REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 134 of 2009

PKN…….....…..APPELLANT

-VERSUS-

REPUBLIC…….....……RESPONDENT

(Being an appeal from original conviction and sentence in Criminal case No. 15 of 2009 by Hon. B. Kituyi, Resident Magistrate dated 15th May, 2009)

JUDGMENT

The appellant, PKN, was charged and convicted of the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8 (4)** of the **Sexual Offences Act**, 2006 and was sentenced to 20 years imprisonment.

According to the particulars of the offence it is alleged that on the 15th day of January, 2008 at Naivasha District the appellant unlawfully had carnal knowledge of a child of 15 years.

Aggrieved by both the conviction and sentence the appellant filed an appeal to this court on 4 grounds, namely:

1. that the trial magistrate erred in law and fact by convicting him on uncorroborated evidence;

2. that the trial magistrate erred in law in convicting him on unsatisfactory medical report;

3. that the trial magistrate erred in law and fact by shifting the burden of proof to the appellant; and

4. that the trial magistrate erred both in law and fact by considering extraneous matters.

In arguing the appeal, learned counsel for the appellant submitted that there was no sufficient evidence to justify conviction; that there was no evidence to connect the appellant to the complainant's pregnancy; that pregnancy *per se* cannot be evidence of defilement; and that there was no proof that the appellant is the one who did the act of penetration.

Learned counsel for the respondent in supporting the decision of the trial court submitted that as the appellant stayed with the complainant he had the opportunity to defile her; that the complainant had complained to the appellant's wife about several incidences of defilement; that the court believed the witnesses; that there was evidence of defilement; and that as the court believed the complainant there was no need for corroboration of the complainant's evidence.

I have considered these submissions alongside those of the respondent. This being the first appeal, I have a duty to consider and re-evaluate the evidence adduced before the trial court in order to arrive at an independent conclusion, but warning myself that it's only the trial court that heard and saw the witnesses.

At the lower court a total of four (4) prosecution witnesses testified. P.W.1, the complainant, told the court that the appellant who was her uncle and with whom she lived had severally defiled her; that he (appellant) used to threaten her with death if she told anyone about the defilement; that on or about 2nd January, 2009 a pregnancy test was done on her and that she was found to be four (4) months pregnant; that it was the appellant who had made her pregnant. The matter was reported to the chief who sent his officers to arrest the appellant. P.W.3, Dr. Daniel Wainaina, who examined the complainant after the alleged defilement found her hymen missing. He also found her to be 4 months pregnant. Because of the missing hymen and the pregnancy he concluded that the complainant must have been defiled. P.W.4, MWK, the appellant's wife told the court that they had been living with the complainant for 15 years; that she was the one who took the complainant to hospital where she was found to be pregnant. After she learnt about the pregnancy she did not tell the appellant about it as she feared he could kill her; that she could not tell whether or not the appellant defiled the complainant and that she had never suspected the appellant of being involved in any sexual relationship with the complainant.

According to the complainant, the appellant defiled her on 15th August, 2008 and he repeated the act severally until the month of August, 2008. For all this time she did not tell anybody of the defilement as the appellant had warned her not to. This was the evidence before the trial court upon which the trial court found the offence proved and sentenced the appellant to 20 years imprisonment as explained earlier.

At the outset I wish to point out that although the evidence of the prosecution witnesses is to the effect that the appellant committed the alleged offence severally, as a matter of law, the only offence that the appellant was facing was that in the charge before the court, the particulars of which were specific that the offence was committed on 15th January, 2008.

In my considered view, the evidence of any other acts of defilement, other than the act specified in the charge cannot, lawfully, be the basis of a conviction. Reliance on such other acts of defilement when the charge was not amended to incorporate the particulars in respect thereof and give the appellant the opportunity to plead to the amended charge would, in my view, amount to violation of the appellant's right to fair trial as guaranteed under Article 50 of Constitution of Kenya, 2010.

Under **Article 50 (2) (b)** every accused person has a right to be informed of the charge, with sufficient detail to answer to it. If the prosecution wanted to rely on several instances of defilement, by dint of the provisions of **Article 50 (2) (b**) of the **Constitution of Kenya, 2010**, it was incumbent upon it to include those other instances of defilement in the charge in order to give the appellant notice therefore so as to be able to answer to them and also to prepare his defence accordingly.

Having found that the only incident of defilement that the appellant could be lawfully tried on is the one which allegedly occurred on 15th January, 2008, I have to consider and re-evaluate the evidence before the trial court to ascertain whether it was sufficient to prove the offence of defilement.

The only evidence available regarding the alleged defilement on 15th January, 2012 is the statement of the complainant to the effect that the appellant went into her room at around 11 pm and forcefully had sex with her. Upon occurrence of that defilement, if it did occur, the complainant never told anybody about it until 3rd January, 2012 when after she tested positive to a pregnancy test she broke the news to the area chief and to her aunt. The alleged offence is said to have occurred in the appellant's house, which house the appellant, even at the time of the offence, shared with his wife (P.W.4) and his children. The room in which the offence occurred was occupied by the complainant with one of the appellant's daughters, Wangoi, who the prosecution did not call as a witness. P.W.4 who lived in the same house with the complainant and the appellant, at the time of the alleged offence, had never suspected the appellant of having any affair with the complainant until the complainant broke the news of the alleged defilement.

Even though the complainant was found by the doctor to have been defiled, it cannot reasonably be said that the defilement in respect of which the doctor examined her is that in respect of which the appellant was charged. I say this because the doctor examined the complainant almost a year after the defilement with which the appellant is charged.

Having declared the evidence of the other alleged incidences of defilement inadmissible as proof of the defilement in the charge herein, I find that the only evidence that links the appellant to the alleged offence is the complainant's word. Given that the complainant never complained and/or reported about the alleged defilement to anybody until after one year there is doubt that the appellant infact committed the offence. The benefit of that doubt must be given to the appellant.

For the reasons stated above I find that there was no sufficient evidence to support the charge and the conviction. Consequently, I quash the conviction, set aside the sentence and order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 3rd day of August, 2012.

W. OUKO
JUDGE