different ages. The second and third charge sheets indicated the age of the complainant as 15 years, while the P3 form indicated that the complainant was 15 years.

8. Counsel also questioned the charge of defilement. His submission was that the P3 form did not mention defilement but rather spoke of bleeding, which was a completely different thing.

9. It was Mr. Miruka's submission further that the evidence of PW1, the complainant's brother and PW5, the complainant, was contradictory with respect to the complainant's age. PW1 had indicated the complainant's age was 16, while the complainant herself mentioned age 12. Counsel relied on the decision in **Court of Appeal at Nakuru Criminal Case No.69 of 2009 – Kenneth Kiplangat Rono vs Republic** and **Njue Solomon vs Republic – Embu High Court Criminal Appeal No.187 of 2008** to submit that establishing the age of the complainant was essential to a conviction for defilement.

10. Counsel also challenged the DNA evidence relied on by the trial court. His submission was that it is possible that genes can be similar, and the trial court was wrong to rely on the circumstantial evidence based on the DNA test and P3 form. Counsel asked the court to consider the evidence of PW4, PC Jepha, who had referred to the child born as a baby girl. He posed the question whose samples were taken if a baby girl was born and they had taken samples of a baby boy to the government chemist.

11. Counsel also noted that the amended charge sheet does not mention when the baby was born, noting that the prosecution did not prove how the baby was born after more than one year after the offence.

12. It was further argued on behalf of the appellant that the issue of identification was in doubt. According to Mr. Miruka, the complainant had said that she did not know the name of the accused. That she was dumb and could not write in court. That her brother M (PW1) told her about the man and to come to court and talk about what had happened, and that she found the accused in the police vehicle. Mr. Miruka's submission was that the complainant never identified the accused and the conviction and sentence are not safe.

13. The appellant also challenged the P3 form relied on in the case. His submission was that the court was not told the expertise of the people who authored the P3 form to arrive at the age of 14 years, and that the P3 form does not talk about the offence of defilement. He asked the court to allow the appeal and set aside both the conviction and sentence.

14. In submissions in reply, Ms. Keli for the state supported the conviction, asserting that the evidence adduced by the prosecution was overwhelming and that the prosecution availed witnesses who were consistent and cogent. It was her submission that the main ingredients of the offence of defilement were proved and the conviction was therefore safe and the sentence legal.

15. With respect to the submission by the appellant that there were 3 charge sheets, Ms. Keli submitted that the charge sheet relied on by the state was the one amended on 5th July 2012.

16. With respect to the submissions on age, Ms. Keli agreed with Mr. Miruka that age in a defilement case is crucial as it forms the basis of sentencing under section 8 (1) – (4) of the Sexual Offences Act. It was her submission, however, that the first thing to determine is whether the complainant was a child as described under section 2 of the Children Act, which defines a child as any human being under the age of

18 years.

17. According to Ms. Keli, the P3 form states that the complainant was 14 years old, while her brother stated that she was 16 years. Her submission was that even though there are contradictions on the exact age of the complainant, what comes out is that she was a child as she was under 18, and the offence of defilement was committed against her as a child. In her view, the inconsistences between the P3 form and the evidence given in court do not affect the fact that the victim was a child under 18 years. That she was either 14, 15 or 16 years, and the trial court, which heard the witnesses and saw the complainant, observed that she was under 18 years.

18. With regard to the appellant's contention that the complainant did not identify the accused and that she did not know his name, the state's response was that the complainant was a deaf and dumb person staying with her elder brother. That she had clearly testified that she knew the accused, whom she had known for 6 months, and that she had slept with the accused person.

19. She had also identified him in court, and had testified that he worked in a butchery. In the state's view, the most important question is not whether the complainant knew the accused's name, but whether she knew him. They used to visit each other, and sometimes slept in a bush. The state's submission was that the complainant knew the accused who worked in a butchery; she had known him for 6 months, and they had been having consensual sex. However, since she was a child under 18 years, she could not give consent, and therefore she was defiled.

20. Ms. Keli further pointed out that following the defilement by the appellant whom the complainant knew and could describe, the complainant fell pregnant, and the appellant decided to help her procure an abortion, which did not succeed. The complainant's evidence was that the appellant visited her and gave her 5 tablets to swallow after which she became sick, started bleeding and was admitted to hospital where she stayed for 4 days. Her evidence in this regard was corroborated by PW1 and PW3, the clinical officer, who confirms that the complainant was pregnant when taken to hospital.

21. In response to the argument that the P3 form does not state that the complainant was defiled but that she was bleeding, Ms. Keli submitted that by the time the complainant was taken to hospital, the appellant had given her pills to procure an abortion and the clinical officer was right to observe her condition then- that she was pregnant and was trying to procure an abortion, and she was able to reveal that it was the appellant who had defiled her, impregnated her and tried to procure an abortion.

22. To the challenge to the DNA evidence, that it was not clear whether the DNA was from a baby boy or girl, Counsel submitted that the evidence of the complainant was that the appellant was the father of her son, so it was a baby boy. That a DNA test was conducted which came out positive that the appellant had fathered a child with the complainant, a child whom she states was a boy, and that the genes of the child were proved to be 99% the genes of the appellant. In the state's view, the conviction was safely secured and the sentence was legal.

23. Ms. Keli relied on the decision of the court in **Daniel Mugambi vr Republic Nyeri Criminal Appeal No.37 of 2014** where there was disparity in the age of the complainant between what was set out in the charge sheet and what emerged from the evidence. The court had in that case observed that there was no prejudice suffered by the appellant. Similarly, according to Ms. Keli, there was no prejudice suffered by the applicant in this case due to the disparity in age.

24. Counsel further relied on the decision in **Stephen Ouma Ogola vs Republic High Court in Homa Bay Criminal Appeal No. 4 of 2015** in which the court cited the holding in **Tumaini Masai Mwanya vs Republic Court of Appeal Criminal Appeal No. 364 of 2010** that as long as there is evidence that the victim is below 18 years, the offence of defilement will be established. It was the state's position that the apparent age only comes to play at sentencing, and the contradictions in the age cannot assist the appellant to escape criminal culpability.

25. Ms. Keli also cited the decision in **Mombasa Court of Appeal Criminal Appeal No. 65 of 2015 –**

Hudson Ali Mwachungo vs R in which the Court of Appeal observed that where there was doubt as to the age of the victim, the benefit of doubt should be given to the accused so that the less severe sentence is imposed. Ms. Keli's submission was that the sentence passed was the least sentence that could be passed in a case of defilement as there was no documentary evidence to prove the age of the complainant yet testimony before the court had established that the complainant was below 18. Ms. Keli's prayer was that the appeal should be dismissed and the conviction and sentence upheld.

26. In his submissions in response, Mr. Miruka distinguished the cases relied on by the state. His submission was that the cases were not relevant to the present circumstances. With regard to the case of **Hudson Ali Mwachango vs R** it was his submission that the point at issue was a matter of months in the age of the complainant. The case of **Daniel Mugambi vs R** also related to the issue of months and a child of tender years, the child in the case being 13 ½ years. He reiterated his relianace on the decision in **John Kiplangat Rono vs R** to submit that none of the elements in defilement was established in this case, and to urge the court to allow the appeal.

27. As this is a first appeal, I am required, as was held in the case of **Okeno vs Republic [1972] EA 32,** to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I must be alive to the fact that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing.

The Evidence

28. The case for the prosecution against the appellant was presented through six prosecution witnesses. PW1 was MO, a tailor at Sigoret and a brother of the complainant. His evidence was that on 15th March 2010, at around 6.30 p.m, he was at his shop. His sister, who is deaf and dumb and aged 16 years then, informed him that she was not feeling well. He took her to Sigoret Hospital where she was rushed to ICU. It was established at the hospital that she was bleeding from the genitalia. Doctors informed him that she was pregnant and had taken some drugs to abort. He asked her what had happened and she told him that the appellant, BKB, had given her the drugs. His sister also told him that it was the appellant who had made her pregnant after they had sexual intercourse.

29. PW2 was Henry Kiptoo Sang, a government analyst based at the Government Chemist in Nairobi. He told the trial court that samples of the blood of the accused, the complainant and a child (KO) had been sent to the government chemist on 20th May 2011. He had found that half of the genes of the child belonged to the mother, the complainant, and the other half to the appellant. He further did an analysis and found that there are 99.99% chances that the appellant, BKB, is the biological father of the complainant's son, KO.

30. PW3, Arnold Aaron Kipngeno Rotich, a Clinical Officer from Sigoret Sub-county Hospital, had examined the complainant when she had been taken to the hospital. She looked pregnant and was in pain. She had tried to terminate the pregnancy by ingesting some drugs. He produced the P3 form in respect of the complainant.

31. PW4 No. 85669 Henry Jepha, was the investigating officer. At the material time, he was stationed at Sondu Police Station in Kericho. A report had been made to the police at Sondu on 13th March 2010 that a 15 year old girl, SA, had been impregnated by the accused. The accused had attempted to procure an abortion but the baby survived. He later took blood samples from the appellant, the baby and the mother which were taken to the government chemist for analysis. In cross-examination, he stated that he had initially charged the appellant with attempting to procure an abortion. He also stated that he cannot tell the exact date the baby girl was born.

32. PW1, the complainant's brother, was recalled on 22nd April 2015. He stated that he had been staying with the complainant at the back of his tailoring shop. She had started complaining of abdominal pain and he notices she was bleeding from her vagina. He took her to hospital where the doctors told him it was a failed attempt to abort. That the complainant had told him that it has the appellant who had given her the drugs. In cross-examination, he stated that the complainant was 15 years at the time.

33. PW5 was the complainant, SA, who is deaf and dumb and who testified through a sign language interpreter. It is noted in the record that communication with the complainant was a bit difficult. PW5 stated that she was 18 years old at the time of her testimony on 22nd April 2015, but was 12 years old in 2010. She further stated that she knew the accused, who is the father of her child. That she had slept with the accused whom she had known for 6 months. That they used to visit each other and sometimes slept in a bush. She also stated that the accused worked in a butchery. It was her testimony further that when she got pregnant, she was given 5 kinds of drugs to swallow, that she felt 'uneasy' and sick, and was taken to hospital by her brother. She pointed at the accused as the person she had slept with.

34. In his defence, the appellant stated that he did not know who the complainant was and had never seen her till the day he was arrested by Administration Police Officers. He denied that he had defiled the complainant and alleged that he had been framed.

35. In its judgment, the trial court analysed the prosecution and defence evidence and identified the issues for determination. On the first issue, whether the complainant is a child under 18 years, the court noted that the age of the complainant was not properly ascertained, but it was clear that she was under 18 when the incident took place.

36. On whether she had been defiled, the court found, on the evidence, that the complainant was pregnant and had made an attempt to terminate the pregnancy. Her testimony was that she had had sexual intercourse with the accused, and that he had given her 5 drugs to terminate the pregnancy. The court also noted that half the genes of the complainant's son belonged to the accused.

37. Against these conclusions, the appellant has appealed and as is evident from the submissions of his counsel, raises multiple challenges against the decision of the trial court, among them the issue of the charge sheet(s), reliance on DNA, the gender of the child conceived, and, more fundamentally, the age of the complainant. I now turn to address myself to these issues.

38. The appellant has challenged his conviction, as I understand it, on the basis that there were three charge sheets. However, the record of the trial court on this point is clear. The appellant had initially been charged with the offence of procuring an abortion. However, on 5th July 2012, pursuant to an application made by the prosecution, there was a substitution of the charge sheet. This particular complaint therefore has no merit.

39. The appellant complains that the offence of defilement was not proved, and that the P3 form indicates that the complainant was bleeding. This, it seems to me, is a red herring argument. The complainant, who was under the age of 18, was pregnant following sexual intercourse with the appellant. He had given her pills to procure an abortion, and she was bleeding. Can he be heard to argue that there was no defilement because the P3 form talks of bleeding? I think not.

40. The appellant has argued that the trial court should not have relied on the DNA evidence that found that there were 99.99% chances that the appellant was the father of the complainant's child. He has also argued that the investigating officer had spoken of the child being a baby girl, and therefore there was doubt as to whose blood samples had been taken. These arguments are easily disposed of.

41. The complainant had the child she bore in court during her testimony. The child was a boy named KO. Half of his genes, according to the evidence of the government chemist, belonged to the complainant, the other half to the appellant, and the appellant was 99.99% chances the father of the child. That the investigating officer makes a reference to a baby girl during cross examination, clearly an error, cannot displace the rest of the prosecution evidence that clearly pointed to the accused as the father of the child.

42. It was also argued on behalf of the appellant that the complainant had not identified him as she did not know his name. The evidence before the court was that the complainant was deaf and dumb. She had not gone to school, and was therefore not familiar with formal sign language. She was, however, able to communicate through a sign language interpreter that she knew the appellant who worked in a butchery;

she had pointed to him in the dock; he had also been identified by the complainant's brother. I believe that there was no basis for impugning the judgment of the trial court on this basis.

43. The core of the appellant's case, as I see it, relates to the age of the complainant. It is correct, as argued by Mr. Miruka, that the age of the complainant was not established. Indeed, the trial court noted as much. The complainant stated that she was 12 years old at the time of the offence, while her brother, PW1, stated that she was 15 or 16. The P3 form indicated that she was of the apparent age of 15. Thus, while her exact age was not established, the evidence indicates that she was below the age of 18 years, and was therefore a child.

44. The question is whether the uncertainty with respect to her age should render the conviction of the appellant unsafe.

45. Counsel for the appellant placed reliance on the decisions in **Court of Appeal at Nakuru Criminal Case No.69 of 2009 – Kenneth Kiplangat Rono vs Republic** and **Njue Solomon vs Republic – Embu High Court Criminal Appeal No.187 of 2008.** I have read these two decisions, and I find that they are of no assistance to the appellant in this case. The case of **Kenneth Kiplangat Rono vs Republic** related to a charge of child trafficking, the appellant in that case having been acquitted of the charge of defilement. In **Njue Solomon vs Republic**, the case related to an appeal against conviction on a plea of guilty, an appeal that was found by the High Court to be without merit.

46. The decisions cited by the state in this appeal speak more to the issues that the appellant raises. In **Homa Bay High Court Criminal Appeal No. 4 of 2015 – Stephen Ouma Ogolla vs R**, it had been argued that the age of the complainant was not proved as there was contradictory testimony on the issue. The trial court had as a consequence acquitted the appellant of the principal charge of defilement, and convicted him on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The Court (Majanja J) found that the trial court had erred in acquitting the accused of the principal count. He observed as follows:

> ***"12. I find and hold that the learned magistrate erred in acquitting the appellant on the principal charge on the basis of the apparent contradiction in the age of birth. The age of a child is an important element of the offence of defilement in two respects. First, as concerns the conviction for defilement, all the court needs to be satisfied is that the victim is below the age of 18 years. Secondly, for purposes of sentence, the age of the victim determines the magnitude of the sentence. Under section 2 of the Children Act, age means the apparent age where the exact age is not known. Before imposing the sentence, the magistrate has to determine the apparent age. In Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR the Court of Appeal explained such a situation as follows;***
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> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.'"***

47. In **Daniel Mugambi vs Republic Criminal Appeal No. 37 of 2014,** the Court of Appeal took the view that the disparity in the age of the complainant should have been considered for purposes of sentencing. In the case before me, the court took into account the uncertainty about the age of the complainant and sentenced the appellant to the least severe sentence under the Sexual Offences Act, which is 15 years. In my view therefore, the challenge on the basis of the age of the complainant is without merit.

48. Accordingly, I am unable to find any merit in the present appeal. I uphold both the conviction and sentence, and dismiss the appeal.

Dated, Delivered and Signed at Kericho this 26th day of July 2017.

MUMBI NGUGI

JUDGE