REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 130 OF 2014

DANIEL SALAT LORIEN.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Daniel Salat Lorien was charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. In the Alternative, the Appellant faced a charge of committing an Indecent act with a child contrary to section 11 (1) of the same Act.

The Appellant was tried and at the end, was convicted on the main charge of defilement and sentenced to fifteen years imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the grounds of appeal the Appellant raised the following issues:

a. **THAT the trial court erred in convicting the appellant on a non existent section of the Sexual Offences Act No. 3 of 2006.**

b. **THAT the trial court convicted the appellant on the shaky and unreliable evidence of the prosecution witnesses.**

c. **THAT the trial court erred in shifting the burden of proof to the appellant.**

d. **THAT the trial court erred in ignoring, disregarding and or not taking into account the appellant's statutory defence or his defence.**

e. **THAT the conviction and sentence are against the weight of the evidence and the law.**

For the appellant, Mr. Kariuki contended inter alia that the charge against the Appellant was defective in form and substance in that the appellant was charged with a non existent section of the law; that the DNA evidence that was produced by PW5 was produced contrary to the express provisions of section 122 of the Penal Code; that the complainant made the appellant to believe that she was 19 years of age and the court denied the appellant the statutory defence under section 8(5) of SOA; that the complainant willfully took part in the sexual act and it did not amount to defilement. Counsel also urged that the complainant's

age was not proved and he relied in the decision in **JON CARDON WAGNER AND OTHERS VERSUS REPUBLIC CRA 405/2009**

This is the first appellate court and it behoves me to re-evaluate and analyze the evidence adduced in the trial court afresh before I come to my conclusion.

In the trial court, the prosecution called a total of five witnesses in support of their case. PW1 R.U.E. was aged 16 years at the time she testified on 16/11/2012. She told the court that the appellant was known to her, having been a member of a talent group at the [particulars withheld] Church, [particulars withheld], and used to sing in church. She recalled that during the school holidays, on 27/8/2011, at about 9.00 pm, she met the appellant when coming from evening studies at the gate of [particulars withheld] Primary School. He asked her to accompany him to the forest, which was nearby and she did. While in the forest he told her to undress which she did. He also undressed and they were involved in sexual intercourse and they went home afterwards. She went back to the forest with the appellant again after 3 days and were involved sexually. The complainant used to be a student at [particulars withheld] Primary School in 2011 and qualified to join our [particulars withheld] School in Timau. On 5/2/2012, she travelled to Ngong in Nairobi for a medical examination and upon examination, was found to be pregnant. She had been taken for the medical examination by her sister PW2, I S. She went back home to Marsabit where she delivered a baby on 18/6/2012 at Marsabit General Hospital. She later made a report to Marsabit Police and the appellant was arrested. She denied that she ever told the appellant that she was 19 years old.

PW2 reiterated what PW1 told the court on how she was found to be pregnant. Before PW1 gave birth, PW2 reported to Marsabit Children's office then to police station.

PW3 Mohammed Jillo, was then the Children's Officer Marsabit. He recalled that on 30/11/2012, I (PW2) reported to him that her sister had been defiled and the girl was pregnant. He summoned the appellant with his relatives on 18/10/2012 called police and the appellant was arrested.

PW4 chief inspector Charles Mwangi who was the OCS Marsabit Police Station recalled that he was investigating a defilement case and on 24th and 25th October 2012, he ordered a DNA test to be conducted on the appellant by taking samples of the appellant's blood, that of the complainant and the baby, which PW1 gave birth to. He forwarded the samples to the Government Analyst for investigations. He later collected the Government Chemist Report which he produced in court as PEX5. He also produced other exhibits including the birth notification of the child.

Dr. John Mwanzia (PW5) of Marsabit District Hospital produced a P3 form in respect of the complainant who had been examined by Dr. David Mangara who was his colleague.

When called upon to defend himself, the appellant made a lengthy unsworn statement. He said that he learnt of the allegations that he had impregnated the complainant in February 2012. He sent elders, his mother and wife to the complainant's home to find out more, but they did not. Elders advised him to wait. Later, he was summoned by the Children's Office where he reported and was handed over to the police.

One of the grounds of appeal is that the charge was defective. The appellant contends that there is no such charge as section 8(1) (4) under the SOA as indicated in the charge sheet. The charge read that the appellant was charged with the offence of defilement contrary to section 8(1) (4) of the SOA 2006. The particulars of the charge were properly stated. The only omission on the part of the prosecution is that they failed to indicate that the appellant was charged under section 8(1) as read with section 8(4) of the SOA. Section 8(1) defines the offence while section 8(4) provides for the sentence. In my view, the charge is very clear and the trial court found the appellant guilty under section 8(1) and convicted him under section 8(4) of the SOA. The appellant has not suffered any prejudice by the omission of the words "read with" It was a minor irregularity that cannot vitiate the charge.

Whether the DNA evidence was properly admitted; DNA samples may be admitted in evidence pursuant

to section 122 of the Penal Code. Section 122 A states as follows:

"122A. (1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

(2) In this section -

"DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of -

(a) the taking of a sample of saliva or a sample by buccal swab;

(b) the taking of a sample of blood;

(c) the taking of a sample of hair from the head or underarm; or

(d) the taking of a sample from a fingernail or toenail or from under the nail,"

122B……..

122C. (1) Nothing in section 122A shall be construed as

preventing a suspect from undergoing a procedure by consent, without any order having been made: Provided that every such consent shall be recorded in writing signed by the person giving the consent.

(2) Such consent may, where the suspect is a child or an incapable person, be given by the suspect's parent or guardian.

122D. The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given."

I have perused the record of the trial court and it is evident that due process was not followed because the appellant was never asked for his consent in terms of section 122(c). In addition to that, PW4 who called for the DNA test did not have a court order to call for the DNA sampling as required by section 122(1)(A) of the Penal Code. For the above reason, the DNA was irregularly carried out and that evidence was inadmissible and contrary to sections 122A and 122C of the Penal Code.

PW1 is the only witness to the offence. She told the court that she was aged 15 at the time the offence was committed. A birth certificate was produced as [particulars withheld] which indicates that she was born on 12/3/1996. The appellant's contention that the complainant's age was not proved is misplaced. The offence was committed on 27/8/2011. It means that the complainant was aged 15 at the time she was defiled. She was a minor.

Under section 8(1) of the SOA, once it is proved that the victim was a minor at the time the offence is committed, it is not necessary to prove consent. The complainant told the court that the appellant asked her to accompany him to the forest at night where they had sexual intercourse. She did not resist but consented to intercourse on the two occasions they were involved. However, once it is proved that the victim is a minor it is immaterial that the minor consented to the sexual acts because she had no capacity to consent.

The appellant also faults the trial court regarding his statutory defence under section 8(5) of the SOA.

He alleged that the complainant had told him that she was 19 years old at the time they got involved. During cross examination, the complainant denied that she had ever told the appellant that she was 19 years old. In considering the said allegations, the trial court observed as follows:

Although during cross examination the accused seems to suggest that the complainant (victim) misled him to believe that she was 19 years old, he did not comment on this issue during his defence. Again I take judicial notice having seen the complainant (victim) testify that she looks young and it is not possible for her to mislead any right thinking person that she is an adult. Assuming that he was informed by the complainant (victim) that she was 19 years, he did not state what steps he took to verify the age of the complainant (victim)".

Under Section 8(5) of the SOA, it is a defence if the victim deceived the accused person into believing that she was over 18 years but the defence is not absolute because under section 8(6) an accused has to demonstrate what steps he took to ascertain the complainants age. The sections read as follows:

(8) It is a defence to a charge under this section if -

> **(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
>
> **(b) The accused reasonably believed that the child was over the age of eighteen years.**
>
> **(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant**.

Even if the complainant had represented herself to the appellant to have been over 18 years of age, the onus was on the appellant to ascertain that the said age was correct. The trial magistrate did consider the said defence. He had observed the minor and concluded that she could not have been 18 years and also found that the accused did not demonstrate what steps he took to ascertain the plaintiffs age.

The appellant's defence did not amount to a defence at all. It was a lengthy statement that only referred to peripheral issues of his arrest. He did not deny or accept the commission of the offence. However, having earlier alluded to the fact that the complainant consented to the act because she was 19 years old, it meant that he was admitting to having taken part in a sexual activity with the complainant. The appellant did not raise any defence at all. Even, if the evidence of DNA was not available, this court does believe the complainant's evidence as the truth. The Appellant was known to the complaint. The appellant did not raise any known reason why the complainant or any of the other witnesses would have framed him. As a result of the relationship with the appellant a child was born. Having considered all the evidence on record in its totality, I find that the trial court returned a correct finding and there is no good ground to fault that decision.

Although the appellant was initially charged with the offence of defilement under section 8(1) (4) of SOA whereby the complainant's age was stated as 16 years, the said charge was amended and on 14/11/2012 a fresh charge was read to the appellant which he denied. The fresh charge was still under section 8(1) (4) but the age of the complainant was stated as 15 years. Indeed evidence by way of a birth certificate was led confirming the complainant's age to be 15 years at the time the offence was committed. In his judgment, the trial magistrate did not specify under what section he was sentencing the appellant but from the sentence, it must have been under Section 8(4). The complainant having been 15 years old, the appellant should have been charged under section 8(1) as read with section 8(3) of the SOA. Section 8 (3) reads:

"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 not less than 20 years..."

Under the above section, the appellant should have been sentenced to a minimum of 20 years. However,

due to the anomaly in the charge sheet and the failure by the State to raise that issue, I will not interfere with the sentence of 15 years imprisonment.

In the end, I find the conviction to be sound and I confirm it. The appellant is a lucky man in that he got 15 years imprisonment instead of 20 years and this court will not interfere with the sentence. The appeal is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 20th DAY OF FEBRUARY 2015.

R. P .V. WENDOH

JUDGE

Mr. Lekoona Appellant

Ms Kigira State

Appellant present

Jane/Kirimi Court Assistant