REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 4 OF 2015

EMMANUEL KASHU KATIKIA……APPELLANT

-VERSUS-

REPUBLIC…….....…...…PROSECUTOR

(Being an appeal from the original conviction and sentence in Cr. Case No. 1198 of 2011 in the Senior Principal Magistrate's Court from the Judgement by Hon. S.O. Temu, SRM dated 12/6/2013)

JUDGEMENT

The appellant was charged with the offence of defilement Contrary to ***Section 8(1)*** as read with ***Section 8(3) of the Sexual Offences Act***. In the alternative he was also charged with committing an indecent act with a child Contrary to ***Section 11 (1) of the said Act.***

Briefly the facts of the case were that on diverse dates within the months of May and July 2011 at Kiwanya Ndege within Loitokitok District of Rift Valley Province, intentionally caused his penis to penetrate the vagina of J N, a child aged 14 years old. That in the alternative on the said diverse dates and months of May and July 2011 at the same District and Province, he intentionally touched the vagina and thighs of J N, a girl aged 14 years old.

He pleaded not guilty to both counts. The prosecution adduced evidence at the trial. He was tried and convicted for the offence of defilement and subsequently sentenced to 20 years imprisonment.

He was aggrieved by the conviction and sentence and filed an appeal before this court.

His appeal is grounded on the amended petition filed in court on 13/8/2015.

The petition constitutes the following grounds:

a. ***That the conviction was manifestly unsafe due to a crucial irregularity in relation to my age, where the issue was not solved amicably and the trial court had no jurisdiction under the law to pass a sentence to one under 18 years of age by the time of conviction of the offence.***
b. ***That the appellant's conviction and sentence ought to have been under the Children's Act as his age was assessed at 17 years.***
c. ***That the plea taken on 22/9/2011 was invalid and the entering the same violation Article 50 (1) of the Constitution taking into account as to my age assessment report as narrated by the court prosecution on 22/9/2011.***
d. ***That the entire trial was unsatisfactory and a nullity as my fundamental rights to a fair and impartial trial as enshrined by Article 25 (c) of the Constitution was violated, as the trial ought to have been referred to a Children's Tribunal soon after confirmation of my age as 17 years.***

APPELLANT'S SUBMISSIONS ON APPEAL

The appellant argued his appeal and also relied on written submission filed together with the memorandum of appeal. At the hearing of the appeal appellant submitted that he had a consensual relationship with the complainant dating back during their school days. It was his case that the complainant dropped out of school and agreed to become his girlfriend. They carried on with their relationship of boyfriend and girlfriend for some time. The complainant eventually gave birth to a baby whom we accepted to raise together as a family. In the circumstances of their relationship appellant submitted that they lived together as man and wife.

As regards the age, it was his case that at the time of arrest he was 17 years old. The conviction and sentence by the learned trial magistrate was unlawful and a nullity. He further submitted and challenged the record of the trial court impugning that some of the evidence adduced was not recorded by learned trial magistrate.

RESPONDENT'S SUBMISSIONS ON APPEAL

Mr. Akula opposed the appeal and contested submissions by appellant.

In his submissions on the ground of appeal in respect to the age of the appellant, he argued the same lacks merit. He gave a chronology of events of how appellant was arrested and charged before court. He urged the court to peruse the record and take notice that appellant was born on 20/1/1991 as per an identification card, produced as exhibit.

The appellant therefore went through the trial as an adult aged 18 years and not 17 years as he alludes to before this court. It was the case by the prosecution that evidence adduced at the trial was watertight and proved the case beyond reasonable doubt against the appellant. He further submitted the evidence on defilement placed the appellant at the scene as perpetrator of the crime. He further submitted that DNA profile of both the victim and appellant was undertaken. This was necessitated as a result of the complainant conceiving after the alleged act of defilement by the appellant. It was his contention that prosecution adduced evidence on DNA profile involving blood samples of the complainant, the child and appellant.

He further stated that the government analyst PW3 testified and presented a report on the findings as exhibit 1.

According to the DNA evidence it was his submission that the DNA results confirmed that the appellant was the biological father of the baby. That evidence according to the learned prosecution counsel was not controverted by the defence at the trial. He urged this court to find that the prosecution established the charge of defilement against appellant beyond reasonable doubt. The appeal lodged by the appellant should therefore be dismissed.

This is a first appeal to the High Court. The duty of this court is to re-examine and re-evaluate the evidence on record at the trial court and draw its own conclusions. In doing so I bear in mind that the trial court had the advantage of hearing and observing demeanor of the witness. The cautionary principle and duty of the court is remarkably set out in the cases of, ***Okeno v Republic 1972 EA 3z, Njoroge v Republic 1987 KLR 99, Karanja v Republic 1986 KLR 190.***

EVIDENCE BEFORE THE TRIAL COURT

PW1 J.N. the complainant gave evidence that in between the months of May and July 2011 she had sex with the appellant on several days. However in her testimony they kept it a secret from the parents. In her evidence appellant was her neighbor and at one time he could induce her with money in order to have sex. The incident continued on and off and at one time her mother noticed some blood stains which prompted her interrogate complainant on the source of blood she was seeing. The complainant adduced evidence that she had disclosed to the mother that appellant had been defiling her for some time. According to her

evidence the sexual relationship with the accused resulted in her conceiving and did give birth to a baby girl aged one month at the time of the trial.

PW2 NAMANYEA ENOLONYUI stated that on 29/7/2011 while in her house with the complainant she noticed her stomach was big than usual.

She became suspicious and questioned her to confirm whether it was a pregnancy. The complainant admitted she was pregnant and appellant was the one who impregnated her.

The matter was then reported to the police and Children's Office for further action.

PW3: HENRY SANG – a government analyst adduced evidence of having received blood sample in a bottle from the complainant, the appellant and the child for purpose of DNA analysis.

On analysis he stated to have confirmed that appellant was the biological father of the child sired by the complainant. According to PW3 he received 3 blood samples marked complainant (PW1) J N, Emmanuel Katikia and baby. He generated DNA profiles. The profiles are as tabulated in the rear part of his report. The report as explained scientifically on DNA and genetic inheritance confirmed appellant to be biological father of the child born by complainant. The report was presented in evidence as exhibit 1.

PW4: PC EVERLYN MWANUSARE of Loitokitok Police Station investigated the case. He compiled witness statements issuance of p3 for medical examination. The blood samples to the government analyst were prepared and sent by her. He also produced the age assessment report of the complainant from Kajiado District Hospital on behalf of the medical officer confirming that she was 14 years old.

In his defence the appellant gave a sworn testimony and called no witness. He denied both counts of defilement and indecent act against the complainant. On cross-examination he denied that they had any relationship nor an affair though people used to suspect him. At the trial he denied that a child was born out of the act of defilement against the complainant.

The learned trial magistrate having considered the evidence by prosecution and defence made the following findings in his judgement;

> ***"I thus find that the prosecution had established that accused had sex with a girl aged 14 and thus they have proved their case beyond reasonable doubt. I thus find the accused guilty for count 1 and there was actual penetration resulting to pregnancy and birth of a child. I thus convict the accused under the provisions of Section 8 (1) and (3) of Sexual Offences Act".***

The question which a trial court ought to answer in a charge of defilement relates to the following elements:

a. ***Proof of penetration.***
b. ***Age of the complainant.***
c. ***Identification of assailant***.

ANALYSIS OF THE EVIDENCE AND DETERMINATION

First Element - Proof of Penetration:

From the record (PW1) complainant gave an evidence of what happened on diverse dates between May and July 2011. The evidence was to the effect that appellant, a neighbor well known to her lured her on several occasions to engage in sex. In one of the incident appellant offered and paid Ksh.10 to influence her to agree to sexual activity which according to her had become the norm.

The penetration of appellant on complainant resulted in her conceiving and giving birth to a baby girl.

PW2 confirmed in her evidence that on 29/7/2011 while in the kitchen with (PW1) she noticed and suspected her to be pregnant. PW1 admitted on further interrogation and named the appellant as father of the child. (PW3) a government analyst gave evidence of having received blood samples from PW4. The blood samples were from (PW1), appellant and minor who was one month old by the time case commenced for trial. The DNA analysis according to PW3 conclusively and positively linked appellant as father of the minor.

The appellant in his defence acknowledged that he had sexual relationship with the complainant. It was also his testimony that out of the relationship complainant conceived and gave birth to a minor which he takes responsibility.

With the above in mind the trial court correctly found penetration proved against the complainant. PW3 Henry Kiptoo, a government analyst presented evidence pertaining to scientific evidence of DNA which was well laid before the trial court. The DNA profile confirmed the appellant to be a biological father of the minor.

The law on expert evidence was considered in the case of **PRAVIN SINGH DHALANY Vs. REPUBLIC NAIROBI CR. APPEAL NO. 10 OF 1997 UR**. The court stated:

> ***"It is now trite law that while the courts must give proper respect to the opinion of expert, such opinions are not, as it were, binding on the courts, and the courts must accept them. Such evidence must be considered along with other available evidence……..?"***

Expert evidence of PW3 in the case facing the appellant was considered alongside other available evidence by the prosecution. The government analyst report produced as an exhibit lays the background, and analysis of blood samples taken from (PW1), appellant and the child.

The witness gave reasons on how he came to the conclusion on the DNA sample analysis. It was established as per the scientific analysis that the appellant was the father of the child in this case.

By admitting the expert evidence the trial court decision was consistent with the laid down principles on this issue. The test on such expert evidence was considered by the Supreme Court of Canada in the case of **REPUBLIC Vs. MOHAN 1994 2 SCR 9.**

The court stated that there are four facts to consider in admitting expert evidence thus:

a. **Relevance**
b. **Necessity in assisting the trial court**
c. **The absence of any exclusionary rule**

AND

d. **A properly qualified expert.**

This criteria set in the persuasive case of **MOHAN (Supra)** is very much relevant in the circumstances of the case before me. In **MUKUNYI Vs. REPUBLIC [1982] eKLR 203** the Court of Appeal held:

> **"Expert evidence is given by a person skilled and experienced in some profession or sphere of knowledge from the facts reported to him or discovered by him by tests, measurements and the like."**

The court of Appeal in Cr. Case of **KAINGU ELIAS KASOMO Vs. REPUBLIC CR. Appeal No. 504 of 2010** when confronted with the issue of prove of age of the complainant observed as follows:

"The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives estimated age as 15 years. The age of the minor is an element of a charge which ought to be proved by medical evidence."

In the case of **JOSEPH KITHI SEIT Vs. REPUBLIC [2014] eKLR at Machakos Cr. Appeal No. 91 of 2011** it was held by Hon. Mutende J.

> **"It is trite law that the age of the victim can be determined by medical evidence and cogent evidence."**

In terms of Section 48 of the Evidence Act the opinion by government analyst was on a point of science to identify and analyse blood samples from the complainant, appellant and the child. The issue at stake is to establish the biological father of the baby.

The relevance of expert evidence is a threshold requirement.

I find that the trial court assessed both the logical and legal relevance of the evidence which is case specific to make a determination. There was absence of any exclusionary rule to make it inadmissible. The trial court was satisfied that the expert PW3 had the appropriate level of knowledge and skill to tender evidence in a court of law

Second Element - Prove is Age:

The complainant testified that she was aged 15 years. PW4 escorted the complainant to Loitokitok District Hospital where an examination of the age was conducted. The assessment report exhibited confirmed her age to be 14 years. That piece of evidence has not been rebutted by the defence. As already stated elsewhere in my judgement. In defilement age is a critical element and must be proved conclusively.

The issue has been discussed expressively in our courts as to what constitutes proof of age.

The law on this was considered in the case of ***Francis Omuroun v Uganda CA Cr. No. 2 of 2008*** it was held:

> ***"In defilement cases, medical examination is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence.***
>
> ***Apart from medical evidence age may also be proved by birth certificate, the victim parents or guardian and by observation and common sense."***

From the record I am satisfied that the medical report tendered determined the age of the complainant at 14 years. The doctor who examined the complainant was qualified to prepare the report exhibited as exhibit 3 by PW4. The report was admitted by the trial court pursuant to the provisions of section 77(1) of the Evidence Act. The witness statement and documentary evidence to be relied by the prosecution had been supplied to the appellant.

The record of the trial court has been examined and no evidence is available that appellant challenged its production by PW4. The medical report was filled on examination made by qualified doctor from Kajiado District Hospital.

In absence of any other evidence to the contrary the report on this issue was therefore credible and authentic.

Third Element – Recognition:

There is cogent evidence on recognition of the appellant as perpetrator of the crime. He was well known to the complainant. In his defence appellant does not dispute that they knew each other since school days. There is therefore no dispute as to how the complainant came to be in contact with appellant. The complainant gave evidence on opportunity when appellant committed the offence. There was consummation of the relationship which gave rise to the complainant conceiving and giving birth to a baby girl.

The trial magistrate upon considering the evidence found the complainant was defiled. The complainant evidence was that they had sexual relationship with appellant for a long time and on diverse dates. She also narrated that sometimes defilement occurred in their house. She named the appellant as a neighbour and defiler, immediately it happened in the last incident. She further testified that defilement incident was described to PW2. PW2 testimony gives sequence steps which led to the arrest of the appellant.

From the evidence the identity of the appellant cannot be mistaken. The evidence recognizes the appellant as the perpetrator and squarely places him at the scene of the crime. See the case of **MWAURA VS. REPUBLIC 1987 eLKR 645** the Court of Appeal held interalia that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires of judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."**

Ground 4 – Violation of Article 50 Rule (4) of the Constitution:

The appellant also raised issue with ***Article 50 (4) of the Constitution 2010.*** The question is whether appellant has raised compelling evidence so as to allow this court to invoke ***Article 50 (4).*** What is the gist of ***Article 50 (4)*** it deals with evidence obtained in a manner that violates any right or fundamental freedom. In the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be determined to the administrating justice.

I do not find merit in this ground. The appellant was arraigned in court where an order of age assessment was made. The medical report assessed his age as 17 years but an identity card produced indicated his birth date to be 20/1/1991. As at the time he was taking plea to the charge appellant was 18 years as evidenced by National Identity Card. The appellant adduced no new or compelling evidence that prove of his birth date as per the identity card was not credible. Production of the identity card at the trial court to prove age of the appellant was not in breach of ***Article 50 (4).*** The identity card bearing the particulars of the appellant was an authentic document which can only be nullified and revoked by tendering new and compelling evidence to discredit the content.

The appellant throughout the hearing at trial court did not discharge that burden. In his memorandum of appeal and at the hearing no new evidence was adduced to challenge authenticity of the identity card bearing details that appellant was born on 20/1/1991.

The prosecution in their testimony adduced evidence of obtaining blood sample from the appellant for DNA profile. On evaluation of the record I find no evidence that the blood samples were obtained by way of torture, coercion, enticement or inducement.

The appellant upon being supplied with debuted information of the charge and witness statement had an opportunity to raise objections at the trial. The appellant right to affair trial was no violated by the court admitting the government analyst report and national identify card to prove age.

I am satisfied that the high standard of proof required in a criminal case of this nature was discharged by the prosecution. There was overwhelming evidence to convict appellant as charged.

Ground 5 – Appeal on Sentence:

The appellant submitted that he was aged 17 years old when he committed the offence. He was sentenced to 20 years imprisonment.

He has also appealed against sentence. It is the contention of the appellant that the sentence imposed by learned trial magistrate is harsh and manifestly excessive. He based his arguments that his age could not have allowed the learned magistrate to sentence him to imprisonment.

I have considered what has been urged before me by the appellant and learned prosecution counsel. It appears the main complaint by the appellant relates to his age.

In analysing the material placed before me trial court admitted a national identity card of the appellant. As at the time of appellant indictment going by the date of birth in the national identify card of 20th January 1991 he was 18 years old.

The appellant was arraigned in court on 19/9/2011. The contention that appellant was below the age of eighteen years cannot be correct.

Secondly sentencing is the discretion of the trial court. The appellate court cannot interfere with and order on sentence imposed by trial court unless it is established;

1. **That the trial magistrate acted on wrong principles; or**
2. **That he overlooked a material factor; or**
3. **The sentence imposed was manifestly harsh and excessive in the circumstances of the case.**

In sentencing the principles upon which an appellate court can interfere with sentence of a trial court have been discussed in the case of **OGOLLA S/O OWUOR 1954 EA CA 270.**

The court stated thus:

> **"The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."**

To this, we would add a third criterion namely, **"that the sentence is manifestly excessive in view of the circumstances of the case."** (**REPUBLIC Vs. SHER SHOW SKY 1912 CCA 28 TLR 263.** See also **OMUSE Vs. REPUBLIC).**

In a more recent case of (**SHADRACK KIPKOECH KOGO Vs. REPUBLIC CR. Appeal No. 253 of 2003** the Court of Appeal discussed the instances and stated thus:

> **"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."**

See also **SAYEKA Vs. REPUBLIC 1987 eKLR 306).**

Taking into account the circumstances of this case, I do not find that the sentence imposed by trial magistrate was illegal, unlawful or manifestly harsh and excessive.

The provisions of Section 8(1) of the Sexual Offences Act prescribes category of sentences to be imposed by courts depending on the age of the victim. The sentence of twenty (20) years imprisonment against the appellant falls under the class of victims identified and proven age of twelve and fifteen years.

The trial magistrate sentenced appellant to mandatory minimum sentence of twenty years. The learned trial magistrate imposed an appropriate sentence and this court finds no reason to interfere with it.

DECISION

I am satisfied that the appellant's conviction was proper and the sentence imposed lawful.

The upshot the appeal of the appellant is hereby dismissed on both conviction and sentence.

Dated and delivered at Kajiado this 16th day of November, 2015.

R. NYAKUNDI

JUDGE

In the presence of

Mr. Akula for State

Mateli Court Assistant
Appellant present