REPBULIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 37 OF 2013

ALFRED KIBET KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of J.Kasam Ag. Senior Resident Magistrate, in the Cr.Case No.400 of 2011 delivered on 16th August, 2013 at Sotik)

JUDGMENT

ALFRED KIBET KORIR, the appellant herein, was tried before the Sotik Senior Resident Magistrate's court for the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act no. 3 of 2006**. At the end of the trial, he was convicted and sentenced to 20 years imprisonment. He was aggrieved, hence this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. **That the learned trial Magistrate erred in law and in fact by failing to note that there was no eye witness in this matter and the P3 form speaks for itself.**
2. **That the learned trial Magistrate erred in law and in fact by relying on the evidence of PW1 and PW2 which was inconsistent.**
3. **That the learned trial Magistrate erred in law and in fact by failing to evaluate that DNA results exclude the Appellant as the victim's child father.**
4. **That the learned trial Magistrate erred in law and in fact by failing to consider the evidence of the defence.**
5. **That the learned trial Magistrate erred in law and in fact by holding that the prosecution had proved its case beyond reasonable doubt without supporting evidence and in view of the unresolved contradiction in the prosecution case.**
6. **That the learned trial Magistrate erred in law and in fact by convicting the Appellant despite the contradiction in dates of commission of the offence.**
7. **That the learned trial Magistrate erred in law and in fact when she misdirected herself on the applicable law and procedure in conduct of the matter.**
8. **That the learned trial Magistrate erred in law and in fact by conviction and sentencing is not supported by the evidence on record as the prosecution failed to prove its case beyond reasonable doubt.**

When the appeal came up for hearing, learned advocates appearing in the matter argued two main grounds of appeal which I will revisit shortly. Let me first set out the case that was before the trial court. The prosecution's case was supported by evidence of five witnesses. **S C**, (PW1)the victim herein, told the trial court that she visited the appellant's house severally where she had sex with the appellant

between the month of September 2010 and May 2011. The victim alleged that she became pregnant in the month of May 2011. It is the evidence of J K. L (P.W.2), the victim's father, that the complainant left her parents' home for an unknown destination for many days before she was found. The complainant's parents were tipped that the girl was in the appellant's house. It is the evidence of the complainant that she spent her time in the appellant's house where one Titus too, used to reside with the appellant. The complainant was finally discovered to have visited and spent in her brother's house in Narok and she was thereafter apprehended with the help of the area chief. It is only after being interrogated that the Complainant revealed that she had an affair with the appellant during her absence from home. That revelation enraged the complainant's family that they took steps to have the appellant arrested and charged with the offence he was finally convicted for. PW2, the complainant's father admitted during cross-examination that he knew the appellant lived with a man by the name Titus whom the complainant knew very well. Mathew Keter, PW4, a clinical officer who examined the complainant told the trial court that the complainant was not pregnant though her hymen was broken. PW4 also found no trace of spermatozoa in the complainant's genitalia. After the close of the prosecution's case, the trial Magistrate, pursuant to **Section 36(1)** of the **Sexual Offences Act**, issued an order directing that a D.N.A test be undertaken to establish whether or not the complainant's child was sired by the appellant. The D.N.A results did not connect the appellant with the complainant's child. When called upon to defend himself, the appellant in his unsworn testimony denied committing the offence. He claimed that the charges preferred against him were fabricated. The appellant said the complainant lied on oath that her child was sired by him.

Having given in brief the case which was before the trial court, let me now consider the merits or otherwise of the appeal. I have already stated that the appellant raised two main grounds of appeal. **FIRST**, it is argued that since no *voir dire* examination was done, then the evidence of the complainant could not be relied upon under **Section 19** of the **Oaths and Statutory Declarations Act** and under **Section 124** of the **Evidence Act**. Mr. Mutai learned Senior Prosecuting counsel conceded the appeal on this ground. The record shows that S C, the complainant was aged about 13 years at the time of testifying. She was affirmed before testifying. In other words she was allowed to give unsworn testimony. Before being affirmed, the trial magistrate did not conduct the preliminary examination of the witness. The purpose of conducting *voir dire* examination is basically to test the competency of a witness. In **Mwalewa Kibaya Kalu -VS- R, Cr.Appeal No. 267 of 2008(unreported),** the court of appeal sitting in Mombasa stated in part as follows:

> ***"As a general rule a voir dire examination becomes necessary in a case where a child or children are of tender age, children who may not, prima facie, understand the significance of an oath. It is the duty of the court, after observing the child, to decide whether the child, either understands the meaning of an oath in which case he may be sworn before testifying, but if not, whether she possesses reasonable intelligence to be allowed to testify."***

The failure on the part of the trial Magistrate to follow the procedure required by law before directing the complainant to give evidence on affirmation, is fatal. There is no evidence to show whether the child possessed sufficient intelligence to be allowed to testify. It was important to do so because at the end of the day, her evidence was the only evidence relied upon to convict the appellant. With respect, I agree with submissions of Mr. Mitey, learned advocate for appellant that the complainant's evidence was unreliable and no amount of corroboration could have sanitized her evidence. Mr. Mutai, therefore, rightly conceded the appeal.

The **second** ground relied on appeal is that since there was no age assessment, then the sentence meted out cannot be sustained. It is argued that the birth certificate produced was tailor made to suit this case. It is said the source of the birth certificate was never laid. I have carefully looked at the record and it is clear that the investigating office i.e P.C. John Wambua (P.W.5) told the trial court that he obtained the birth certificate of the complainant. The source of the birth certificate was not given. The evidence of Mathew Keter (P.W.4), a clinical officer based at Kapkatet District Hospital told the trial court that no age assessment was done on the complainant. In fact he said, her parents confirmed her age to be 13 years. On the other hand, PW5 avers that age assessment of the complainant was ascertained. The

evidence of PW5 conflicts with that of PW4. This further taints the credibility of the evidence. If the basis of the birth certificate had been laid I would have had no problem. With great respect, I agree with the arguments of Mr. Mitey that there was doubt on the credibility and reliability of the evidence used to convict and sentence the appellant.

After critically re-evaluating the evidence it is clear in my mind that there are more questions than answers which arose from this appeal. In other words, I have entertained doubts in my mind. The law enjoins me to give the appellant the benefit of those doubts.

The other aspect which became apparent to me when I was re-evaluating the case that was before the trial court is that the appellant faced a charge of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act**. A close examination of the **Sexual Offences Act no. 3 of 2006** will reveal that the provision does not exist. I can only presume that the framers of the charge meant to rely on **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Unfortunately, this court while exercising its appellate jurisdiction does not enjoy the wide discretion a trial court has. The law binds the appellate court to rely on the record of appeal save in peculiar circumstances. The charge was therefore rendered fatally defective. The drafters of charges in criminal cases must be careful and precise when drawing up charges. The competency of the charge therefore is tainted.

In the end, the appeal is allowed. The appellant's conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated, Signed and delivered this 3rd day of December, 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Orina for Mr. Mitey for Appellant

N/A for Director of Public Prosecution

Mr. Korir- court clerk