



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 530 OF 2013

(Appeal from original Conviction and Sentence in Kigumo SPM Criminal Case No 841 of 2010 – B Khaemba, Ag SRM)

D K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **D K M**, was convicted after trial of **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the charge that on diverse dates between the months of December 2009 and May 2010 in Kigumo District of the Central Province, he willfully and unlawfully had carnal knowledge of **P N N**, a child aged 13 years. He was sentenced to twenty (20) years imprisonment. He has appealed against both conviction and sentence.

2.The Appellant lodged his appeal in person but subsequently instructed counsel who filed an amended petition of appeal on 17/09/2015. The following grounds of appeal emerge therefrom –

(i) That the prosecution did not prove the charge against the Appellant beyond reasonable doubt as required by law.

(ii) That the learned trial magistrate erred in law in relying upon a DNA report “that was suspect from the word go” and thus arrived at a wrong finding.

(iii) That the trial court erred in law and fact in relying upon a retracted statement of the complainant, thereby arriving at a wrong finding.

(iv) That the trial court erred in law in shifting the burden of proof to the Appellant.

(v) That the trial court erred in law and fact in failing to appreciate the Appellant’s defence, and thus failed to give the Appellant the benefit of doubt thereby raised.

3. Learned counsel for the Appellant, Miss Wambui, chose to argue all the grounds of appeal together. She submitted that the complainant (PW1), who testified under oath after a *voire dire* examination, was the only eye-witness who testified; and that her testimony was that the Appellant defiled her between December 2009 and May 2010. Learned counsel pointed out that PW1 made allegations of defilement only after her mother (PW2) discovered that she was pregnant in May 2010; that she never complained of any defilement between December 2009 and May 2010; and that she stated in her testimony-in-chief that she was defiled several times by the Appellant, yet in cross-examination she stated she was defiled only

once.

4. Learned counsel further submitted that the police should not have taken samples from the Appellant for DNA testing after he had been charged and after the child he allegedly fathered for PW1 had been born; that therefore the Appellant had in effect been forced to supply to the prosecution self-incriminating evidence contrary to **Article 49(1) (d)** of the **Constitution**; and that therefore the DNA evidence was illegal and should not have been admitted. On this point learned counsel relied on the case of **MA –vs- Republic [2014) eKLR**.

5. Miss Wambui also pointed out that the Appellant gave sworn testimony in his own defence and called one witness. He denied that he committed the offence and stated that in a family meeting (Appellant's and complainant's families) the complainant stated that the Appellant was not responsible for her pregnancy and that another cousin of hers was (the Appellant and complainant were cousins); and that the trial court totally ignored the Appellant's defence.

6. Learned counsel also submitted that the evidence laid before the trial court regarding the complainant's age was that she was about 14 years old at the time of commission of the alleged offence, and that therefore the charge that could have been proved was under section 8(1) as read with **subsection (3)**, not **(2)**, of the Act, a fact reflected by the sentence imposed (20 years imprisonment instead of life imprisonment).

7. In her reply learned prosecution counsel, Miss Keya, submitted that though the Appellant was charged under section 8(1) & (2) of the Act, the particulars of the offence stated that the complainant was 13 years old. In her view, that defect in the charge was curable under **section 382** of the **Criminal Procedure Code**, as there was no miscarriage of justice because all the elements of the offence were proved beyond reasonable doubt: age of the complainant; identity of the Appellant (who was a cousin of the complainant; and penetration (as a child was born fathered by the Appellant as proved by DNA testing).

8. As for obtaining DNA samples from the Appellant, learned prosecution counsel submitted that this was expressly permitted by law (**section 36(1)** of the Sexual Offences Act). She further submitted that obtaining the DNA samples from the Appellant did not amount to **confession** and **admission** dealt with by Article 49(1) (d) of the Constitution as the DNA testing could well have exonerated the Appellant! In that regard, the case cited by the Appellant's learned counsel was irrelevant as it dealt with the offence of rape where the main issue was whether or not the complainant had given consent.

9. Learned prosecution counsel therefore supported the conviction and sentence.

10. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as a first appellate court. I have borne in mind however that I neither saw nor heard the witnesses myself, and have given due allowance for that fact.

11. I will first deal with the charge as laid. The Appellant was charged with defilement contrary to section 8(1) & (2) of the Act which provide –

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

12. A charge of defilement under section 8(1) of the Act must thus allege in the particulars the act committed by the accused which caused penetration of the child, bearing in mind the definition of penetration in section 2 of the Act –

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

13. In the present case the particulars given in the charge were that on diverse dates between the months of December 2009 and May 2010 the Appellant willfully and unlawfully **had carnal knowledge of the complainant**. The phrase **carnal knowledge** was obviously lifted from the old definition of rape under the repealed provisions of the **Penal Code, Cap 63 – having carnal knowledge of a woman without her consent**. Can this phrase, **carnal knowledge**, be properly substituted in place of **commits an act that causes penetration** in a charge of defilement under section 8(1) of the Act? I doubt it.

14. It is to be noted that the definition of the offence of rape under **section 3(1)** of the Sexual Offences Act completely avoids use of that old phrase **carnal knowledge**! Section 3(1) aforesaid provides –

“3. (1) a person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.”

15. The long and short of it is that the phrase **carnal knowledge** does not appear in the Sexual Offences Act. At any rate, that phrase is not the *actus reus* of the offence of defilement under section 8(1). The *actus reus* is **committing an act which causes penetration – penetration** as defined in section 2. A charge of defilement that alleges **carnal knowledge**, a phrase that does not appear in the Act and is not defined therein, is thus fatally defective, and I so hold.

16. The charge facing the Appellant was also defective on another score. The punishment for defilement under section 8(1) of the Act will depend on the age of the child: **11 years or younger - mandatory life imprisonment** (subsection (2)); **between 12 and 15 years – not less than 20 years imprisonment** should the court decide that a custodial sentence is deserved (subsection (3)); and **between 16 and 18 years – not less than 15 years imprisonment**, again should the court decide that a custodial sentence is deserved (subsection (4)). So, the age of the complainant is a material ingredient of the offence of defilement under section 8 of the Act and must be stated in the particulars of the charge, and proved beyond reasonable doubt.

17. In the present case, it was alleged in the particulars of the offence that the child was aged 13 years. So, the offence disclosed was that of defilement contrary to section 8(1) & **(3)**, **not** subsection **(2)**. This was a fatal defect that could only have been cured by amendment of the charge. There was never such amendment.

18. Matters were further compounded by the fact that despite convicting the Appellant under section 8(1) & (2) of the Act, the trial court nevertheless sentenced him to 20 years imprisonment instead of the mandatory life imprisonment.

19. With all the defects in the charge as discussed above, I need not consider the grounds relating to the evidence. Suffice it to say that the conviction cannot be upheld on account of all the defects in the charge.

20. I will in the event allow the appeal in its entirety. The conviction is hereby quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF MAY 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 13TH DAY OF MAY 2016