REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 185 OF 2014

ALBERT WAMBUA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No. 319 of 2013 by Hon. P.K.MUTAI –R M at the Principal magistrate's court at Kwale on 5th December 2014)

JUDGMENT

1 The appellant, ALBERT WAMBUA has appealed against the conviction and sentence passed against him by the learned Resident Magistrate P. K. Mutai in Criminal case No. 319 of 2013, Republic Vs Albert Wambua.

2 In the said case, the appellant was charged with the offence of defilement of a girl contrary to Section 8 (1) as read with Section 3 of the Sexual Offences Act.

3 The particulars of the charge were that on diverse dates between the 10th September, 2012 and 28th February, 2013 in Kwale County within Coast region the appellant unlawfully and intentionally caused his penis to penetrate the vagina of ZMM a child aged 14 years.

4 The appellant face an alternative charge of indecent with a child contrary to Section 11(10 of Sexual Offences Act.

5 The particulars are that on diverse dates between the 10th September 2012 and 28the February 2013 in Kwale county within Coast region, the appellant unlawfully and intentionally committed an indecent act on ZMM, a girl aged 14 years by torching her vagina.

SUMMARY OF EVIDENCE.

6 The prosecution called a total of four (4) witnesses whose evidence is summarized below.

7 Pw1, ZM , testified that she stays at [Particulars Withheld] and has not completed primary school. She said that she was 16 years old. She said that in September, 2012 she left her father's place to visit her grandmother's house but instead went to the home of the appellant who is their neighbour.

8 Pw1 told the that as a result of their encounter, she fell pregnant. She also said that at one point, she had gone to fetch firewood, when the appellant followed her from behind and defiled her by force.

9 That her grandmother noticed she was pregnant and informed her father who sent her fare to go home at [Particulars Withheld]. She went to hospital and a P3 form was filled. She told her parent who was responsible but by then, the appellant had disappeared. At the time of testifying, Pw1 said her child was 6 (six) months old.

10 Upon cross examination, Pw1 said that she was born in 1996 and was 16 years old. She said that she left for her grandmother's on 24.9.2012 and was still a student at the time of defilement.

11 In re-examination, Pw1 said that her child was sired as a result of defilement, She also said that she did not know the appellant's wife although they were neighbours.

12 Pw2, MB, who is the father of the complainant, testified that she was 16 years old and a standard 4 student at [Particulars Withheld] school before being impregnated by the accused. He said that in the month of September, 2012, he noticed that the complainant was sleeping frequently when at home and then she disappeared. He later learned that she was at her grandmother's house.

13 Pw2 then sent the complainant fare to come back home, only to learn she was expectant. And on asking her who was responsible, she implicated Albert, who is his neighbour.

14 He said that he reported the matter to Tiribe police post and police started looking for the appellant, who he arrested after two months. at Likoni and took him to Kwale police station.

15 He also said that the complainant was taken to Kwale Hospital where she was found to be expectant and infected with syphilis. A P3 form was filled on 28.2.2013.

16 On being cross examined by the appellant, Pw1 said that the appellant is the one who planned and facilitated the complainant to her grandmother's house. He said that he reported the matter on 21.1.2013 and arrested the appellant on 24.2.2013. He also said that at one point the appellant made a report at the police and he was arrested.

17 Pw3, Warungu John, testified that he was a senior clinical officer attached to Kwale sub County Hospital. He told court that the complainant was sent to the said hospital with a history of having been defiled, impregnated and infected with a venereal disease.

18 And on examining her stomach, he felt a palpable mass in the uterus which was estimated to be twenty four (24) Weeks. On examining her genitalia, he found no physical injuries but established that the hymen was broken and private parts easily penetrable. He also found she had whitish discharge and sent her to the lab for investigations.

19 The laboratory results showed that the pregnancy test was positive, urinalysis revealed pus cells with hyconomes vaginalisis but HIV and syphilis tests were negative. He advised the complainant to start anti- natal clinic and treatment for the sexual infections.

20 Pw3 filled and signed the P3 form on 28.2.2013. He produced it as exhibit P1.

21 He also said that he conducted age assessment on the complainant on 7.1.2014 and he found she was 16 years old. He produced the age assessment report dated 27.2.2014 as exhibit P2.

22 On cross examination, Pw3 said that the complainant was taken for examination on 28.2.2013 and he assessed her age later. He also said that there was no requirement that he also examines the appellant and he could not also direct the police on what to do. He said that he could not tell if the appellant was responsible for complainant's pregnancy and a DNA test could be conducted to confirm paternity.

23 Pw4, No 46381 corporal John Ololi was the investigating officer attached to Kwale police station. It was his testimony that on 22.1.2013 a report of defilement was made at the said police station by one ZM, the complainant.

24 That she said that the appellant had taken her as his wife and was arrested on 27.1.2013 in Likoni.

25 Pw4 said that they took the complainant to hospital for examination, upon which the appellant was arrested and denied that it was confirmed that the complainant was 16 years old.

On cross examination, Pw4 said that the complainant was found at the appellant where they had stayed as husband and wife. He said that the appellant was implicated by the complainant and that she was arrested at his house.

26 The appellant, Albert Wambua, was placed on defence and he opted to give unsworn evidence. He called no witness.

27 The appellant, testifying as Dw1, stated that he was a manson, who works anywhere. He said that on 27.2.203 at about 10.00am, he had gone to his place of work where he was told there was no cement. He then went to visit his up country neighbour when he saw M passing by and he greeted him.

28 He explained that he and M had differed over a boundary and he had reported the matter to the village chairman. And so, on this day, M told him that they would visit the land office over this dispute.

29 The appellant said that he accompanied M to the police station where he was to pick a letter. He waited for M outside and after about 30 minutes, he was called in by the officers, who asked him if he knew M and he answered the affirmative.

30 The appellant went on to state that he was asked if he knew the complainant's whereabouts and he told the police that the matter he had was a land dispute.

31 The appellant said he was arrested and locked up in the cell where he asked the head of the station what had happened and was told he had taken the girl from her house.

32 According to the appellant, he knew nothing about the complainant and was surprised by the turn of events. It was his evidence that the matter before court was reiterated by land dispute as M had threatened to take unspecified action against him.

33 The trial magistrate found the appellant guilty of the offence of defilement, convicted and sentenced him to twenty (20) years imprisonment.

34 The appellant, being aggrieved with the said conviction and sentence, appealed on the following grounds.

1. That the learned trial magistrate erred in law and fact by convicting and sentencing him to serve twenty (20) years imprisonment considering the same was harsh and excessive.

2. That, the learned trial magistrate erred in law and fact by arriving to his conclusion without considering the fact that the DNA test was not conducted and Section 36 (1) of the Sexual Offences Act No .3 of 2006 was not adhered to.

3. That the leaned trial magistrate erred in law and fact by convicting him without considering that the source of my arrest was not established to have had any connection with the offence in question.

4. That, the learned trial magistrate failed in the rule of law by not considering that the prosecution's case was not proved to the required standard of law.

5. That the learned trial magistrate erred in failing to consider his reasonable defence statement which had created doubts in the prosecution's case.

35 **THE APPELLANT'S SUBMISSIONS.**

The appellant, who was unrepresented at the hearing of this appeal had filed written submissions and opted to rely on them entirely.

36 **RESPONDENT'S SUBMISSIONS.**

The respondent was represented by Miss Ocholla, learned state counsel gave oral submissions and opposed the appeal.

i. That the age of the victim was proved by Pw3 who produced exhibit P2 the age assessment report which showed that she had been assessed and found to be 16 years of age as at 27.5.2014, so that if the offence was committed in 2012, she was 14 years old then.
ii. That it was not mandatory to adhere to the provision of Section 36 (1) of the Sexual Offence Act. And even then the appellant failed to make the request to the trial court.
iii. That the appellant was well known to the complainant since they were neighbours and so there was no issue of misidentification.
iv. That the prosecution proved their case against the appellant beyond reasonable doubt as the victim's age was proved by exhibit P1 and P2 which penetration was proved by Exhibit P1.
v. That the appellant having been charged under Section 8 (1) of the Sexual Offences Act, and the complainant having been found to be aged between 12 and 15 years at the time of the alleged incident, the offender was rightfully sentenced to 20 years imprisonment.

37 The respondent's counsel urged the court to dismiss the appeal.

COURT'S FINDINGS

38 Being the first appellant court, the court is duty bound to review, revisit and reanalyze the evidence that was tendered in the lower court in line with the decision of the East African Court of Appeal in the case of **Okero Vs Republic (1972) E.A 32,** where it was stated as follows:

> ***"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court's own decisions on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".***

39 On the ground that the trial magistrate acted out of the parameters of law by sentencing the appellant to 20 years, I find that in the instant case, the appellant was charged, tried and convicted for the offence of defilement under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act, which provides that:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence of defilement.***
>
> ***(3) A person who commits and offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".***

40 Why does the appellant feel that the sentence he was accorded does not fall within the parameters of the law under which he was charged? This is because sentence (punishment) under the Sexual Offences Act is determined by the age of the victim.

41 According to the appellant, the age of the complainant does not fall within the parameters set in section 8 (3) of the Sexual Offences Act.

42 It was Pw1's (complainant) evidence that she was 16 years old in September, 2012, when she went to appellant's home and they had a sexual encounter. She also revealed that there was a time when she had gone to fetch firewood and he followed her from behind and defiled her by force. When cross examined by the appellant, she said that she was 16 years old and that she was born in 1996. In re – examination, she said that she was 15 years old the previous year (NM that she was testifying on 16.12.2013).

43 Pw2, complainant's father said that the complainant was 16 years old. In cross examination, he said that she was 16 years old but the P3 form indicated that she was 14 years old. Pw3, the clinical officer who examined the complainant stated

> ***"I signed the P3 form on 28the February 2013. I also conducted age assessment. Z was brought on 7th January, 2014 and found her to be 16 years old. I wish to produce the P3 form dated 28th February, 2014 as exhibit P1 and age assessment report dated 27.5.2014 as exhibit P2."***

44 From the evidence, the 16 years that the complainant is alleged to be appears to be the age she was at the time of testifying, so that her age at the time of the alleged incident should be counted backwards to either a year or two before the date she was testifying or when she was examined by the doctor. This would then put the age to either 14 years or 15 years at the time of the incident. And of this is the case, then sentence of 20 years imposed on the appellant would be safe.

45 The next issue for consideration is whether the prosecution proved its case against the appellant beyond reasonable doubt.

46 It is a cardinal principal of law that in a criminal case, the legal onus of proof, is always on the prosecution to prove the guilt of the accused and the standard of proof is beyond reasonable doubt. This degree is well settled in many cases in Kenya courts, such as **FESTUS MUKATI MURWA VS REPUBLIC (2013)** e KLR, where it was held:

> ***"That the standard of proof required is proof beyond reasonable doubt"***

47 In- fact Section 107 of the Evidence Act provides;

> 1. Whoever desires any court to give judgment as to any legal right on liability dependant on the existence of facts which he asserts, must prove that these facts exists.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof was on that person.

48 The legal burden of proof in a criminal case remains constant and does not shift, so as to uphold the constitutional right to the presumption of innocence and to remain silent.

49 In a case of defilement, like in the case herein, the critical elements that needed to be proved are:

(i) penetration;

(ii) the age of the victim;

(iii) the identity of the assailant;

50 With regard to penetration, the complainant testified that ***"on September, 2012, I left my father's place to my grandmother's home. I instead left to the accused home. The accused used to stay next to***

my father's home. As a result of our encounter l feel" pregnant. We met at my father's place. I had gone to fetch firewood. The accused followed me from behind. It was around 3.00pm. The accused defiled me. He used force" (at lines 9-18 on page 12 of the proceedings.)

51 Pw3, Mr Warungu John Munyaka, the clinical officer told court that he examined the complainant who was taken to him with allegations of having been defiled. He had this to say".

> ***" On examination, on the stomach, there was palpable mass from uterus estimated at 24 weeks. The nature of offence is defilement. On genital examination, no physical injuries, hymen broken, private parts penetrable with ease. There was white discharge. I sent her to lab for investigations. Pregnancy test was positive, urinalysis showed pus cells it hyconoma vagials. We tested HIV which was negative and syphilis was also negative...."***

52 On re- evaluation of this evidence, it confirms that the complainant's hymen was broken, though with no sign of recent injury in the vaginal area. There was evidence that the victim was pregnant (established at 24 weeks) and that her private parts were easily penetrable, evidence of consistent sexual intercourse. With this kind of evidence, which was uncontroverted, it was established that penetration had been established to the required standard of proof beyond reasonable doubt.

53 Before I can deal with the issue of age of the victim, I wish to follow with the question of whether the appellant was found to be the perpetrator of this offence against the complainant.

54 The complainant testified that it was the appellant who forcefully defiled her and in whose house she went and they had a sexual encounter. She further testified in re- examination that:

> ***"The child was sired as a result of defilement (see line 8 at page 15 of the proceedings) At page 13 lines 12-13 of the proceedings,) she said;***
>
> ***"I did not realize I had conceived..."***

55 In this case, while there is no dispute that the complainant was defiled or penetrated, the question is who was the culprit? Was it the appellant?

56 Upon evaluating the judgment by the trial magistrate, I find that his finding was informed by the evidence of the complainant who he said identified the appellant because they are neighbours and gave her testimony candidly. I truly appreciate that the trial magistrate had a greater advantage than myself in examining the complainant's demeanor.

57 However, in going through the evidence, that was adduced, by witnesses , when accused cross examinined witnesses and his own defence, the appellant seemed to imply that the offence was fabricated against him because of a land dispute between the complainant's father and himself.

58 Also, it came out when the complainant was cross examined by the appellant and re examined by the prosecutor that she did not record a statement with the police but that they recorded it and inserted her name.

59 And when Pw2 was cross examined, he appeared to be confused as to what date the offence took place and when the appellant was arrested. He said that the offence took place on 24.2.2013 and he reported the matter on 21.1.2013. The particulars of the charge and evidence of the complainant showed that the offence was committed sometime in September.2012. Pw4 the investigating officer said that the report was made on 22.1.2013.

60 In his judgment, the trial magistrate noted that;

> ***"I have evaluated evidence adduced by prosecution witnesses and the accused person in defence. The accused was linked to the offence after the complainant became pregnant....."***

61 From my analysis of the evidence adduced by the prosecution, there are gaps and unanswered questions which needed to be filled and answered so as to corroborate the evidence of the complainant against the appellant in this case. It was not enough for the complainant to say that she knew the appellant as a neigbhour.

62 It is also not enough for one to be said to be pregnant and get a baby. As put by Pw3, the clinical officer on being cross -examined said at page 27 lines 10-12 of the proceedings:

> ***"I cannot tell if you are responsible. I examined the complainant alone. May be DNA test can be conducted to confirm paternity".***

63 In the instant case where the complainant was pregnant and went on to have a baby, it was necessary for, the court, to call for a DNA testing so as to prove. The offence of defilement conclusively. At the time of Pw1 testifying, the said child was 6 months old, requirements is provided for under Section 11 of the Sexual Offences Rules of court 2014 as follows;

> ***"where a person has been accused of committing an offence under the Act, and it is alleged that a child has been born alive as a consequence of the commission of that offence, the court may order the collection of such samples in the form provided in the schedule as may be required from the accused person and such samples may undergo such tests as the court may order to determine whether or not the child is the result of the commission of the alleged offence"***

65 This was a remiss of the court. With the gaps and unanswered questions in the evidence of the prosecution, I find that the same was insufficient and doubtful. The trial magistrate therefore erred in convicting the appellant for the charge of defilement.

66 As such, I quash the conviction and set aside the sentence against the appellant.

67 The appellant is hereby set free unless lawfully held.

Judgment singed, delivered and dated this 16th day of February 2016.

D. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The appellant in person

C/Assistance - Kiarie