**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**High Court Criminal Appeal No. 64 Of 2015**

**FORMERLY NAKURU HC.CR.A. 253 OF 2013**

***(BEING APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN THE CHIEF MAGISTRATE'S COURT AT NAIVASHA CRIMINAL CASE NO. 11 OF 2007 – E. BOKE, PM)***

**PATRICK KIHARA MWANGI……....APPELLANT**

**-VERSUS-**

**REPUBLIC……..RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged in the lower court with Defilement of a girl Contrary to Section 8 (3) of the Sexual Offences Act (sic). The particulars state that on 14th February 2007 at [particulars withheld] Secondary School, Nyandarua District, he had "carnal knowledge" of MNN a girl under the age of 18 years. The Appellant denied the charges. His first trial was not concluded as the trial magistrate was transferred, necessitating a retrial as demanded by the Appellant, before the succeeding trial magistrate.

2. On 4/10/2013 the trial terminated with a finding of guilt and conviction against the Appellant. He was subsequently sentenced to serve 15 years imprisonment. The Appellant filed an appeal and was released on bail pending appeal on 27th March, 2015 before the High Court sitting at Nakuru. Subsequently the appeal was transferred to this court for hearing and determination.

3. The Appellant relied on his amended grounds of appeal filed on 13/7/2015, which in substance are similar to the earlier grounds filed on 3/3/2015. Four grounds are raised in the former viz:

> **"1) That, the learned trial magistrate erred in law and fact in convicting me in the present case yet failed to find that the charge sheet was fatally defective.**
>
> **2) That, learned trial magistrate erred in law and fact in convicting me in the present case yet failed to find the provision of Section 211 of the Criminal Procedure Code were not duly complied with.**
>
> **3) That, learned trial magistrate erred in law and fact in convicting me in the present case yet failed to find on the authenticity of the DNA sampling and results.**
>
> **4) That, the pundit trial magistrate erred in law and fact in rejecting my plausible defence without giving any cogent reason Section 169 (c) of the Criminal Procedure**

**Code."**

4. The Appellant filed submissions in support of the appeal and highlighted them at the hearing. For his part the Director of Public Prosecutions through Mr. Koima conceded the appeal, primarily on ground 3. He stated that the chain of handling of the DNA samples from the complainant, her baby and the Appellant was not established in the trial.

5. The duty of the first appellate court is to appraise the evidence tendered at the trial and to arrive at its own conclusions. (**See Okeno –Vs- Republic [1972] EA 32)** and as stated in **Francis Otieno Oyier –Vs- Republic Criminal Appeal No. 158 of 1984 2 (UR**) the appellate court will not normally interfere with findings of the trial court based on the credibility of witnesses, unless it is demonstrated that no reasonable court could have arrived at such findings or that the findings were plainly wrong.

6. Briefly, the facts of this case were that in the material period the Appellant had been hired as a substitute teacher at [particulars withheld] Secondary School to replace a biology teacher who was away on maternity leave. On the fateful day the Appellant was taking the complainant's class through a Biology lesson. The complainant, then just months shy of her eighteenth birthday was the class monitor/prefect. At about 11.00am when the class ended, the Appellant instructed the complainant to return six microscopes used in the lesson to the store or preparation room adjoining the laboratory, for storage. Other students meanwhile dispersed for tea break.

7. After the Complainant entered the backroom, the Appellant pursued her into the store and proceeded to demand sexual intercourse. He forced himself on the girl and after pushing away her biker and underpants had sexual intercourse with her while standing. He then left her after about 10 minutes. The complainant did not reveal this episode to anyone until a month later. This was after her mother took her to a clinic following her complaints regarding abdominal pains. It was discovered that she was pregnant.

8. On 21/3/2007 the complainant reported to Charles Wachira (PW2), the Principal of the school about the incident. The Board of Governors convened and interviewed both the complainant and the Appellant before handing over the matter to police for investigations. Police recorded statements and had DNA samples taken pursuant to the order of the court given on 9/6/2008. The complainant had by then given birth to a baby boy who was 3 years old at the time of the second trial.

9. The results of the analysis of DNA samples taken from the putative father (the Appellant), the complainant and the baby were produced in court by the analyst **Henry Kiptoo** (PW4) as Exhibit 1.

10. In an unsworn defence statement, the Appellant described the meeting before the [particulars withheld] School Board of Governors on 2/4/2007. He stated that on arrival he met members and police. Upon being questioned he told the Board of Governors about the lesson he conducted on 14/2/2007. The complainant also recounted the day's events, which he disputed. His version was that the complainant was not among the students assigned to return the microscopes to the store after the lesson and that the laboratory was available to other teachers and was adjacent to the secretary's room. He pointed out the failure by the complainant to report immediately even while admitting that he gave samples for DNA analysis. He raised doubts as to whether the DNA samples of the complainant and the child were ever taken.

11. Starting with the last issue, it is true that the prosecution did not establish the full chain of custody of the DNA samples from the point of extraction to analysis. According to PW4, the DNA samples were received from PC Korir Kibet of Njabini Police Station on 13/6/2008. This police officer was not called to testify and neither did the clinical officer or medical officer who extracted the specimens. Be that as it may, the Appellant admits that his samples were taken, and the complainant asserted that her samples together with those of the child were also taken.

12. According to PW4's report he received 3 samples marked Patrick Kihara (Appellant), M.N. (Complainant) and J. N. (Baby) and generated DNA profiles thereof. The profiles are tabulated at the rear of the report. Each profile is different from the other depending on sample. The report also explains the science behind genetic inheritance as follows:

> **"Every biological person inherits half of their DNA from their biological mother and the other half from their biological father. By examining the DNA from a person and their parents, it is possible to determine the elements of DNA gained from their biological mother and those gained from their biological father."**

13. Hence, if indeed the complainant and the baby did not give any samples as purported by the Appellant, all 3 samples given to PW4 would be the Appellant's. The respective DNA profile of all 3 samples then would resemble 100%. Secondly, it would be impossible to determine any hereditary genes, even in respect of the Appellant (in absence of his parent's specimen). I think the science behind genetic inheritance excludes any possibility that only the Appellant's samples were taken, or even that the other two samples were from strangers without any connection to him. PW4 on examining the 2 adults' DNA samples related them genetically to that of the baby. The report concludes that chances are 99.99+% that the Appellant is the father of J. N., also M. N.'s son.

14. In as much as the prosecution failed to call PC Korir and the clinical officer who took the samples, I think that the report by PW4 and the Appellant's admission in many ways renders this omission less significant in this case, as opposed to say, a case where drugs samples are extracted and escorted to the government chemist. The need to establish a clear chain of handling in such a case is borne out of the fact that the risk of substitution of drugs is high and that, what eventually reaches the government chemist may not be the extracted sample. That is the danger that courts guard against by insisting on a clear chain of handling of samples.

15. In a case such as the one before us any substitution of samples would show up in the DNA profiling and would have been detected by the analyst. This is because unlike a drug sample, the DNA sample is from a specific identifiable individual and no two persons share similar DNA structure. It seems to me that in conceding the appeal, Mr. Koima did not study the particular samples in question in this case and the science behind it. Nevertheless, as a rule, it is always a good practice to have the chain of custody of samples whatever their nature, clearly established. I do not consider that the Appellant was prejudiced by the omission by the prosecution to call the Clinical Officer who took the samples.

16. In this case, the DNA evidence is only one of the strands of evidence tendered against the Appellant. The other strand primarily comes from the complainant and is augmented by her principal (PW2) and her father (PW3). It is well to note, while examining the evidence of PW1 that the absence of medical evidence *per se* does not defeat the charge of defilement.

17. In **Geoffrey Kionji –Vs- Republic Criminal Appeal No. 270 of 2010** the Court of Appeal applied this principle earlier stated in a rape case (**Kassim Ali –Vs- Republic Criminal Appeal 84 of 2005 MSA)** to a defilement case (Kionji) stating interalia:

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. What the Court of Appeal had sated in Kassim –Vs- Republic is that:**

> **"[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."**

18. In the present case, PW1 was cross-examined at length by the Appellant during the trial, especially concerning the possibility that the offence could occur in the lab adjoining other offices, with workers and students in the vicinity, and her failure to report immediately to any person in the school.

19. From her answers the complainant acquitted herself well. This is what the trial magistrate stated with respect to the first aspect:-

> **"Accused denies a possibility of defilement in a laboratory and claims that it was a plan by the principal and victim to fix him…… But I am wondering why the victim could have liked to fix him and yet this was a student and accused was not even a teacher in that school to make one think he might be having scores to settle with the principal and or some students. He has also not given a reason why he thinks so, therefore that is not true that he was fixed by the two. On top of that there is a DNA test report which shows he is the father of the victim's child…… He was taken the samples (DNA) separately therefore he doubts the results. But the witness who would have cleared his doubts was…… Henry Kiptoo …… To my surprise accused did not ask him a question related to what he is saying now, therefore what he is alleging about his doubts is just an afterthought." (sic)**

20. From the foregoing, the trial magistrate clearly gave reasons for believing the complainant, and then went ahead to call to aid the DNA results in corroboration. Secondly, the fact that the complainant did not immediately report the offence does not detract from her evidence. Her explanation was as follows:

> **"There was a teacher on duty. I did not report the same day……I also did not tell anyone. Even my close friends could come and ask me what was wrong with me but I did not tell them…… I revealed on 23/7/2007. A pregnancy test was done and I was given a document to show that I was pregnant. I did not reveal the matter immediately because I was frightened. You being my teacher and I also did not know whom to tell and how was scared and confused because of the act." (Sic)**

21. This explanation to my mind is reasonable for a minor confronted with a situation of such a grave nature involving a person in authority over her; a teacher. Of course, once a pregnancy was confirmed to her, she had to muster the courage to speak. And this she did first with the principal, PW2 who asked for a written report before convening the meeting of the Board of Governors. I also agree with the findings of the trial magistrate that there was no plausible reason in the circumstances of the case for PW1 to make and persist with false accusations against the Appellant who was barely one month old at the school. Whether or not there were other rooms adjoining the lab does not exclude the possibility that the Appellant sequestered the Complainant and had sex with her in the lab backroom. It took barely 10 minutes as per PW1.

22. Having believed the evidence of PW1 the trial court could have based its conviction on her evidence but it went further to consider the DNA evidence, which I have indicated is credible for purposes of the charge before the court. Regarding the P3 form, the same was not produced as it seems the doctor who completed it had long left the hospital concerned. This is hardly surprising as the retrial took place over 2 years since the offence.

23. The Appellant's complaint in ground 2 is related to this question. There were several adjournments occasioned by the apparent difficulty to trace witnesses. It is true the prosecution had the lion's share of adjournments in the trial but it seems the Appellant also demanded for convenient dates to accommodate his various activities such as attendance of exams, seminars etc

which were granted by the court.

24. From his objections one would have expected him to have had his witnesses ready as soon as he was placed on his defence. He sought and was granted time to call his 2 witnesses but he failed to do so. He now claims that he was not given adequate time to call his witnesses while the prosecution got about 10 adjournments. There is no requirement that each side in a criminal case must have equal numbers of adjournments for justice to be done. The Appellant opted to have his case heard *denovo* two years after the offence. That witnesses could take time to trace and recall was almost inevitable.

25. That notwithstanding, the Appellant after he was granted time told the court on his defence date that his witnesses were in *"college……. and were asking for a date in November or December."* The trial magistrate indicated that she was on transfer and proceeded to give a closer date on which the Appellant said his witnesses were unable to attend "due to their tight schedule." There was a clear risk of yet another retrial if the trial magistrate did not conclude the case. I do not think she can be faulted for declining a further adjournment in the circumstances.

26. In my own evaluation, the trial magistrate was entitled to convict upon the evidence before her, and to dismiss the defence of the Appellant which primarily consisted of a denial to have engaged in the act complained of. In the circumstances, grounds 2 – 4 of the amended grounds of appeal have no merit.

27. Turning to the last ground, the Appellant submitted that the charge sheet was defective on the three counts:-

**"a) It showed the age of the complainant as 18 years.**

**b) Section 8 (3) quoted therein did not describe the offence.**

**c) The offence was not specified."**

28. I have perused the original charge sheet on the record of the original file. The particulars thereof state that the complainant was "a girl under the age of 18 years." The particulars should have stated her exact age. The difficulty appeared to stem from the fact that she was over 17 years but under 18 years old. The description given is satisfactory in my view. Her birth certificates (Exhibit 2) shows she was about five months shy of her 18th birthday when the offence occurred, as she was born in July 1989.

29. It is true that the section quoted in the statement of offence is the one prescribing the penalty for the offence, yet the offence itself is described in Section 8 (1). Ideally both sections should be cited together, conjoined with the words as "read together with." However the failure to do so is not fatal to the charge.

30. Nor the fact that the particulars stated that the accused had "carnal knowledge" of the complainant. This description seems to be spill over from previous sexual offences under the Penal Code prior to the enactment of the Sexual Offences Act in 2006. Carnal knowledge in ordinary parlance connotes an act causing penetration by a sexual organ. The Appellant clearly understood the charges facing him as evidenced by his active participation in his trial. In my view no miscarriage of justice resulted from these omissions in the charge sheet.

31. However in light of the proven age of the complainant the court should have convicted the Appellant on a charge of Defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. While the offence of defilement is created in Section 8 (1) Subsections 8 (2) to 8 (4) prescribe the penalty in relation to the age of the victim.

32. In this case, the proper sentence is provided under Subsection 8 (4) and not 8 (3). This irregularity

is cured by Section 382 of the Criminal Procedure Code as no failure of justice resulted there from. All in all, I have found no merit in this appeal and dismiss it in its entirety. In the circumstances I will quash the conviction under Section 8 (3) of the Sexual Offences Act and substitute it with a conviction for Defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The prison term of 15 years imprisonment imposed on 19/9/2013 was proper and is upheld

33. The Appellant is hereby recommitted to serve the remaining portion of his 15 years sentence (excluding the period between 19th September 2013 and 31st March 2015 which he had served before being released on bail pending appeal).

**Delivered and signed at Naivasha, this 22nd day of September 2015.**

**In the presence of:-**

**State Counsel : Mr. Koima**

**For the Appellant : N/A**

**C/C : Steven**

**Appellant : Present**

**C. MEOLI**

**JUDGE**