REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO. 49 OF 2014

(FORMERLY MOMBASA HCCR A NO. 252 OF 2012)

DANIEL WAMBUA MUSEMBI ………... APPELLANT

VERSUS

REPUBLIC ………………….. RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 86 of 2012 made on 14th June 2012 by the Senior Resident Magistrate's Court at Wundanyi (the Hon. Orenge K.I. RM)]

JUDGMENT

INTRODUCTION

1. This is a judgment on first appeal from original conviction and sentence of Senior Resident Magistrate's Court at Wundanyi Criminal Case No. 86 of 2012. The appellant was convicted for the offence of defilement of a girl contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 15 years on the 14th June 2012.

2. The particulars of the offence were that –

> *"PARTICULARS OF OFFENCE: Daniel Wambua Musembi - On diverse dates between 20th August 2011 to 6th January 2012 at [Particulars withheld] village, Mwatate location, within Taita-Taveta County, willfully and unlawfully caused his penis to penetrate the vagina of E W D a girl of 17 years."*

3. The prosecution called 6 witnesses in support of the charge and, when put on his defence, the appellant gave an unsworn statement and called no witnesses in defence.

The prosecution's case

4. The prosecution's case was that the appellant had defiled the complainant girl aged 17 years in a bush while on her way back from school in August 2011 and asked not to report the matter as he would assist her even if she became pregnant. She indeed became pregnant a fact which was first discovered by the headmistress of her school in January 2012 and later on 7th February 2012 confirmed by medical examination when she was found to be five months pregnant. Upon discovery of the pregnancy, she had told the headmistress that the accused, whom she knew previously as a neighbour, was responsible.

5. The alleged facts of the case relied on by the Prosecution were set out in the evidence of the complainant PW 1, as follows:

PW 1

I am E W. I am 17 years old. I am a pupil at [particulars withheld] primary school at class 7. On 6/8/11 at 5pm. I was from school and found the accused Wambua. I knew him previously he is our neighbor. He told me not to say that I was his girl friend. He asked me not to tell Mary who was his former girl friend. On 20/8/11 I was from school. I found the accused he pulled me to the bush and removed my underwear and defiled me. I did not report the matter. On 23/08/12 and 25/08/11 the accused met me and defiled me while I was from school. The accused asked not to report he could assist me if I got pregnant. The accused had sex with me on the 06/01/12 at the bush. I was called by the Headmistress on 06/02/12 and she asked me whether I was pregnant. I said I did not know. I was taken to Hospital and I was examined and found to be five months pregnant. I was given a booklet MFI-1 and I have birth certificate before court. I was born on 22/03/1994 serial number [particulars withheld MFI-3. The accused is identified. I am pregnant at the moment. (sic). [emphasis added.]

6. On cross-examination, the PW1 responded as follows:

"You found on my way from school and pulled me to the bush. I did not report immediately. I was taken to hospital had no blood stains. You defiled me and when I told you I was pregnant you asked me to mention another school boy. You came home to ask me not to mention you. You made me pregnant out of the said encounter."

7. In support of the complainant's testimony, the following other witnesses testified as follows:

PW2 – David Gona a Clinical Officer at Wundanyi sub-district hospital said that the complainant was seen at the hospital on 11/2/2012 and found to be without hymen and pregnant.

PW3 – Anastacia Omamo the headmistress of [particulars withheld] Primary school testified that upon opening the school on 5th January 2012 she had discovered that the complainant looked pregnant. She subsequently summoned her and interviewed her when she confirmed that she was pregnant and "*she mentioned Daniel Wambua as the person responsible for the pregnancy.*" The witness confirmed that the complainant was 17 years according to the school register and that she had on 7/02/12 asked the complainant's parent to take her to hospital after informing him of the pregnancy.

PW4 – Mwanaidi Shali Daniel, the farmer of the complainant confirmed that she had gone to [particulars withheld] Primary school on 7/02/12 upon summons by the headmistress who had told him that the girl was pregnant; that upon examination at the hospital the girl was found to be pregnant; and that he had sought the assistance of community policing to arrest the accused.

PW5 – Patrick Juma a community Policing officer of Kipusi village confirmed that he had been asked to arrest the accused which he did and took him to Wundanyi Police station.

PW6 – PC Reuben Guya the investigation officer confirmed the reporting of the matter to the police on 14th February 2012 and the subsequent investigations on the leading to the charge of the accused.

Defence Case

8. When put on his defence, the appellant gave sworn testimony in which he put forward a mere denial as

follows:

> ***"I am Daniel Wambua Musembi. I come from [particulars withheld]. I am a casual worker. I did not defile the complainant, it was due to a grudge with the family of the complainant. I deny the charges totally."***

Judgment and sentence of the Trial Court

9. The learned trial magistrate considered the evidence finding the charge proved against the accused and sentenced him to imprisonment for 15 years.

THE APPEAL

10. The appellant set out his grounds of appeal in his Amended Grounds of Appeal filed in court, as follows:

*"**AMENDED GROUNDS OF APPEAL***

1. *The trial magistrate erred in law and fact by failing to consider that PW1 (complainant's) medical examination was conducted after 7 months from the date when the alleged offence was committed.*
    a. *The alleged offence was committed on the 20th August 2011 whereas PW1 medical examination was conducted on the 11th February 2012 at the Hospital.*
2. *The trial magistrate erred in law and fact by failing to consider that PW1 complainant and PW4 (mother) reported the offence to the police station after 7 months from the date when the alleged offence was committed.*
    a. *The alleged date of the offence was 20th August 2011 to 6th January 2012 whereas both PW1 (complainant) and PW4 (mother) reported the incident in the OB on the 14th February 2012 at the Wundanyi Police Station.*
3. *The trial magistrate erred in law and fact by failing to consider that the age of the pregnancy and paternity of the unborn baby was not proved by forensic DNA tests pursuant to section 36 (1) of the Sexual Offences Act..*
    a. *No DNA examination was conducted to connect the paternity of the unborn baby to the appellant.*
4. *The trial magistrate erred in law and fact by failing to consider that the charge sheet was fatal and incurably defective especially particulars therein are at variance with the adduced evidence.*
    a. *Both the age of PW1 and dates of the alleged offence in the particulars of the charge sheet were at variance with PW1 adduced evidence and in details in exhibit marked MFI-3 (birth Certificate).*
5. *The trial magistrate erred in law and fact by failing to consider that the Alibi defence advanced by me was not challenged by the prosecution evidence.*
    a. *My alibi defence was not adequately considered by the trial magistrate."*

11. During the hearing of the appeals the appellant filed written submissions in court while, Ms. Nyakoni, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

12. The issue for determination before the court is whether on the evidence presented before the court the charge of Defilement of a girl contrary to section 8(1) as read with 8(4) of the Sexual Offences act 2006 No. 3 of 2006 had been proved.

DETERMINATION

Analysis of Evidence

13. The complainant stated that the accused whom she knew previously as a neighbor and who had asked her to be his girlfriend who had defiled her on three occasions - on 20th and 25th August 2011 and 6th January 2012 - and asked her not to tell the accused's former girlfriend Mary or to report the matter as he was going to assist her even if she became pregnant. There was no question of mistaken identity. DNA testing would a useful device in ascertaining the parentage of a child in circumstances where there is a question of identity of the person responsible. In this case there was no such question. There is no merit in the appellant's complaint that the medical examination of the complaint was done 7 months after the alleged defilement and without DNA testing. The examination was done after the report was made to the police following the discovery of the girl's pregnancy by the school headmistress. The age of the complainant was proved by a birth certificate produced in court and the testimony of the headmistress PW3 who confirmed that according to the school register the complainant girl was 17 years.

14. The evidence of the complainant PW1 needed no corroboration in terms of the proviso to section 124 of the Evidence Act, which is in the following terms:

> *"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

15. However, that evidence is supported by that of the headmistress PW3 who confirmed that the complainant had informed her of the person responsible as the accused, which she in turn informed the parent of complainant PW4 who sought the assistance of the Community Policing Officer PW5 to get the accused arrested. The accused was arrested at the end of the unbroken chain of information given by the victim PW1 to the headmistress PW£ then to the complainant's father PW4 and ultimately to the arresting officer PW5. The chronology of events supports the evidence of the complainant PW1 and, even if corroboration were necessary, this court would have found it in the testimony of the witnesses PW3, PW4 and PW5.

16. Moreover, that the complainant on the first opportunity upon discovery of the pregnancy reported to the headmistress that it was the accused Daniel Wambua who was responsible counts for the consistency of the complainant in terms of section 165 of the Evidence Act, which provides that –

> *"**165.** In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."*

17. The appellant denied the charge and suggested a grudge with the complainant's family. However, his was not an alibi defence that he was not at the place of the alleged crime on the material date; it was a bare denial of the charge given on an unsworn statement. He merely said:

> ***"I did not defile the complainant, it was due to a grudge with the family of the complainant [and] I deny the charges totally."***

18. There was really no evidence in an unsworn statement for the court to weigh against the evidence of the prosecution in the usual way (see ***May v. R*** (1981) KLR 1) but the court may consider the statement to see whether it raises a reasonable doubt on the accused's guilt. It is also cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See ***Karanja v. R***. 1983) KLR 501. Moreover, as held in ***Kossam Ukiru v. R***. (2014) eKLR by Court of Appeal (Azangala, Gatembu and

Kantai, JJA.) the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established.

Findings of the appellate court

19. In this case, having considered the evidence presented by the prosecution the court finds the charge of defilement as proved against the appellant and his bare denial statement, even if considered as an alibi, does not raise any reasonable doubt of the appellant's guilt. I would in any event reject such alibi on the grounds accepted in ***Kossam Ukiru,*** supra, that it was raised as an afterthought presented late in the proceedings without being raised in cross-examination of any of the prosecution witnesses and that it was totally out-weighed by the evidence produced by the prosecution as shown above.

Findings of the trial court

20. In convicting the appellant, the trial court, rightly in my view, found as follows:

> *I have considered the evidence on record. The complainant alleged to have been defiled by the accused who was well known to her. The accused had befriended the complainant and had had sexual encounters leading to pregnancy of the complainant. The complainant was taken to hospital and it was confirmed that she was five (5) months pregnant as at the time. The hymen was absent. The birth certificate shows that the complainant was a minor as at the time of the commission of the offence. She was 17 years. She had no capacity to consent to sex. The headmistress told court that the complainant had mentioned the accused as the person who made her p[regnant. The accused person attributed the charges to grudge between him and the family of the complainant. The court is of the opinion this was an afterthought as the issue was not raised during cross-examination. The court is satisfied that the complainant had positively identified the accused and her evidence corroborated by PWII and PWIII. The court finds that the prosecution proved their case as required by law. The accused will be convicted under section 215 of the Criminal Procedure Code.*

ORDERS

21. Accordingly, for the reasons set out above, the court finds that appellant's appeal herein is without merit and dismisses the same.

DATED AND DELIVERED THIS 25TH DAY OF AUGUST 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

…………………………............................ for the Appellant

……………….. for the Respondent

.... Court Assistant.