REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 16 OF 2015

BETWEEN

SILVANUS LUMASIA……..APPELLANT

AND

REPUBLIC……..…..RESPONDENT

(Being an appeal from of original conviction and sentence on Kakamega CMC Cr. Case (S.O) No. 20/2013 delivered on 21.01.2015 by Hon. C. Kendagor, SRM)

J U D G M E N T

Introduction

1. In the case before the lower court, the appellant was charged in the main count with defilement contrary to Section 8(1) [as read with Section 8](4) of the Sexual Offences Act, No.3 of 2006, the particulars thereof being that on the 3rd day of May, 2012, in ***[particulars withheld]*** village in Khayega Location in Kakamega East Division within Kakamega County unlawfully and intentionally caused his penis to penetrate into the vagina of E.A, a child aged 17 years.

2. In the alternative count, he was charged with indecent act with a child contrary to Section 11(A) of the SOA, No.3 of 2006, the particulars being that on the 3rd day of May, 2012 in ***[particulars withheld]*** Village in Khayega Location within Kakamega County, he unlawfully and intentionally touched the vagina of E.A with his penis, a child aged 17 years.

3. The appellant denied both the main count and the alternative charge; thereby setting the stage for a full hearing during which the prosecution called 3 witnesses. At the close of the prosecution case, the appellant was put on his defence. After carefully considering all the evidence that was on record, the learned trial Magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt to warrant a conviction on the main count. Upon conviction, the appellant was sentenced to 15 years imprisonment.

The Appeal

4. Being dissatisfied with both conviction and sentence, the appellant personally filed the petition of Appeal comprising 12 grounds. He prayed that the appeal be allowed, conviction quashed and sentence set aside so that he may be set free.

5. As this is a first appeal this court is under a duty to reconsider and evaluate all the evidence afresh

with a view to reaching its own conclusion in the matter, but always remembering that unlike the trial court, it does not have the privilege and opportunity of seeing and hearing witnesses. For the reasons that this court does not have the opportunity to see and hear witnesses, it has to act with circumspection in deciding whether or not to confirm the findings of the learned trial Magistrate. Generally see **Pandya – vs – Republic [1957] EA 336 and Okeno vrs – Republic [1972] EA 32.**

6. When the appeal came up before me for hearing , Miss Shibanda Counsel for the appellant filed written submissions and raised the following issues;

a) That the lack of medical evidence namely the DNA test results worked against the prosecution case, and therefore that the prosecution did not prove its case yond any reasonable doubt.

b) That the evidence of crucial prosecution witnesses was not corroborated.

c) That crucial prosecution witnesses were not called.

d) That a voir dire examination was not conducted on the complainant who testified as PW1

e) That the appellant never admitted the charges.

7. Counsel urged the court to allow the appeal. Mr. Oroni prosecution counsel for respondent conceded the appeal for the following reasons;-

a) That results of the DNA tests were never availed to confirm if the appellant was the father of the child who was born as a result of the alleged defilement

b) That the appellant was not clearly and positively identified

c) That the age of the complainant was not proved.

Analysis and determination

8. I have now carefully reconsidered and evaluated the evidence on record afresh. The evidence adduced during the trial shall become apparent as I consider each issue in controversy.

Was the age of the complainant proved

9. Both the defence counsel and counsel for the prosecution submitted that the age of the complainant was not proved. I do not think that this argument is valid. The offence herein is alleged to have taken place on 03.05.2012 and when the complainant appeared in court on 23.01.2014. She stated this;- " I am E.A …….. I am now 18 years my birth date is not very known to me. I see my birth certificate. It indicates [date of birth as] 11.2.1995 – MFI – P1." On cross examination she stated;- " ……I was 17 years. I went to Igulu. I was still 17 when I went to Mukumu. I was headed to 18."

10. The father of the complainant testified as PW3 and told the Court. I am M.A.A. I am a resident of Mukomari Sub-Location Ilesi. I am a driver and farmer. I know EA. She is my first born. She is now 18 years." PW4, number 86381, Cpl Phoebe Aluoch of Kakamega Police Station, was the investigating Officer of the case. She produced the complainant's certificate of birth as PExhibit 1. The Certificate of Birth No.[particulars withheld] dated 15.09.2010 gives the complainant's name as the child who was born on 11.02.1995 to M.A as the father and E.K as the mother. The documentary evidence regarding the date of birth of the complainant is not controverted. In any event, there is no other form of evidence that can prove the age of a person in any better way than the production of a certificate of birth and the complainant's father's oral evidence to corroborate the same. This ground of appeal premised on the alleged failure to prove the age of the complainant fails. There was no need for age assessment in the circumstances.

Did the trial court fall into error by not conducting a voir dire examination in respect of PW1

11. It is correct as was held by my brother **Justice John N. Mativo in John Wanjohi Kabau – vs- Republic, Cr. Appeal No. 29 of 2010 in High Court at Nyeri**, that "the purpose of voir dire examination was to enable the Court satisfy itself that the minor understands the nature of an oath, and if the court is satisfied that the minor understands the nature of oath, it may allow the minor to give sworn evidence. Where the court is not satisfied that the minor understands the nature of an oath, it will proceed to take unsworn evidence from the minor.

12. In the instant case, the complainant told the court that she was a form 2 secondary school student and had just turned 18. If her date of birth was in doubt, the complainant told the court that she understood the nature of an oath and it was on that basis that the court concluded that the witness was to be sworn. What I am saying here is that voir dire examination is conducted on minors who are below the age of 18 years. In the instant case, the complainant had just turned 18 by the time of her testimony, but in addition to that fact, when she was examined by the court, she confirmed that she understood the nature of an oath and was accordingly sworn. In this regard, I do not think that the trial court fell into error of any kind. The court conducted a voir dire examination although the same was brief, and further the complainant was now of age and did not have to go through a voir dire examination. This ground of appeal also fails.

Whether there was failure of justice when crucial prosecution witnesses were not called

13. The appellant submitted that the evidence of the DNA tests by the Government Analyst was crucial in establishing whether the appellant committed the offence as alleged. That failure to adduce the said evidence caused a great injustice to the appellant. Regarding the issue of which witnesses and how many witnesses are to be called for any particular case is a matter for the prosecution to determine and it is not for the defence to determine whether it is this or that witness who should be called to testify. There are many authorities on this issue. In the now well know case of **Abdala Bin Wendo –vs- Republic [1953] 20 EACA166**, the court held inter alia, that "(1) although subject to certain exceptions, a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions, favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct pointing to guilt is needed"

14. What the above holding boils down to is that a court can convict on the strength of single identifying witness if it has warned itself appropriately of the dangers of doing . And in Sexual Offences, Section 124 of the Evidence Act, Cap 80 Laws of Kenya, makes special dispensation for corroboration once a court is satisfied that the single witness is a truthful witness. In the instant case, the appellant's complaint revolves around the prosecutions failure to call evidence on the DNA test that would either confirm a vindicate the appellant as the father of the child who was born as a result of the alleged defilement. I will now move on to consider the issue of the DNA evidence,

Did the prosecutions failure to adduce evidence or DNA tests results mean that the prosecution did not prove its case beyond any reasonable doubt?

15. PW4 testified that she submitted blood samples from the complainant, the appellant and the baby to the Government Chemist for analysis with a view to determining the paternity of the child. The appellant's submissions on this point are that this was the only way of confirming whether or not the appellant committed the deed he is accused of having committed. The prosecution counsel was of the same view.

16. In my considered view, the evidence of the DNA tests results is like any other evidence that the Court of Appeal for Eastern African discussed in the Abdala Bin Wendo case (above) so that if there is other evidence linking the appellant to the offence, it would not be prejudicial either to the appellant or the state. It is now necessary to move on and determine the next critical issue of identification.

Was the appellant properly and positively identified?

17. There is no doubt in law that the issue of identification is at the centre of whether a case against an accused person fails or succeeds especially where the conditions for such identification are difficult. Courts have held that it is important to examine such evidence with much care and to reject reliance upon it if miscarriage of justice may accrue to the accused. In **Nzaro – vrs Republic [1991]KLR 70**, the court held, inter alia that "where the case against an accused depends wholly or substantially on the correctness, of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of identifications."

18. In the instant case, the defence contends that the complainant could have been made pregnant by any man other than the appellant, especially in view of the fact that the DNA test results were not availed to the court. I hasten to say here that DNA results are critical where there is tussle over paternity of a child, which was not really the issue in this case.

19. In the instant case, the alleged incident took place between 5.00pm- 6.00pm and this is what the complainant says of the person who allegedly defiled her and the time of the defilement;

> "I was at Khayega. It was around 5.00pm I had been sent to buy vegetables…… I bought the vegetables ……after purchase, I stopped the motorcycle that I wanted to board, but it did not stop. The accused emerged from behind with a motorcycle. He told me he would charge me 40/=. I did not know him before. I sat on it. He did not drive off. He asked if I was a student. I told him I was a student. He asked for my school. I told him. He said his sister knew of some whites who were assisting children in schooling with fees. I accepted to go along. It was 5.00pm. We went to the homestead. It was at Khayega. He showed me a house where there was no one and asked me to wait there. I sat inside. The accused stepped out and came through another door. He told me if I dared to scream, he would finish me. He carried me from the sitting room to a bedroom. He carried me on his arms like a baby……He tore my skirt. He then tore my pant and threw it aside. He put me on the bed by force. He pushed his trouser down. He did not remove all of it. He came on top of me. He had sexual intercourse by force. He put his penis inside my vagina. He was entering and coming out in a movement. It was for about 5 minutes. I was scared. I was afraid of being killed ……. I bled. When he had finished, he opened the door and told me to leave and that I should never return. I held my skirt and left. It was headed to six pm….."

20. That is the scenario. Everything happened during the day. During cross examination, the complainant denied boarding two different motor cycles. She also stated that after she boarded the appellant's motorcycle, the appellant engaged her in a conversation as he sought to know if she was a student and if so, which school she attended. From all the above evidence, and though I did not see the complainant testify, and although she did not inform her parents of the incident or make a report to any authority, I am satisfied as the trial court was that the complainant was a truthful witness. I have also reconsidered and evaluated the appellant's defence in which he denied the allegations made against him. He also testified that when the complainant eventually delivered, PW3 paid the hospital charges though the payments were registered in his (appellant's) name. In my considered view, the appellant's defence does not in any way shake the vivid and consistent testimony given by the complainant.

21. I have also considered the evidence of PW3 and the arrangements he entered into with the appellant. Whether he received the money or not is immaterial. The fact is that he was not aware of the incident until the complainant gave birth. And when PW3 enquired from the complainant who had done the deed to her, the complainant on this first report gave her father the name of the appellant. This report, coupled with the fact that the complainant spent some reasonable time together with the appellant from the time she sat on the motorcycle right up to the home, the 5 minutes intercourse and his opening the door for her to leave and warning her never to return was sufficient time for the complainant to entertain no doubts in her mind that is was the appellant who defiled her. In my considered view the issue of identification is settled in favour of the complainant.

Was there penetration

22. It is admitted that the complainant was examined after she delivered her baby on 21.02.2013. Dr. Winstone Ongalo PW2 produced the P3 form as Pexhibit 3. He stated that according to the immunization card of the child, the appellant's name appears as the father while the complainant is shown as the mother. PW2 stated that it is possible for one to be raped /defiled and have no injuries. It is my considered view that the fact that the complainant got pregnant and gave birth within the normal gestation period from the time of the alleged defilement is a confirmation that there was penetration, and the penetration was caused by the appellant. The complainant testified thus;

> "He took me to the bedroom. It was a three (3) roomed house. He tore my skirt. He then tore my pant and threw it aside. He put me on the bed by force. He pushed his trouser down. He did not remove all of it. He came on top of me. He had sexual intercourse by force. He put his penis inside my vagina. He was entering and coming out in a movement."

23. But more significantly also, penetration need not be complete. Section 2 of the Sexual Offences Act defines penetration as;-

> "The partial or complete insertion of the genital organ of a person into the genital organ of another person."

24. The above definition was amplified by the court in **Mark Oiruri Mose – vrs – Republic[2013]eKLR** when the Court of Appeal stated in part;-

> "…… Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ……."

Conclusion

25. From all the above, it is clear to me that the prosecution proved its case against the appellant beyond any reasonable doubt. There was penetration, as a result of which the complainant became pregnant. There is also clear evidence that the appellant was the perpetrator of the offence. There is sufficient evidence showing that the complainant was a minor at the time when she was defiled. For all above reasons, I do not agree with the respondent that this appeal on both conviction and sentence should be allowed. The sentence imposed upon the appellant was in accordance with the law.

26. Accordingly, the appeal is found to have no merit and the same is dismissed in its entirety. The judgment of the learned trial Magistrate is confirmed. Right of Appeal to Court of Appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 27th day of October, 2016.

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Shifwoka for Shibanda…..…….for Appellant

Mr. Oroni……..…for Respondent

Mr. Polycarp……..……Court Assistant