



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 50 OF 2015**

**SIMON GICHUKI MAINA ... ..APPELLANT**

**VERSUS**

**REPUBLIC ..... PROSECUTOR**

***(Appeal from the Judgment of the Principal Magistrate's Court at Nyahururu Hon. V. Ochanda - Resident Magistrate delivered on the 17<sup>th</sup> October, 2014 CMCR Case No. A/Cr 20 of 2011)***

**JUDGMENT**

The appellant herein **SIMON GICHUKI MAINA** has filed this appeal challenging his conviction by the learned Resident Magistrate sitting at Nyahururu Law Courts. The appellant had been arraigned before the trial court on 4/1/2011 facing a charge of **DEFLIMENT CONTRARY TO SECTION 8(1) (3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

***“In the month of July 2010 in Subukia District within Rift Valley Province unlawfully and intentionally caused your genital organ namely penis to penetrate the vagina of MWC a child aged 15 years”***

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**. The appellant entered a plea of ‘Not Guilty’ to both charges. His trial commenced on 9/6/2011. The prosecution led by **INSPECTOR RUTO** called a total of five (5) witnesses in support of their case.

The complainant, **MWC** testified as **PW1**. She told the court that on an unknown day in July 2010 she was on her way to collect milk in [particulars withheld] Area at about 7.00 am. She met the appellant who held her hand and pulled her into a nearby thicket. He removed her underwear and lowered his own trousers to his knee. The appellants then proceeded to defile the complainant for about 2 hours. After he finished the appellant released the complainant but threatened to kill her if she revealed the incident to anyone. The complainant went home but did not divulge her ordeal to anyone.

**PW2 AK** was the complainant's mother. She stated that in the month of December 2010 she noticed that the complainant appeared unwell and worried. **PW2** called the complainant's elder sister and requested her to take her to hospital.

**PW3 RM** was the complainant's sister. She stated that she took the complainant to Nyahururu General Hospital where she was examined and found to be 24 weeks pregnant. Upon being questioned the complainant revealed that the appellant had defiled her in June 2010. The matter was reported to police.

The appellant was then arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he categorically denied ever having defiled the complainant. On 5/11/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of Defilement and sentenced him to serve twenty-five (25) years imprisonment. Being aggrieved the appellant filed this appeal challenging both his conviction and sentence. **MRS WANDERA** Advocate argued the appeal on behalf of the appellant. **MS NGOVI** learned State Counsel made oral submissions opposing the appeal. She urged this court to uphold both the conviction and sentence.

This being a first appeal the court is obliged to review the prosecution case afresh and draw its own conclusions. In the case of **MWANGI Vs REPUBLIC [2004] KLR 28** the Court of Appeal held that:-

***“It is not the function of the first appellate 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 had the advantage of hearing and seeing the witnesses.*”**

The learned trial magistrate succinctly set out the issues to be determined in this case, in his judgment at page 46 line 7

**“(i) Was the complainant a minor?**

**(ii) Was the complainant defiled? Was there penetration?**

**(iii) Was the accused the one responsible for such defilement?”**

On the first question the complainant told the court that she was 15 years old and was a class 7 pupil at [Particulars withheld] Primary School. **PW2** the mother of the complainant told the court that her child is 15 years old having been born in 1996. **PW2** produced the complainant’s Immunization Medical Health Card as proof of her age **P Exh 3**. This document provides conclusive proof of the age of the child. Having been born in 1996 the complainant would have been aged 14 years and therefore a minor in July 2010 when the defilement allegedly occurred. I am satisfied that the complainant’s age has been proven to the standards required in law.

The complainant told the court that in July 2010 a man known to her pulled her into the bushes and defiled her. The complainant did not immediately report the incident to anyone as she had been threatened with death. It is only five months later that she revealed the incident after she was examined and found to be pregnant. Therefore by the time the complainant was undergoing a medical examination, she had bathed removing any traces of evidence like discharge, semen etc. Similarly any bruises, tears or lacerations that may have been inflicted would have already healed.

**PW5 DR BEATRICE CHESIRE** produced the complainant’s P3 form **P. Exh 1**. Upon examination the complainant was found to have a torn hymen. She was also found to be 24 weeks pregnant. The torn hymen as well as the fact of pregnancy are all sufficient proof that the complainant had been defiled and that penetration did occur. I therefore find that the evidence is sufficient to prove the fact of defilement.

The next question would be whether it was the appellant who defiled the complainant. In her evidence the complainant insists that it was appellant whom she knew as a teacher who defiled her. **PW2** and **PW3** the complainant’s mother and sister both state that the complainant named the appellant as the man who defiled her. The incident occurred at 7.00am. It was day time and visibility was good. The complainant spent time with her assailant and obviously had an opportunity to see him well. The appellant was a man well known to the appellant and her family. Therefore there was evidence of recognition as opposed to mere visual identification. If this was all the evidence available, I would have no hesitation in finding the

appellant's conviction merited.

However a twist was brought into the case by the results of a DNA test conducted on the complainant's baby (who was about two weeks old) at the time of the trial.

In her evidence the complainant said she was a virgin and had never had sexual intercourse before her defilement. If his was true then the only possible father to her child would have been the appellant. **PW4 ANN WANGECHI NDERITU** an Analyst attached to the Government told the court that she conducted an analysis and DNA test comparison on a blood sample taken from the appellant and that of the complainant's newborn baby. Surprisingly her findings **excluded** the appellant as the biological father of the child. **PW4** filled and signed her report a copy which was produced in court **P. Exb 4**. This was expert forensic evidence which was neither challenged nor controverted by any party. This evidence came from the prosecution's own witness.

I have perused the judgment of the trial court. I note that the learned trial magistrate went to great lengths to try and discredit this report. The trial magistrate raised the following as grounds to discredit the DNA report

- The DNA test report was never produced as an exhibit in court.
- The report brought to court was not an original document
- It was unclear how that report was transmitted to the court.
- The DNA report was privately paid for by the appellant.

A look at the testimony of **PW4** and a perusal of the report reveals that the learned trial magistrate totally erred and misdirected herself in making the above findings. As stated earlier **PW4** was a witness called by the prosecution, she was not a defence witness. **PW4** was an analyst who worked at the Government Chemist Department. She was not an analyst in private practice. There was no evidence that it was the appellant who engaged **PW4** and instructed her to prepare a report. **PW4** in her evidence clearly stated that she received the various blood samples from PC Anthony Kamau of '**Subukia Police Station**'. The samples were transmitted to **PW4** via a Police Memo Form **P. Exb 5**. The request to carry out the DNA testing was made by the police **not** by the appellant. Although the report was a copy **PW4** as the maker confirmed the same and thus authenticated it. Contrary to the allegation by the trial court **PW4** did produce this report as an exhibit and it was marked as **P. Exb 4**. The report was validly authenticated by the maker. It was validly produced as an exhibit by the prosecution itself. The appellant did not in any way request or commission the DNA test.

It is clear that the learned trial magistrate did not have an open mind in analyzing the evidence before her. She was biased and was out to render a conviction regardless of the nature of evidence available. The thinking of the trial magistrate is made very clear in her statement found in her Judgment at page 50 line 11

***“Referring back to the complainant's testimony she stated she was a virgin when she was defiled and insisted that the accused was the one responsible for the pregnancy. So how come the DNA turned negative where was the original DNA results? How was the DNA conducted? How was it transmitted back to court...”***

The trial magistrate seems to be gravely disappointed by the fact that the DNA results did not support the evidence given by the complainant. It is not the business of the court to side with one or other party in a case. The court must maintain an open mind and decide a case purely upon the basis of the evidence presented to it. A magistrate should never try to twist and/or manipulate evidence to suit a certain preconceived position.

As noted by the trial court, the complainant claimed she was a virgin when defiled and claimed that the only sexual encounter she ever had was with the appellant. **PW4** an expert witness called by the prosecution told the court that the DNA test positively **excluded** the appellant as the father of the child borne by the complainant as a result of this alleged defilement. This was a scientific test and was not

controverted in any way. Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.

Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case. I therefore quash the appellant's conviction on the charge of defilement. The subsequent sentence of 25 years imprisonment is also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated in Nakuru this 29<sup>th</sup> day of July 2016**

Mrs. Wandera for accused

Mrs. Rugut for DPP

**Maureen Odera**

**Judge**