REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 62 OF 2016

GILBERT SHIKOLI .....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. R. Amwayi–Resident Magistrate delivered on the 29th March, 2016 in CMCR Case No.* 2910 of 2015*)

JUDGMENT

The appellant **GILBERT SHIKOLI** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 16/9/2015 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (4) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 14th day of September, 2015 within Nakuru County, intentionally caused his penis to penetrate the vagina of SW a child aged 16 years".***

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) SEXUAL OFFENCES ACT**.

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 1/3/2016. The prosecution called five witnesses in support of the charge. The complainant **'S W N'** who testified as **PW1** told the court that she was born in 1999. The complainant stated that on 14/9/2015 she was at the family farm when the appellant met her there. He gave the complainant his mobile phone and told her to return it to him in the evening.

Later that evening after the complainant had returned home the appellant went to her home and asked for his mobile phone. **PW2 M W** who was the complainant's mother asked her if she had the phone. The complainant (probably out of fear) denied that she had the phone.

Later **PW2** began to beat the complainant demanding to know the truth. The complainant then ran away to hide behind the house. The appellant came and found her there. He asked for his phone which she returned to him. Then the appellant told the complainant to accompany him to her home. She obliged and went with him. They spent the night together and engaged in sexual intercourse.

The following day the complainant's mother and sister **E G N (PW3)** went to search for the complainant at the appellant's house. **PW3** went into the house and found the complainant seated on the bed. The complainant told **PW3** that the appellant had defiled her. The matter was reported to police. The complainant was taken to hospital for treatment. Eventually the appellant was arrested and charged with the present offence.

At the close of the prosecution case, the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn defence in which he denied having defiled the child. On 29/3/2016 the learned trial magistrate delivered her judgment in which she convicted the appellant of the main charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved the appellant filed this appeal.

This is a first appeal and this court has a duty to re-evaluate the prosecution case and draw its own conclusions on the same. In **DAVID NJUGUNA WAIRIMU Vs REPUBLIC [2010] eKLR** it was held that

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without over-looking the conclusions of the trial court……"***

In a case of defilement the prosecution must adduce evidence to satisfactorily prove the following

i. The age of the victim

ii. The fact of penetration

iii. The identity of the perpetrator

In this case the complainant told the court that she was born in 1999. This evidence regarding her age was corroborated by **PW2** who was the complainant's mother. She told the court that the complainant was born on 19th May 1999. **PW2** produced as an exhibit the complainant's birth certificate **P exb 2**. This birth certificate Serial No. *[particulars withheld]* is an official document and it confirms the child's date of birth as 19/5/1999. Therefore in September, 2015 when this incident occurred the complainant was aged about 16½ years old. She was legally a minor at the time.

The complainant told the court that on the material day the appellant met her in the farm and he gave her his mobile phone. Later that afternoon the appellant went to the home of the complainant to ask for the mobile phone. The complainant's mother who undoubtedly did not approve of the budding relationship between the two beat up her child. The complainant went to hide and the appellant found her. He took back his mobile phone but also invited the complainant to his house.

The complainant told the court that she accompanied the appellant to his house which was a single room. They ate and then slept together on the sole bed in the room. The complainant told the court that the two engaged in sexual intercourse.

PW3 the complainants sister confirmed to the court, that when she found the complainant the next day in the house of the appellant, the child admitted to her that they had engaged in sex.

PW5 DR. GEORGE BIKETI was the doctor who examined the complainant on 16/9/2015, a day after the incident. He found her to have bruises and lacerations in her vagina and her hymen was freshly torn. **PW5** filled and signed the P3 form which is produced in court as an exhibit **P. exb 3**. The doctor's evidence provides irrefutable proof that penetration did occur and I do so find.

Regarding identification of the offender, the complainant identified the appellant as the man who defiled her. The appellant was a neighbor who was well known to her. Through her testimony the complainant referred to the appellant by his given name **'Gilbert'**.

The appellant had met her earlier in the farm given her his mobile phone and later came to collect the phone from her home. The complainant had interacted with the appellant several times that day.

PW2 the child's mother confirms that it was **'Gilbert'** who came to her home asking for the complainant. He sought to have his mobile phone returned to him.

Later the complainant went missing from her home. **PW2** and **PW3** went to the appellant's house where they found the complainant seated on the bed. The room was a single room with only one bed. It is not difficult to guess what had occurred during the night. Indeed **PW3** the complainant's sister stated

> ***"S is my sister. I interrogated S and she told me that accused had given her his phone and told her to take it back in the evening. She also told me that she had sexual intercourse with the accused person".***

All these witnesses who knew the appellant well have identified him. The complainant had no reason or motive to fabricate evidence against the appellant.

In his defence the appellant denied having defiled the complainant. He merely issued a blanked denial to the charge. In his written submissions the appellant argued that he did not force the complainant to have sex with him. He submits that she came to his house willingly.

It is quite true that there was no element of compulsion in this case. The complainant willingly accompanied the appellant to his home. He bought food and she cooked it for them to eat together. I have no doubt that the two were friends and that the complainant willingly engaged in sexual intercourse with the appellant.

However the fact remains that being aged 16 years the complainant was in law a minor. She had no capacity to consent to sexual intercourse with any person. Notwithstanding her willingness any intercourse with the complainant constituted offence of defilement. I therefore reject the appellant's defence.

On the whole I am satisfied that the charge of defilement was indeed proved beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction. Section 8(4) of the Sexual Offences Act provides for a minimum mandatory sentence of fifteen (15) years upon conviction for defiling a girl aged between 16-18 years. The complainant was proved to have been aged 16 years. I find that the 20 year sentence imposed by the trial court was excessive. I set aside that sentence and instead impose the lawful minimum term of fifteen (15) years. To this extent only does the appeal succeed. It is so ordered.

Dated and delivered in Nakuru this 3rd day of August, 2017.

Appellant in person

Mr. Chigiti for DPP

Maureen A. Odero

Judge