REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 37 OF 2015

(CORAM: J.A. MAKAU – J.)

GOO..APPELLANT

VERSUS

REPUBLIC...........................RESPONDENT

(*Being an appeal against both the conviction and the sentence dated 12.4.2016 in Criminal Case No.367 of 2015 in Ukwala Law Court before Hon. C.N. Wanyama – RM)*

JUDGMENT

1. The Appellant **GOO** was charged with Offence of Defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that between 1st day and 28th day of February 2015 in Ugenya District within Siaya County intentionally caused his penis to penetrate the vagina of DA a Child aged 15 years.

2. The Appellant was tried, found guilty, convicted and sentenced to serve 20 years imprisonment.

3. The Appellant aggrieved by both the conviction and sentence filed the appeal setting out four (4) main grounds of appeal being as follows:-

> ***1. That, the trial magistrate erroneously convicted me on the evidence of PW1 and yet the said witness was not credible enough during her evidence in chief, cross-examination and re-examination.***
>
> ***2. That, the prosecution evidence was marred with contradictions which made them unreliable.***
>
> ***3. That, the age of the minor was not proved since no documents like birth certificates to approve the same.***
>
> ***4. That, the trial magistrate had formed opinion in her findings.***

4. At the hearing of the appeal the appellant appeared in person whereas M/s. Mourine Odumba, learned State Counsel, appeared for the State.

5. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

6. The Appellant in support of his appeal produced written submissions that he relied upon and had nothing else to add. He urged the complainant's evidence was not credible, and was riddled with contradictions, that the age of the complainant was not proved and that the

charge was defective.

7. M/s. Mourine Odumba, learned State Counsel, urged there was no evidence to prove the age of the complainant, though the court found after its observation the complainant was a minor, that the P3 form did not support the charge of defilement, that the evidence of the complainant was inconsistent and contradictory and that she did not appear to be credible witness, that there was no sufficient evidence to support the charge.

8. The ingredients of an offence of defilement are:- identification or recognition, penetration and the age of the victim. Did the prosecution prove the ingredients of the offence of defilement? PW1 testified that the appellant is her brother-in-law, who was known to her as he is married to her cousin. PW3, testified that on 14.7.2015 at 8.00 a.m. the appellant went to his clinic with the complainant, to be helped procure an abortion. PW1, knew the appellant and recognized him as the person married to her cousin, who she met when she went to visit her cousin, thus wife to the appellant. The complainant stated she was 15 years old having been born on 28.4.2000, but she did not produce any evidence as regards her date of birth and age. No birth Certificate or Baptismal card or any document was produced to confirm the age of the complainant. It is significant to note sentences in defilement cases under **The Sexual Offences Act No. 3 of 2001**, are pegged on the age of the minor and as such age of a victim should be proved to enable court mete the proper sentence. In the instant case the court was faced with the word of mouth from the complainant who stated she was 15 years old whereas the appellant stated he knew the appellant to be 17 years. The absence of Birth Certificates to confirm the age of the complainant and the appellant believe that the complainant was 17 years old, should have been considered in determining the sentence to be meted against the appellant as the sentence provided for in a case where the victim is 15 years is different from that of 17 years. That failure to consider the appellant's defence, that the complainant was 17 years old and not 15 years old, prejudiced the appellant. The appellant should have been accorded the benefit of doubt and given a lesser sentence of 15 years rather than 20 years.

9. I now turn to the ingredient of penetration . **Penetration** is defined as follows under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006**:-

> ***"penetration" means the partial or complete insertion of the genital***
>
> ***organs of a person into the genital organs of another person;***

10. PW1, in her evidence stated that she went to see her cousin who was married at [particulars witheld], the Appellant, but did not find her but the Appellant alone. That she had sex with the Appellant. That in July 2015, the Complainant discovered she was pregnant, PW1, testified that she has had no sex with any other person, other than the Appellant, however, during cross-examination PW1, stated she told the Appellant she was pregnant from a friend and that she knew the person who had impregnated her. On re-examination the complainant stated that it is not true that she slept with the Appellant, but she had sought his help. She contradicted herself when she said she had slept with the Appellant before, but the pregnancy is not his. PW2, who presented the P3 form from the complainant testified that complainant was examined on 15.7.2015 complaining of having been defiled on February 2015, the P3 form, exhibit P1, indicates normal external genitalia and no discharge and that the Complainant was currently about 22 means pregnancy. PW1 in her evidence did not state the day she went to visit her cousin and found the complainant there. She did not even disclose what month it was save it was 3.00 p.m. Her evidence raises doubt and contradictions as to whether she had sex with the appellant or not, as at one time she said she had sex with him but on re-examination she denied she had sex with him. She at one stage, stated that she was impregnated by the appellant but both in cross-examination and re-examination she stated the appellant was not responsible for her pregnancy. I have very carefully examined her testimony and I have found that there are fundamental inconsistencies that dent the prosecution's case. The Appellant has succinctly identified the alleged inconsistencies and has pointed out how they dent the prosecution's case. I therefore find and hold that the complainant's evidence is incredible and could not be relied upon to sustain the conviction. I therefore find that the prosecution did not prove penetration and in absence of that, conviction on defilement could not be correctly founded.

11. Whether the charge is defective? The Appellant urged the charge was defective as the prosecution's case was based on an alleged pregnancy termination, a charge, that had not been preferred against him. The Appellant urged the evidence on record was at variance with the charge and as such the charge was defective. **Section 214 (1) of the Criminal Procedure Code** provides:-

> ***214. (1) Where, at any stage of a trial before the close of the case***
>
> ***for the prosecution, it appears to the court that the charge is defective,***
>
> ***either in substance or in form, the court may make such order for the***
>
> ***alteration of the charge, either by way of amendment of the charge***
>
> ***or by the substitution or addition of a new charge, as the court thinks***
>
> ***necessary to meet the circumstances of the case:***
>
> ***Provided that –***
>
> > ***(i) where a charge is so altered, the court shall thereupon call up the accused person to plead to the altered charge;***
> >
> > ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

12. I have perused the charge and particulars in support of the charge and evidence in support. The particulars in support of the charge and evidence of PW1 are materially at variance. The evidence against the appellant is that he attempted to procure an abortion from the complainant and as such he was responsible for her pregnancy. The evidence in the essence is at variance with the charge and as such I find the charge to be defective.

13. Whether the trial Court considered the Appellant defence of alibi? The Appellant defence is that in the month of February 2015 he was in custody and that he did not defile the Complainant. The particulars of the charge are that between 1st and 28th February, 2015 the Appellant defiled PW1. The trial court in rejecting the Appellant's defence stated the Appellant was arraigned in Court on 23.2.2015 in Criminal Case No. 76 of 2015 and remanded in Siaya G.K. Prison. That his explanation was not convincing since the incident happened between 1st February and 28th February 2015 and that there was a chance of the incident of having happened before.

14. The prosecution did not through PW1 or any of their witness state the exact date when the alleged defilement took place as the particulars of the charge are that the incident took place between 1st February and 28th February 2015. The P3 form exhibit P1 was issued on 15.7.2015 and the date and time of the alleged offence is indicated as February 2015 on unknown date. It could be a date before 23rd February 2015 or after. The prosecution had the burden of proving beyond reasonable doubt, that the offence occurred before the appellant was remanded in custody, but not to speculate on the alleged date and more so when the Appellant denied the commission of the offence. The trial Court in its judgment talked of the first court's records in Criminal Case No. 76 of 2015. It is not clear how the court accessed the court's record and used the same as part of its record in writing its judgment. The Appellant was not afforded an opportunity to comment on the said record and thus was against **Article 50 (j) of the Constitution of Kenya 2010,** as regards fair trial, in that the Appellant did not have reasonable access of the said evidence.

15. On Appellant's defence of alibi, in the case of **Charles Anjare Mwamusi V. R CRA No. 226 of 2002** the Court of Appeal stated.

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."***

I have considered the evidence of PW1, which has exonerated the Appellant from an offence of defilement and which evidence is riddled with the inconsistencies and contradictions. The trial Court considered the evidence and referred to **Section 124 of the Evidence Act,** but the Court failed to make a finding as required under the proviso thereto. The trial Court did not find in the evidence available, that the alleged victim of the **Sexual Offence** could be relied on without being corroborated nor did it record the reasons in the proceedings that it was satisfied that the alleged victim was telling the truth. That once a trial court complied with the proviso of **Section 124 of the Evidence Act**, it can convict the accused on Evidence of the Sexual victim alone and it needs no corroboration, such as medical document or any other. I have very carefully considered the Appellant's defence of alibi against the Evidence of PW1, PW2, PW3, PW4 and PW5 and I find that the prosecution witnesses Evidence has not dislodged that of the Appellant's defence of alibi. The Appellant's defence of alibi was not correctly evaluated and analyzed. The Appellant did not by his defence of alibi assume any burden of proving that the answer he gave was indeed true or correct but the defence of alibi can suffice if it is sufficient to introduce into the mind of a Court a doubt that is not unreasonable. I find the Appellant's defence introduced into the mind of court a doubt that it is not unreasonable.

16. I am of the considered opinion that the conviction is not safe and is not deserved.

17. **The upshot is that I hereby allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty forthwith unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF DECEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 8TH DAY OF DECEMBER, 2016.

IN THE PRESENCE

M/S. M. ODUMBA FOR THE STATE

COURT ASSISTANTS:

1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE