REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 79 OF 2015

WILLIAM OKEYO LIN'ONDO……..……..…...……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Criminal Case No. 10 of 2014 delivered by A. Ong'injo,CM on 30th March, 2015)

JUDGMENT

William Okeyo Ling'ondo was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual offices act No. 3 of 2006.** It was alleged that on diverse dates between 22nd November, 2013 and 19th December, 2013 within Nairobi County unlawfully and intentionally committed an act by inserting his genital organ (penis) into the genital organ (vagina) of TWM which caused penetration into the said child aged 15 years. In the alternative, he was charged with indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same date and same place unlawfully and intentionally committed an act by touching the female genital organ (vagina) of TWM a girl aged 15 years. The Appellant was found guilty of the main count. He was convicted and sentenced to serve 20 years imprisonment. He was aggrieved by both the conviction and the sentence and preferred this appeal.

At the hearing of the appeal, he informed the court that he would be relying on Supplementary Grounds of Appeal dated 25th February, 2016. He was aggrieved that his conviction was based on a defective charge sheet. He was also aggrieved that the learned trial magistrate convicted him for the offence of defilement whereas the prosecution had not proved the elements of the offence. Moreover, it was alleged that after defilement, the complainant got pregnant yet the prosecution was unable to link the pregnancy to the Appellant. Hence, his conviction was based on mere hearsay. He also faulted the prosecution for not calling key witnesses who would otherwise have justified their evidence against them. He faulted the fact that he was convicted after recovery of a mobile phone which linked his communication with the complainant. He contended however, that the production of evidence touching on the mobile phone was not in accordance with **Section 65(8) and (9) of the Evidence Act**. Finally, he was dissatisfied that the judgment of the learned trial magistrate contravened **Section 169 of the Criminal Procedure Code**.

Filed contemporaneously with the Supplementary Grounds of Appeal were the Appellant's written submissions. In brief, on defective charge sheet, he submitted that the charge sheet as drawn contravened **Section 134 of Criminal Procedure Code** in that it did not particularize the key elements of defilement which are; the penetration and age of the victim. He faulted the fact that the charge sheet was drawn

under **Section 8(1)(2) of the Sexual Offences Act**, yet the evidence adduced disclosed that the complainant was 15 years old. His view was that at the point that the evidence disclosed that the charge was drawn under the wrong subsection of **Section 8 of Sexual Offences Act,** the prosecution ought to have amended the charge sheet pursuant to **Section 214 of the Criminal Procedure Code.** On prove of the elements of defilement, he submitted that the evidence adduced did not prove penetration, the age of the complainant and that he was the person who allegedly defiled the complainant. He stated that he was convicted based on hearsay evidence which did not stand the test of law. His justification was that the prosecution was required to prove the existence of the pregnancy and that the said pregnancy was linked to him. According to the Appellant, it was not sufficient merely for the prosecution to adduce the evidence that the complainant had a miscarriage in hospital whereas there was no evidence to prove the miscarriage.

On failure by the prosecution to call crucial witnesses, the Appellant cited the failure by the prosecution to call witnesses who would have adduced evidence to establish his contact and link between himself and the complainant and the circumstances leading to his arrest. On production of evidence related to his communication with the complainant and complainant's mother, he submitted that the trial court ought not to have relied on it because the same was not adduced by an expert dealing with production of primary evidence under **Section 65(8)(9) of the Evidence Act**. It is only the mobile phone subscriber who would have adduced evidence relating to any communication that he may have had with any of the prosecution witnesses. On non compliance with Section 159 of Criminal procedure Code, the Appellant submitted that the trial magistrate failed to highlight the issues for determination and the reasons for the decision arrived at.

The appeal was opposed. Learned State Counsel Ms. Atina submitted that the prosecution proved all the elements of defilement. She submitted that PW1 had travelled from Nakuru to Nairobi where she stayed with the Appellant who had a wife. For the period in question, the two had sexual intercourse culminating into a pregnancy. The pregnancy was confirmed by a Dr. Nguku who also stated that the complainant had lost her hymen. On the age of the complainant, she submitted that a Birth Certificate produced by the complainant showed that she was born on 25th March, 1998 which placed her age at 15 years as at the date of defilement. On identification, Ms. Atina submitted that the Appellant stayed with the complainant for almost a month during which time she became well acquainted with him. The identification was thus by recognition and not identification. On prove of the pregnancy, Ms. Atina submitted that under **Section 35 of the Children's Act** a DNA examination was not mandatory. In the present case, none was required because the evidence available was factual that the Appellant had had sexual intercourse with the complainant for the period he lived with her. In any case, it was not possible to conduct the DNA test owing to the fact that the complainant got a miscarriage. With regard to compliance with **Section 169 of the Criminal Procedure Code**, counsel submitted that the same was duly complied with. On sentence, she submitted that the same was lawful and in accordance with the law.

In rejoinder, the Appellant urged the court to take into account that both the complainant and her mother gave contradictory evidence regarding the miscarriage. According to the complainant, she miscarried sometime in January, 2014 whereas her mother testified that this occurred on 2nd February, 2014 after he (Appellant) was arrested. He also urged the court to take into account that **Section 210 of the Criminal Procedure Code** was not complied with.

This being the first Appellate court, its duty is to re evaluate the evidence and come up with its own independent conclusion. See **Okeno vs Republic [1972] EA 32.** Before I summarize the evidence, it is important to first look into the issues of law raised by the Appellant. On defective charge sheet, the Appellant submitted that the charge sheet as drafted did not comply with Section 134 of the Criminal procedure Code which provides as under:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement or specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

His contention was that the particulars of the charge did not particularize the elements of the offence. It is important to note that for a charge to be deemed as proper, the accused must be charged with an offence known in law. The offence must also be disclosed and stated in a clear and unambiguous manner so as to enable the accused to plead to it in a manner he understands. This enables him to prepare himself to combat the case with a strong defence. Reverting to the offence with which the Appellant was charged, it was defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The particulars were stated as follows:

> **"That on diverse dates between 22nd November 2013 and 19th December, 2013 within Nairobi County unlawfully and intentionally committed an act by inserting his genital organ (penis) into genital organ (vagina) of TWM which caused penetration into the said child aged 15 years.**

It is clear from the particulars of the offence that the Appellant was required to disprove that he penetrated the genital organs of the complainant, that the complainant was not aged 15 years and that he is not the person who caused the penetration. As such, those particulars clearly spelt out the elements of the offence the prosecution was required to prove. They also duly supported the statement of the charge. I do not therefore find as valid the Appellant's submission that the charge was defective.

However, it is clear from the evidence that the complainant was aged 15 years and not 11 years. The charge then ought to have been drawn under **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act**. It is also proper to state that immediately such evidence was adduced, the prosecution ought to have seized the opportunity to amend the charge sheet pursuant to **Section 214 of Criminal Procedure Code**. That was not done but in my view the failure to do so did not vitiate the charge itself or render the trial a nullity. The trial magistrate had powers to convict the Appellant under **Section 8(3)** which he did. In any case, the omission to state the right provision of the law was minor and is curable under **Section 382 of the Criminal Procedure Code**.

On non compliance with **Section 169 of Criminal Procedure Code**, the Appellant submitted that the judgment of the trial court did not outline the issues for determination and the reasons for the decision arrived at. That makes me conclude that he was referring to **Section 169(1)** thereof which provides as follows:

> ***Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

I have looked at the judgment of the trial magistrate and it is true that the leaned trial magistrate did not outline the points for determination. The conclusion to a verdict of guilty was also very brief. However, the entire judgment analyzed both the prosecution's case and the defence case as a result of which the trial magistrate arrived at a decision that the prosecution had proved their case beyond all reasonable doubt. What is important for this court is to re-evaluate the entire evidence and come to the conclusion of whether or not the learned trial magistrate arrived at the correct verdict.

The Appellant submitted that **Section 210 of Criminal Procedure Code** was not complied with. However, that is not factual as the record of proceedings clearly shows that after the prosecution closed its case, the learned trial magistrate set the date of 21st November, 2014 for ruling under Section 210, that is to say whether or not the Appellant had a case to answer. The same was delivered on the due date and the learned trial magistrate found that the prosecution had established a prima facie case to warrant the Appellant to be put on his defence. That submission has no merit in the circumstances.

On the merit of the case, the prosecution called a total of 5 witnesses. The prosecution's case is that the complainant frequently communicated with the Appellant using her mobile phone. She knew him as William who to her knowledge stayed in Kitengela but later learnt that he lived at Kangemi. On 22nd

November, 2013, the Appellant went to Nakuru where he picked up the complainant (PW1) and both travelled to Nairobi without her parents' knowledge. On the following day, PW1 texted her mother using the Appellant's phone and she informed her that she had travelled to Nairobi to look for a job and that she would return after the schools opened. She then switched off the Appellant's phone. PW1 and Appellant went to hospital to establish their HIV status. The Appellant's phone was switched on and PW1's mother who testified as PW2 called the Appellant to enquire of the whereabouts of PW1. He denied he was with her and then switched off the phone. According to PW1, both lived as husband and wife and they used to have sexual intercourse. After sometime, the Appellant started disrespecting PW1 by bringing other girls into the house. She however got pregnant out of the cohabitation. The Appellant later told PW1 that he would marry her. She travelled back home on a Friday after the Appellant promised to visit her mother together with his mother. On arrival home, the mother took her to hospital and on examination was found pregnant. On Sunday, the date the Appellant promised to visit PW1's family, his phone was switched off. He sent text messages insulting PW1 and her mother by calling them stupid. Her mother reported the matter to the police at Nakuru. She later on went to stay with her aunt in Kikuyu. The Appellant was arrested in Elburgon in Nakuru and escorted to Kabete Police Station where he was charged.

PW2, ANW corroborated the evidence of PW1. She testified that after PW1 told her that she was married, she advised that that was not possible because she was still in school. She testified that PW1 told her that the person who had married her was called Kemboi. She pleaded with her to return home after which she told her that she would return home after one week accompanied by her husband. PW1 returned on 19th December, and she reported the matter to the police. According to PW2, they tried to track the Appellant at the house where he lived but he had moved. Her sister called the Appellant by his mobile phone and that is how he was tracked to Elburgon. He was arrested, taken to Elburgon Police Station and thereafter to Kabete Police Station. PW2 testified that PW1 was found to be pregnant. After a few days, she was informed by a neighbour that her daughter had fallen sick. When she went home she found her bleeding. She took her to Banana Hospital where it was confirmed that she had a miscarriage. She identified PW1's Birth Certificate which showed that PW1 was born in 1998.

PW3, Dr. Daniel Nguku of Nairobi Women's Hospital testified that he examined PW1 and confirmed that she was pregnant. The history given to him was that PW1 was cohabiting with a 23 years old man for about a month and both had sexual intercourse. That PW1 reported the matter to the police after the man abandoned her. Other tests including HIV, Syphilis and Hepatitis were negative. The examination report had been signed by a Dr. Mugo on whose behalf PW3 produced. **PW4** was **Dr. Joseph Maundu**. He examined the Appellant whom he found to have no injuries around his genitals and other areas. He also examined PW1 whom he found with normal genitals with no tears and lacerations. Her hymen was however missing. She had a whitish discharge. He did the examination on 5th February, 2014 and produced the P forms in respect of PW1 and the Appellant.

PW5, Police Constable **Peris Indeche** was the Investigating Officer. She testified that on 24th December, 2013, she received two ladies accompanied by a girl who had a letter dated 23rd December, 2013 from Nakuru Police Station. The letter requested for assistance to the girl who it was alleged had been defiled. It was signed by a Corporal Beth Kamande in charge of Child Protection Unit, Nakuru Police Station. The girl informed her that on the 2nd November, 2013, one Willy Kemboi took her from Nakuru and travelled with her to Nairobi in Kawangware where both cohabited between 22nd November and 19th December, 2013. During that period, Willy repeatedly defiled her without using any protection. She returned to her parent's home on 19th December, 2013. Her mother took her to Nairobi Women's Hospital where she was examined and found to be pregnant. On 2nd February, 2014, PW5 received a call from PW1 who informed her that the suspect had been arrested and was being held at Elburgon Police Station. On the following date, 3rd February, 2014, the suspect who is the Appellant was escorted to Kabete Police Station and his file was compiled and he was charged. The Appellant denied committing the offence. In his sworn defence, he stated that he was a case of mistaken identity because PW1 was clear that she had been defiled by a Willy Kemboi who was not himself. He stated that the only evidence that would have linked him to the offence was a DNA examination which would have proved who the father of the unborn child was. He stated that PW1's mother wanted the person who was staying with

PW1 to go and introduce himself officially to her. Further, that although PW1 returned home on 19th December, 2013, it was not until 24th December, 2013 that PW2 took her to the Police Station. His further defence was that he lived in Elburgon where he was arrested and the person who must have defiled PW1 is one who lived in Nairobi. He cannot therefore be linked to the offender. In any case, PW1 was old enough to know the name of the person who had defiled her.

On evaluation of the evidence, it is clear that the Appellant was arrested through a telephone number that was called by the sister to PW2 who then was an Aunt to PW1. What did not come out clearly was whether this telephone number is the same telephone number that PW2 used to call when the alleged defiler was cohabiting with PW1. PW5 was also very sketchy with regard to how the Appellant was arrested. Her only testimony was that the Appellant was arrested at Elburgon, held at Elburgon Police Station and thereafter escorted to Kabete Police Station. Her evidence did not disclose who arrested the Appellant and by what means he was traced at Elburgon. The evidence of PW1 was that his defiler was a man who lived at Kangemi or Kawangware areas and that is where she left him when she returned to her parent's home on 19th December, 2013. There is clearly no evidence that the Police attempted to return to the house of the Appellant in Nairobi in an attempt to track him. According to PW1, his so called boyfriend with whom she cohabited was Willy Kemboi. The Appellant herein bears a different name of William Okeyo Ling'ondo. Although she identified him in court as the person who had defiled her, with the disconnected evidence of how the Appellant was arrested, I hold that there is no concrete link between the Appellant and PW1's defiler, one Willy Kemboi. It is not sufficient as submitted by the Respondent that the Appellant bears the name Willy which is the same name in the name Willy Kemboi. It is also not sufficient to found a conviction based on dock identification. The only water tight evidence that would have erased any doubt that the Appellant is one and the person by the name Willy Kemboi was a proper linkage with the telephone number that PW2 used to call Willy Kamboi with. Unfortunately, PW2 did not mention the Telephone number and neither gave the Police the telephone numbers by which she used to call Willy Kemboi. The police also casually investigated the matter by not investigating which numbers PW1, PW2 and the Appellant used to communicate with. That would have shed light that the number by which PW2's sister tracked the Appellant was the number being used and in possession of Willy Kemboi. Surprisingly, the so called sister to the mother of PW1 was not called as a prosecution witness. Thus, any evidence tending to link the arrest of the Appellant to telephone communication between himself and PW1's aunt was hearsay evidence which is not evidence at all. The police should also have sought the assistance of the mobile phone subscriber to confirm whether the lines used by PW1 and PW2 were registered to the Appellant or had been used by the Appellant. That not having been done casts doubt whether the Appellant is one and the same person as Willy Kemboi. I therefore agree with the Appellant that he was most likely arrested in a case of mistaken identity.

On failure to conduct a DNA test on the pregnancy, the circumstances of this case may not have allowed that to be done. PW1 experienced miscarriage in her early pregnancy and the foetus was not preserved for this purpose. Although PW1 no doubt was defiled as a result of which she became pregnant, there is no sufficient evidence to prove that the defilement was committed by the Appellant. I shall accordingly give him the benefit of doubt.

In the result, I find that the prosecution did not prove their case beyond all reasonable doubt. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** this **21ST** day of **MARCH, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *The Appellant in person*
2. *Miss Nyauncho holding brief for M/s Atina for the Respondent.*