REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 125 OF 2010

DAVID NDERITU RUKWARO…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 1517 of 2007 (Hon. S.M. Muketi) on 28th May, 2010)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1) (3)** of the **Sexual Offences Act, No. 3 of 2006**; the particulars thereof were that on diverse dates during the months of December 2006 and February, 2007 at ***[particulars withheld]*** village in Nyeri District within Central Province, the appellant intentionally and unlawfully committed an act of penetration to S W W, a girl aged between 12 and 14.

The appellant faced the alternative count of indecent act contrary to **section 11 (c)** of the **Sexual Offences Act** the particulars being that on diverse dates during the months of December 2006 and February, 2007 at ***[particulars withheld]*** village in Nyeri District within Central Province, the appellant intentionally and unlawfully committed an indecent act with S W W by causing his genital organ to touch her sexual organ.

The trial court found the appellant guilty of the principal count and sentenced him to 20 years imprisonment; it is this conviction and sentence that the appellant has appealed against and in the petition he filed in court on 3rd June, 2010 he raised the following grounds of appeal:-

1. The learned magistrate erred in law and in fact in convicting the appellant without considering that his constitutional rights as stipulated under **section 72(3) (b)** of the Constitution were violated in the sense that he was detained for more than twenty four hours before he was charged;

2. The learned magistrate erred in law and in fact in convicting the appellant despite the existence of a grudge between the appellant and the complainant's family;

3. The learned magistrate erred in law and in fact in failing to observe that the lapse of time between the time the offence was committed and the time the appellant was arrested raised doubts to the prosecution case;

4. The learned magistrate erred in law and in fact in relying on the prosecution evidence that the complainant had been threatened with death if she disclosed her assailant without considering the possibility that the evidence could have been fabricated;

5. The learned magistrate erred in law and in fact in disregarding the fact that the DNA report could have been manipulated "in the absence of proper safeguards".

6. The learned magistrate erred in law in disregarding the appellant's defence and without complying with **section 169(i)** of the Criminal Procedure Code.

At the hearing of the appeal the appellant represented himself and opted to rely on his written submissions which he filed in court on 2nd April, 2015. Counsel for the state on the other hand opposed the appeal and submitted that though there was a delay of 4 days before the appellant was charged, the issue was never taken up at the trial and in any event, a delay in arraignment of an accused person in court cannot, by itself, vitiate his prosecution; the remedy for such delay is in damages, so counsel argued.

Counsel for the state also urged that the prosecution called the essential witnesses noting that under **section 143** of the **Evidence Act,** Cap 80, the number of witness the state may call to prove its case does not matter. The witnesses who were called were able to prove that the complainant was defiled and in particular, there was evidence that the complainant's hymen was raptured; further the complainant conceived and later gave birth to a child whose DNA profile showed that the appellant was the father. In a nutshell, the state counsel submitted that the prosecution case was proved beyond all reasonable doubt.

Inorder to appreciate the appellant's and the state counsel's submissions it is necessary to look at the trial record and consider the evidence afresh. More importantly, however, this Court as the first appellate court has the legal obligation to re-evaluate the evidence at the trial and to come to its own conclusions free from those findings that the lower court may have come to but always bearing in mind that the lower court had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The prosecution's case was basically that the appellant was a minor aged between 12 and 14; she was defiled sometimes between December 2006 and January, 2007. According to the complainant herself, the appellant defiled her on two occasions; this was in December 2006 and February, 2007. On the first of these occasions, the appellant found the complainant alone in their (complainant's) house; he shut the door, laid the complainant on the sofa seat and defiled her. He sexually assaulted the complainant in similar circumstances on the second occasion except that this round the defilement was done on the bed. It was the complainant's evidence that on each of these occasions and in between the appellant would threaten her with death if she ever disclosed that the appellant had sexually assaulted her.

It was the complainant's evidence that sometimes in May, 2007 her mother and a school worker in the school in which she learned noticed that her stomach was somehow enlarged and that she was probably pregnant. The pregnancy was confirmed when the complainant was later examined at the Nyeri Provincial General Hospital. Meanwhile, a report was made to the police, more particularly on 21st May, 2007 of the sexual assault and subsequently, the appellant was arrested and charged in court.

The complainant testified that on 9th August, 2007 she delivered a baby boy though she had to undergo a caesarean section during the delivery.

It was the complainant's testimony that the appellant was a person she always knew because he was her cousin; their respective mothers shared a father though their mothers were different.

At cross-examination, the witness testified that she was born on 30th September though she could not recall the year she was born.

The complainant's mother who is identified in the proceedings as **N (PW2)** and erroneously described as a "male adult" testified that she noticed some unusual symptoms with her child sometimes in May 2007; in her own words, her daughter looked different and that she vomited repeatedly; she also noticed that she had either missed or delayed her monthly periods. Later, a counsellor at the complainant's school informed her that her daughter had been defiled. The complainant's father was subsequently informed and

that it is to him that the complainant revealed that the appellant had defiled her. She confirmed that the appellant was her sister's child and that they were neighbours.

Police Constable Regina Kanari (PW3) received and apparently investigated the complainant's complainant; she was then attached to Nyeri Central Police station. According to her, the complainant and her mother reported the complaint against the appellant on 19th May, 2007; they came back to the station with the appellant on the following day. She confined him and accompanied the complainant and her mother to hospital where it was confirmed that the complainant was pregnant. She charged the appellant. The officer testified that a sample of the appellant's blood together with that of the child and the complainant were taken for **DNA** analysis by the Government chemist.

The Government chemist himself, Mr **Henry Kiptosa (PW4)** testified that he received the blood samples from the complainant, the complainant's child and that of the appellant for a DNA analysis. Upon examination and analysis of these samples, he concluded that the appellant was the father of the complainant's child.

Police Constable Daniel Kandei (PW5) testified that he accompanied the complainant, the appellant and the complainant's child to hospital where their blood samples were taken. The witness testified that the samples were taken by one Dr Achama in his presence. The samples, according to the witness, were escorted to the analyst by **Police Constable David Ali (PW7).** Ali himself testified that he indeed took the samples to the Government analyst; he initially took the appellant's and later, Police Constable George Odhiambo escorted the samples of the complainant as well.

The doctor who produced the P3 form in respect of the complainant was **Dr Janet Githinji (PW6).** She testified that the P3 form was filled by one Dr Gitau who had been transferred at the time she testified. It was her testimony that she did not know Dr Gitau personally but that the P3 form which he filled was one of the documents found in the hospital records. The P3 form showed that the complainant was examined on a complaint of defilement; it was established that she had a distended abdomen with a baby. Her hymen was also found to have been raptured.

In his defence, the appellant gave unsworn testimony; it is not clear from that testimony what his defence was but the best I can do is to reproduce his rather brief statement here verbatim:

> ***I come from Ihururu. In the family we have dug a ground water farm. The mother had been left under her brother's care. They dug a hole in my home and removed. I reported. They were caught by the chief as suspects. The case was taken to the chief and they returned. The mother said she was doing that out of us is admitted. They were not harmed. I was given bond. The person who stood surety and he got another person who was giving out money. That is all.***

That is as far as the evidence at the trial went.

Section 8 (1) and **(3)** of the **Sexual Offences Act** under which the appellant was charged provides as follows:-

> **8. Defilement**
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2)* …
>
> *(3)A person who commits an 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.*

According to this section two critical elements must be established before one is convicted of the offence of defilement; first, the act of penetration and second, the age of the victim.

"Penetration" as a technical term is defined under **Section 2** of the Act to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

The uncontroverted medical evidence of **Dr Janet Githinji (PW6)** was clear that the complainant's hymen was not only raptured but that she was also pregnant at the time she was examined; the P3 form filled by Dr Gitau on 23rd May, 2007 but which was produced by Dr Githinji and duly admitted in evidence with the concession of the appellant's counsel left no doubt that there must have been not only complete insertion of the genital organs of a person into the genital organs of the complainant but also that such insertion was followed by insemination of the male seed from which the complainant conceived. The only question for consideration is whether the penetration amounted to defilement as defined under **section 8(1)** of the **Act** and whether the appellant was culpable for the offence under subsection **8(3)** thereof.

The learned magistrate held that indeed the complainant had been defiled and that the appellant was the culprit of this sexual assault. In coming to this conclusion, the learned magistrate was no doubt influenced by the medical evidence particularly by that aspect of the evidence that clearly showed that there was penetration and the subsequent conception of the foetus in the complainant's womb. The culpability of the appellant, according to the learned magistrate was demonstrated by the scientific examination of his deoxyribonucleic acid (DNA) which linked him to the complainant's child alleged to be the product of the defilement.

I do not doubt the learned magistrate's finding on the penetration of the complaint's genital organs for the obvious reason that such finding was supported by concrete and uncontroverted medical evidence. My concern, which ought to have also been the learned magistrate's concern, is whether the act of penetration was, of itself, a sufficient proof of the offence of defilement.

Coming back to **section 8(1)** of the Act, defilement is not an offence as defined in law unless the act of penetration is with a *child.* As to who qualifies to be a child for purposes of the Act is not a question left to speculation; he is defined under **section 2** of the **Children Act, Cap 141** as *"any human being under the age of eighteen years"*. It follows that the age of a victim of a sexual assault is an important and a necessary component of the offence of defilement and to sustain a conviction for this offence, it must be proved, as a matter of law, beyond all reasonable doubt.

Proof of age is not just important merely to prove whether there has been defilement or not; it is equally important in the meting out the punishment against an offender who has been convicted of this offence either under **subsections (2), (3) or (4)** of **section 8** of the **Act.** The severity of the punishment under this subsection is directly proportional to the age of the victim; under **subsection (2)** an offender convicted of defiling a child of 11 years or less faces a mandatory sentence of life imprisonment; according **to subsection (3)** under which the appellant was charged and subsequently convicted, the offender faces a minimum sentence of 20 years imprisonment while under **subsection (4)** where the victim is aged between 16 and 18, the offender is liable to imprisonment for a term not less than 15 years.

Subsection 3 was of particular interest in the sentencing of the appellant and thus it is apt to reproduce it here:

> ***A person who commits an 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. (Underlining mine).***

It is apparent, therefore, an offence of defilement under **section 8(3)** can only be said to have been proved only if the age of the victim of the sexual assault has been established beyond all reasonable doubt; similarly, the court can only properly mete out the sentence against the offender if the age of the victim has been ascertained beyond peradventure. Suffice it to say that where an offence of defilement is alleged to have been committed, the age of a victim of a sexual assault is an essential ingredient in not only establishing that the offence has been committed but it is equally necessary in the sentencing of the offender.

Coming back to evidence on record, there is nothing in it to suggest that the age of the complainant was established to the required standard; the complainant's mother did not mention anything about her daughter's age. The complainant's evidence in this respect was not useful either; all she said during her cross-examination was that she was born on "30th September" but that she could not recall the particular year. Though she also testified that she was 15 years old, it is not clear how she settled on this age if she could not recall the year she was born.

It has been noted that the issue of age is not anything that the prosecution can take for granted if it has to establish the commission of an offence under **section 8** of the **Act**. Age must be proved beyond all reasonable doubt. In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal has been of the view that the word of mouth alone, irrespective of whose mouth the word is coming from, is insufficient to prove age in a trial of an offence under **section 8** of the Act; proof of the fact of age demands some sort of documentary evidence. The Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** held that an **"estimated age"** indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> ***There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.***

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment, an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the culprit of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises.

The importance of ascertainment of age in sexual offences was also alluded to by the **same Court in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> **Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault the following terms:-

> **In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother M A when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the**

appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under the Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

Considering the express provisions of the law supported by the forgoing decisions of the Court of Appeal, I am of the humble view that the prosecution took a rather lackadaisical approach to the issue of age in the trial against the appellant. On its part, the trial court misdirected itself both in fact and in law when it proceeded to convict the appellant on the presumption that the complainant was within the age bracket of 12 to 14 years indicated in the charge sheet; as an element of the offence, age must be proved and not presumed. Without the establishment of the age of the complainant, a conviction cannot be sustained under **section 8** of the Act and to this extent, the conviction of the appellant was, in my view, unsafe.

Whenever it has been proved beyond any shadow of doubt that an appellant sexually assaulted a person and, considering the peculiar circumstances of each particular case, I have always invoked section **358** of the **Criminal Procedure Code** and remitted the case back to the trial court to take the evidence on the age of the complainant if the only outstanding issue is that of the age of the complainant. This case would have been an appropriate one for me to take a similar course but I am afraid that the question of age may not be the only unresolved issue at the appellant's trial. The evidence that the appellant was the perpetrator of the offence for which he was charged and convicted appears to have been equivocal.

The complainant testified that the appellant sexually assaulted her on at least two occasions the first of which was in December, 2006; according to her evidence, she was assaulted again in February, 2007. Although she testified that the appellant forcefully engaged her sexually, she never reported these attacks to anybody either on any of these occasions or at any other time; it was not until her mother noticed something unusual about her physical stature and health and suspected that she was pregnant that complainant is alleged to have opened up to her father and named the appellant as the person who had impregnated her.

Failure to report may not, by itself, be taken against the complainant but even the father she is alleged to have eventually opened up to and named the appellant as the perpetrator of the sexual assault did not testify and was therefore not cross-examined on the circumstances under which the complainant may have told him about the assault by the appellant. It is not clear why the complainant could only tell her father about her misfortune when she could have shared that information with at least two other people one of whom was her own mother.

My assessment of the complainant's conduct after the alleged assault coupled with the omission by her father to testify leads me to doubt the credibility of the prosecution evidence in this regard.

The other evidence which the trial magistrate heavily relied upon in the conviction of the appellant was the DNA analysis of what is alleged to be the blood samples of the appellant, the complainant and the complainant's child. According to the learned magistrate the analysis revealed that the appellant was the complainant's child's father and this was sufficient proof that the appellant defiled the complainant.

The evidence of how the blood samples were taken from the complainant, her child and the appellant and forwarded to the government laboratory was, in my humble view, contradictory. According to the investigations officer, **Police Constable Regina Kanari (PW3)** the blood samples were taken from the three persons and that those samples taken to the government chemist for a paternity test. The Government chemist, **Mr Henry Kiptosa** testified that he received the three samples on 17th July, 2007 and after analysis he came to the conclusion that the appellant was the complainant's child father.

The exhibit memo forwarding the three samples did not show when the samples were received by the Government chemist but it was stamped with the Criminal Investigation Department, Nairobi, showing

that the samples were received by the department on 17th July, 2009.

The officer who escorted the three people to hospital for purposes of extracting their blood samples **Daniel Kadei (PW5)** testified that the samples were taken to the Government analyst on 3rd July, 2009. According to him, extra samples were from the child's mother and forwarded to the Government chemist but that the accompanying exhibit memo was not filled.

The only other exhibit memo that was produced in evidence was that forwarding the blood samples of the appellant; the memo shows that the appellant's blood sample was received on 3rd July, 2009 and that it was extracted from the appellant on 1st July, 2009. The government chemist did not make any reference to this particular sample either in his evidence or in his report which he produced in court.

More importantly on this question of the DNA analysis, although it was alleged that the complainant was admitted at Nyeri Provincial General Hospital on 7th August, 2007 and delivered a baby through a caesarean section on 9th August, 2009 there was no evidence of the complainant's admission to hospital or the delivery of her alleged baby. Again, although she testified that she was given a notification of birth at the hospital, the complainant never produced it in court; neither did she produce any certificate to demonstrate the birth of the baby whose father is alleged to have been the appellant.

In the absence of a certificate of birth of the complainant's child or any other evidence to demonstrate the birth of the child, it cannot be simply assumed that the complainant begot a child whose father was the appellant; simply put, the appellant could not be linked to a child whose existence had not been proved. Without proof of the child's existence, the purported extraction of the child's blood sample which was allegedly compared with that of the appellant was of no consequence and the learned magistrate erred in law in convicting the appellant based on the DNA report.

I am satisfied that, for the reasons I have given, the prosecution did not prove its case beyond all reasonable doubt; in the same breath, I am persuaded that the appellant's appeal is merited and it is hereby allowed. Accordingly, the appellant's conviction is quashed and sentence set aside; he is set at liberty unless he is lawfully held.

Signed, dated and delivered this 10th June, 2016

Ngaah Jairus

JUDGE