REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 30 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 244 OF 2014)

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 64 of 2014 Sitati - SRM)

BONIFACE KIMUTAI ……..……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

J U D G M E N T

1. The Appellant was charged with Defilement Contrary to Section 8 (1) (3) (sic) of the Sexual Offences Act. In that on the 27th day of December 2013 at Melelo Location in Narok South District within Narok County, he unlawfully and intentionally caused his penis to penetrate the vagina of S C a child aged 15 years old. He denied the charge. Following a full trial he was found guilty, convicted and sentenced to serve 20 years imprisonment.

2. Aggrieved by the decision he has now lodged an appeal in this court raising four grounds in the Amended Grounds of appeal as follows:

> **"1. THAT the trial magistrate erred in law and facts when he convicted me in the present case yet failed to find that the evidence adduced was not conclusive as required under Section 2 (1) of the Sexual Offences Act 3 of 2006.**
>
> **2. THAT the learned trial magistrate erred in both law and facts when he convicted on an improperly or irregularly conducted trial contrary to section 214 of the Criminal Procedure Code.**
>
> **3. THAT the learned trial magistrate erred in both law and facts when he relied on evidence adduced by incompetent witnesses.**
>
> **4. THAT pundit trial magistrate erred in both law and facts when he convicted me in the present case yet failed to find that the charges preferred against me are defective."**

3.In support of the amended grounds, the Appellant filed written submissions upon which he relied during the hearing. Arguing grounds 1 – 3 together, he faulted the prosecution for not tendering medical evidence to prove that the defilement occurred and that he was culpable.

4. With regard to the medical evidence tendered in respect of the Complainant, he contended that the

treatment sheets and the P3 form were not identified by the complainant prior to production and were therefore "valueless". More so because PW4 who tendered the same was not a qualified medical officer and hence was not competent.

5. The Appellant further faults the trial court for failing, pursuant to the amendment of the charge in respect of the minor's age, to comply fully with Section 214 of the Criminal Procedure Code requiring the recall of witnesses on demand, by the Appellant.

6. Regarding ground four, submissions were made to to effect that the charge particulars were at variance with evidence of the Complainant regarding the date or dates of defilement. Secondly that the charge as laid in the statement of offence is non-existent. Finally, the Appellant asserted that he offered a strong and plausible defence which deserved better consideration by the trial Court.

7. Through Miss Waweru, the Director of Public Prosecutions opposed the appeal. Reiterating the prosecution evidence she submitted that the elements of age and penetration had been proved. Further, that the Appellant had been identified as the person responsible for the penetration and that his defence was sham.

8. In his response, the Appellant pointed to evidence of the Clinical Officer that blood on the Complainant's clothes was related to her menses and further no spermatozoa were seen during her examination. He took issue with the key witnesses stating that as members of the same family they were biased. He urged the court to note that the birth certificate tendered was not reliable having been issued on 24th February, 2014.

9. In the case of **Ajode -Vs- Republic (1972) E.A 32** the court stated what the duty of the first appellate court should be. This was reiterated in **Okeno -Vs- Republic (1973) E.A. 32.** In a synopsis the duty of the first appellate court is to review the trial evidence afresh and to make its own findings. In so doing, the appellate court is enjoined to bear in mind that the trial court had the opportunity to hear and see the witnesses testify. Thus the appellate court will be slow to upset findings by the trial court that are based on the credibility of witnesses, except where such findings are plainly wrong, and no tribunal properly applying itself could have made them.

10. The prosecution case at the trial was as follows. **C S** was about 14 or 15 years of age in 2012. She resided at Sogoo with her mother **A C M (PW2)** and her family including a brother **G K Y (PW3)**. She was a high school student. It would seem that the Appellant had made advances towards the Complainant which culminated with her "elopement" with him on 27/12/2013. On that night, she went to the Appellant's house where she had sex with him severally. After several days, PW2 and PW3 traced the Complainant to the Appellant's house.

11. In the company of police, they stormed the house. While the Appellant escaped, the Complainant was taken to hospital for examination. However, she escaped again upon returning home on the same day and returned to the Appellant, residing with him for several days at a different house. However police pounced on the couple while asleep early in the morning on 10/1/2014 in a house. Both were arrested. The P3 form was completed by a Clinical Officer **Zachary Bii (PW4)** and the Appellant was charged.

12. The Appellant opted to make a sworn defence statement and called two witnesses, namely, **Kimalel Arap Koech (DW1)** and **Wilson Chepkwony Langat (DW2).** The defence case was that the Appellant hailed from Seneto, Melili and on 27/12/2013 he was at Suswa trading centre. He did not know the Complainant but knew the mother whose name he alleged was B.

13. The said lady had previously leased land from his father but did not honour the lease, failing to pay charges or release the land. The ensuing dispute was reported to elders including DW1 and DW2 but before the elders could deal with it, the Appellant was arrested from his home on 10/1/2014. The defence position was that the charges were trumped upto settle scores.

14. The court has considered the trial evidence in light of the submissions made on this appeal. Two

grounds raised on the appeal, namely ground 2 and 4 are technical in nature and can be dealt with right away.

15. The Appellant's submission that the charges were defective, have no merit. Firstly, the Appellant was only charged with one count of defilement in respect of the 27/12/2013. Even then the evidence by **PW1** as supported by **PW2** and **3** indicated that there was more than one sexual encounter between him and the Complainant during the first period of their "elopement" on 27/12/2013.

16. The Complainant gave evidence that the Appellant had sex with her in the night and on the next day. The fact that only one count was brought against the Appellant does not render the charge sheet defective. The prosecution choice to lay one court against the Appellant is to his benefit. Secondly, it is true that the charge of defilement as laid in the statement of offence had an anomaly caused by the omission of the words "as read with" between the two cited subsections of Section 8 of the Sexual Offences Act.

17. However, the Appellant was represented at the trial by counsel. Clearly, the defence understood the charges facing the Appellant as evidenced by the robust defence put up by cross-examination of witnesses and calling of defence witnesses. The Appellant was not prejudiced in any way therefore. Grounds 2 has no merit.

18. Regarding ground 4, it is true that the prosecution amended the age of the minor in the charge particulars to 15 years, from the original age of 14 years. However the principal offence remained the same. The Appellant's advocate did not raise any objection or ask to recall any of the witnesses (PW1 – 3) who had already testified.

19. As required, the court should have made an explicit record of its compliance with Section 214 of the Criminal Procedure Code. But in this case I cannot see how the Appellant was prejudiced by the change in the age of the Complainant when the offence remained the same. Such an omission in my view is too minor to vitiate the trial in the present circumstances. Ground 4 has no merit.

20. Turning now to the substantive evidence, PW1, 2 and 3 narrated how the Appellant befriended and eventually took the Complainant with him to his home on 27/12/2013. The Complainant testified that the Appellant had sex with her on 3 occasions on that night and once on the next day at 3.00pm. All the while, the minor was locked up in the Appellant's thatched hut. He expressed to her his desire to marry her. After the family including PW2 and PW3 traced the Complainant in the said home, they made a report to police.

21. PC Mark Kipkoech (PW5) received the report at Kimogoro Police Post on 3/1/2014 from PW2. With other officers he proceeded to the home of the Appellant. Led by PW2 and 3 they searched for the Appellant's house within the homestead. But the Appellant apparently heard the commotion and dashed out of his house leaving the Complainant in the house.

22. She was referred for treatment at Longisa District Hospital. In her words:-

> **"……I was medically examined. I was given anti-pregnancy pills. Later that evening Boniface (Appellant) passed by our home. I went with Boniface to his house again. He spotted me and I spotted him standing nearby. He took me to a different house. He went to his house. I stayed there for 5 days. On the 5th day, he collected me and took me to his house but on arrival police pounced on both of us and arrested us."**

23. On 10/1/2014 a P3 form was completed by PW4. PW4 confirmed penile penetration upon noting that the hymenal membrane was breached and tenderness in the genitalia. There was also a foul smelling discharge and pus cells with fresh blood the latter which was attributed to monthly periods by PW1. In cross-examination PW4 attributed the tenderness in the genitalia to the recent breach of the hymeneal membrane. On the absence of spermatozoa, he stated that sperms cannot be detected after 48 hours of sexual activity. PW4's testimony was not shaken in cross-examination.

24. The objection raised by the Appellant concerning the competence of PW4 holds no water. The original record of the proceedings indicates that PW4 introduced himself in the trial as a District Clinical Officer and not as a District Officer. The latter is an error in the typed proceedings. Secondly as a Clinical Officer PW4 is a competent medical officer. A similar challenged raised in **Fappyton Mutuku Ngui -Vs- Republic (2014) eKLR** case was rejected by the Court of Appeal in the following words:

> **"PW5 is a clinical officer who testified on behalf of his colleague….. who examined and treated PW2 at Matuu District Hospital. In our opinion, a clinical officer is qualified to fill a P3 form. This is an areas of his competence (See Raphael Kavoi Kiilu -Vs- Republic Criminal Application No. 198/2008; Section 2 of the Clinical Officers (Training, Registration and Licencing) Act, Cap 260….."**

25. The Complainant herself testified that she was examined at hospital after being taken away from Appellant. PW5 confirmed that he escorted PW1 to Ololulunga District Hospital where the P3 form was completed. Also PW4 confirmed that he personally examined the Complainant and completed the P3 form on 10/1/2014. He produced the P3 form.

26. The fact that the said form was not shown to PW1 during her evidence does not detract from the substance therein or evidence by PW4. Besides there is no requirement that a sexual offence can only be proved through medical evidence linking the alleged assailant to sexual assault. See Section 124 of the Evidence Act. PW1's evidence is given weight by the medical evidence. And the trial court believed her evidence as to the identity of the assailant.

27. Further the absence of spermatozoa as noted by PW4 does not diminish the value of other observations he made showing recent sexual activity by PW1. The evidence adduced through the prosecution witnesses strongly identified the Appellant as the one who having "eloped" with PW1 penetrated her on 27th of December 2013.

28. His defence that alleged a disputed over a lease with PW2 fell flat on its face, principally because it was not put to PW2 and secondly, could not explain the Complainant's evidence implicating him. Yet, he said she was a stranger to him. The Appellant testified that his home was at [Particulars withheld], some 10 kilometres from the home of PW1. Even PW1 said that the Appellant's home was "very far" from her home.

29. The Appellant's witness DW1 however claimed that he lived in the same village, [Particulars withheld], with the mother of the Complainant and knew her for over ten years and that he knew PW1. In that case the Appellant should also be expected to know PW1.

30. In cross-examination DW1 stated that the Complainant's mother was called "B K" but that her witnesses were form Bomet. He could not state the exact dates of the alleged dispute between "B" and the Appellant's father, reported to him as an elder. The said father of the Appellant did not testify.

31. Another alleged elder DW2, also from [Particulars withheld], testified concerning the alleged land dispute between PW1's mother and the Appellant's family. While the Appellant and DW1 had claimed that the land in question belonged to the Appellant's family, DW2 said that the Appellant's father "was just a caretaker." He too claimed that the Complainant's mother was known as B.

32. These witnesses, apart from the obvious inconsistencies in their evidence, were not with Appellant on the material date hence could not account for his movements. Their assertions that he did not commit the offence were therefore hollow. Their evidence that PW2's mother lived at [Particulars withheld] was displaced by the prosecution evidence, and the Appellant's own statements.

33. Indeed DW1 said he had never visited the Appellant's home. Four prosecution witnesses testified consistently on the conduct of the Appellant on 27th December 2013 and subsequent days all were cross-examined. None of them were confronted with the defence line that this case arose from a land dispute, or that the mother of the Complainant was known as 'B' while her daughter was a stranger to the

Appellant. The defence rings hollow and is certainly an afterthought.

34. On the age of the victim, PW4 stated that he assessed minor's age as 14 years as at 10/1/2014. In her evidence on 27/2/2014 PW1 said she was 15 years old, while her mother PW2 testified that she was 14 years old. The more reliable evidence is that by the mother and PW4, establishing that PW1 was aged 14 years at the time of the offence. **(See Mwalongo Chichoro Mwanjembe -Vs- Republic, Mombasa Criminal Application No. 24 of 2015 (UR).**

35. The birth certificate which was the basis of the amendment of the charge particulars was not identified by PW1 and PW2 prior to production by PW5 and should have been disregarded. As it turns out, that amendment was unnecessary in the circumstances of this case. This is further reason why the Appellant's ground of appeal premised on compliance with Section 214 of the Criminal Procedure Code has no substance.

36. For my part, having reviewed the evidence on record, I am satisfied the Appellant was properly convicted. He offered a sham defence which was displaced by the overwhelming prosecution evidence. The defence was correctly rejected by the trial court.

37. As a footnote I must observe that the trial court's judgment albeit containing all the essential ingredients was weak and sketchy on analysis of the evidence before the court. That notwithstanding, this court finds that the Appellant's conviction is safe and there is no merit in grounds 1, 3 and 5 either. The appeal is accordingly dismissed.

Delivered and signed at Naivasha, this **19th** day of **July, 2016.**

In the presence of:-

For the DPP : Mr. Koima

For the Appellant : N/A

C/C : Barasa

Appellant : present

C. MEOLI

JUDGE