REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 3 OF 2017

BETWEEN

KAZUNGU CHARO.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. N. Ruguru SRM

on 10.1.17 in Mombasa CMC S.O No. 1206 of 2012)

JUDGMENT

Introduction.

1. Kazungu Charo was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. He was also charged with offence of alternative count of Indecent Assault contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. After trial, the trial court found the Appellant guilty of the offence of defilement and he was convicted in the main count and sentenced to serve 15 years imprisonment.

3. Being aggrieved by the conviction and sentence, the Appellant filed his Appeal on the following grounds.

> **1. That learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that the charge of defilement as preferred against me by the prosecution was not proved.**
>
> **2. That learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that section 36 (1) of the Sexual Offences Act No. 3 of 2006 was considered hence the prosecution allegation that I defiled the complainant does not link me with this offence.**
>
> **3. That the learned trial magistrate erred in law and fact by not seeing that the case at hand was due to fabrication.**
>
> **4. That the learned trial magistrate erred in law and fact by not considering my reasonable defence statement`.**

SUBMISSION

4. The Appellant filed his written submissions and relied on the same. The Appellant submitted that in sexual offences the proof of evidence is guided by the rule beyond reasonable doubt as required by law. He further submitted that the 15 year sentence was a breach of justice on his part since the evidence was not worth to secure a conviction and sentence of a mandatory nature.

5. The Appellant submitted that since the complainant conceived and eventually gave birth as a result of the defilement, it was necessary for a DNA test to be conducted to ascertain whether the appellant was the biological father of the complainant's child, since there was no other evidence to link the appellant to the offence.

6. The Appellant submitted that even though the P3 form indicted that the age of injuries are 18 weeks and the hymen status was absent, this was not conclusive to link him to the offence. Reliance was placed in the case of Kennedy Sheveka Mwakio-VS Rep. APP. No. 61/15 at Voi High Court on 30th November, 2017

7. The appellant submitted that the trial magistrate erred in law by placing reliance on section 124 of the Evidence Act to secure conviction since the said section falls short of the dictates of Clause 7(1) of the Transitional and Consequential provisions and it does not conform to the new constitution of 2010 as required. He further submitted that since the complainant in his testimony sated that she had siblings with her at the mango tree, the said siblings should have been called by the prosecution to corroborate the complainant's testimony.

8. It was submitted by the Appellant that the complainant was taken to the hospital 6 weeks after the occurrence of the said offence, was unprocedural since it is required by law that a victim of defilement should be attended to within 24 hours of the offence.

9. The appellant submitted that imposition of a minimum mandatory sentence of 15 years was arbitrary and unconstitutional. Reliance was placed in the case of Francis Kariako Muruatetu & Another VS Rep. Petition No. 15 & 16 of 2015.

10. **On sentencing,** the appellant submitted that having been in remand for 2 years pending trial, the trial magistrate ought to have considered this, and failure to do so was a denial of his rights under section 333(2) of the criminal procedure code.

DETERMINATION.

11. This being a first appeal this court as held in the case of **Okeno vs Republic** has an obligation to re-evaluate and re-look at the evidence in the trial court a fresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.

12. The prosecution case was that between December, 2011 and 31st January, 2013, while the complainant was collecting mangoes with her siblings, she was grabbed by the appellant and defiled. That at the time the appellant told the complainant that she will not get pregnant but she got pregnant eventually.

13. That PW 1 testified that she was a standard 5 pupil at a school in U and was living with her mother. That the appellant who was previously known to her did to her an act of making babies, she felt pain and she was unhappy with it. That after the said act the appellant went to his home and PW 1 also went home. However she did not tell anyone as she was afraid she would be beaten. That the complainant stayed for 3 days without going to the toilet and during this time, she thought that she was constipated.

14. That neighbors informed her mother when they saw her swollen stomach and knew that she was pregnant. That PW 2 took her to the hospital where she was informed that she was three months pregnant.PW 2 also reported the matter at the chief's office Utange who referred her to Kiembeni Police station. They went to report the matter at Kiembeni Police Station where the complainant was interviewed by police officers.

15. That the appellant was later arrested in April. PW 1 said that at the police station she was given a P3 form to take to the hospital. She further stated that the appellant lives within the area but not far from her home and is the one who impregnated her. PW 1 gave birth to a baby boy.

16. The complainant during examination in chief testified that she was 17 years in January, 2012. However during cross-examination, she stated that her age was assessed as 16 years.

17. PW 2 JK testified that the complainant was epileptic and she is also mentally unstable. She also stated that the complainant was in class 5 but she stopped going to school when she gave birth. She also confirmed that she personally knew the appellant before the time of the offence since they are neighbors and that the appellant knew that the complainant was sickly.

18. During cross-examination, PW 2 stated that she noticed the complainant's big breasts and that her body was growing and on inquiry, the complainant told her that the appellant had sex with her. She also testified that the complainant gave birth on 9th September, 2012 and that she has no information whether someone else defiled the complainant.

19. PW 3 KKK testified that he is the complainant's brother and that the complainant is a school going child. That on 18th March, 2012, he received a report from PW 2 that the complainant was pregnant. That they went to the sub-chief's office where they were advised to go report the matter at Kiembeni Police Station. That they later went to Coast General Hospital for age assessment and examination and the complainant was examined. He further stated that the P3 form was filled by a doctor at the Coast General Hospital.

20. PW 3 testified that on interviewing the complainant, she told him that the pregnancy belonged to the appellant. The first time the appellant had sex with her was in December, 2011, she had gone to collect firewood and the appellant forced himself on her. She further told her that the appellant did it two times in December, and that the appellant defiled her again in January, 2012.

21. PW 3 stated that the complainant is 16 years and she is epileptic and mentally retarded. P3 form-Plaintiff Exhibit 1, PRC form-Plaintiff exhibit 3, CT scan & report- Plaintiff Exhibit 4 and clinical card-Plaintiff exhibit 5 were identified and produced. PW 4 Dr. L. Ngone a medical doctor of Coast General Hospital testified that he attended to the Complainant at Coast General Hospital. He produced the P3 form, PRC form, CT scan & report and clinical card for the Complainant as ExP 1, 3, 4 & 5.

22. Dr. L. Ngone testified that the Complainant's hymen was found not to be intact. He also testified that an obstetric scan was done on 23rd March, 2012 and it revealed that she was 17 weeks pregnant. It was his testimony that the scan confirmed that the complainant had been

defiled and conceived which coincided with the dates of the alleged defilement. PW 4 confirmed that the complainant was epileptic and that epilepsy also causes retardation after repeated convulsions. He stated that the complainant's age was assesses at 17 years.

23. PW5 PC Jenson Langat the investigating officer testified that the complainant reported the matter between December, 2011 and January, 2012. He stated that he accompanied the complainant for the filling of the P3 form and recorded her statement and that of her witnesses after the P3 form had been filled.

24. At the close of the prosecution's case, the Appelant was placed on defence and he opted to give sworn statement and to call two witness. The Appellant testified that he knows the complainant since she is his grandfather's daughter, he stated that the complainant's home is 500m from his home. He stated that he has known the complainant since she was born and that she is epileptic.

25. It was the appellant's testimony that between 1st December 2011 and 31st January, 2012, he did not meet the complainant. That there family had a family dispute with him. He stated that the complainant's family encroached onto his land and when he was arrested, his plot was sold and a school built. The said issue was dealt with by the area chief but there is bad blood between his family and the complainant's family.

26. He stated that during the alleged period, he had a leg injury and he could not even walk. He stated that the complainant gave birth when he was in custody and no DNA was done on the child. The appellant stated that he did not defile the complainant instead she was defiled by Hinzano who is now deceased. He states that the complainant was told to frame him due to the land dispute between his family and the complainant's family.

27. The appellant had indicated that he was going to call two witness in his defence but on 6th December, 2016, the trial magistrate closed the Appellant's case on grounds that the appellant had a last adjournment on 29th August, 2016 and it was over a year since the appellant gave his defence, he has never availed any witnesses and even if he is given more time, he will not avail them.

28. The burden of proof in criminal cases is beyond reasonable doubt and not on a balance of probability as is the case in civil proceedings. As to what constitutes the burden of proof beyond reasonable doubt the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

29. In our criminal justice system, an accused person has no duty to prove anything on allegations that are criminal in nature and brought against him or her by the state. The burden of proof lies solely on the prosecution except in instances where there are admissions by the accused person.

30. From the record it is not in dispute that at the time of the offence, the complainant was below the age of 18 years, it is also not in dispute that there was actual penetration since PW 4 testified that on examining the complainant, and observed that her hymen was absent. The issue that is now left for this court to determine is whether the prosecution proved that the appellant was the perpetrator who committed the said offence.

31. The appellant's family and the complainant's family were well known to each other. This is evident from the testimony of PW 2, PW 3 and the appellant. The complainant testified that the appellant grabbed her while she was picking mangoes and defiled her. She however did not scream or even state any attempt to alert the neighbors despite the fact that she testified that the offence took place in an open field.

32. The trial magistrate in his judgment misdirected himself first in stating that since the complainant was 16 years old at the time of the offence hence her cognition level was well developed. This is because all the prosecution witnesses including PW 4 who was a doctor and the appellant testified that the complainant was not only epileptic but also mentally retarded. PW 2 the complainant's mother testified that by virtue of the complainant being mentally retarded she sometimes wandered off alone even at night. She further testified that due to the fact that the complainant is mentally retarded, she does not even care for her child

33. I therefore find that by virtue of the complainant being mentally retarded, her evidence as to identification of the perpetrator should have been corroborated by independent evidence.

34. It is also not in dispute that the complainant conceived after she was defiled. PW 4 in his testimony stated that the scan confirmed that the complainant had been defiled and conceived which coincided with the dates of the alleged defilement. I also note that in the appellant's testimony, he stated that there was bad blood between his family and the complainant's family fact which was not considered by the trial court at all.

35. It is so unfortunate that such a heinous crime was committed against a minor and a mentally retarded one such as the complainant. It is also unfortunate that there was no independent eye witness to corroborate the evidence of the complainant bearing in mind that she is mentally retarded.

36. It is noteworthy that by the time the prosecution closed its case in the trial court, the complainant had already given birth to a baby boy. PW 2 testified that the complainant gave birth on 9th September, 2012, while the prosecution closed its case on 6th February, 2015.

37. Section 36(1) of the Sexual Offences Act No. 3 of 2006 provides that:

> **"Evidence of medical, forensic and scientific nature**
>
> **(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence"**

38. I find that the trial magistrate misdirected himself by failing to consider the mental state of the complainant despite the presence of conclusive evidence that she was retarded.

39. In view of the foregoing and notwithstanding the fact that the complainant was 16 years at the time of the offence, I find that the evidence of the complainant ought to have been corroborated by an independent eye witness. In the absence of one, I am of the view that a DNA test was indeed of utmost importance to be carried out between the appellant and the complainant's child so as to link the appellant to the offence, since from the record, PW 2 learnt that the complainant had been defiled after they realized she was pregnant.

40. The appellant in his defence stated that at the time of the alleged offence he could not walk since he had injured his leg. The burden of proof in the case before us was for the prosecution to prove that the appellant indeed committed the offence he is being charged with. Requiring the appellant to produce medical documents and/or treatment notes to confirm that he indeed had injured his leg at the time the offence occurred is shifting the burden of proof to the appellant and requiring him to prove he is innocent. This is against the law.

41. I find that notwithstanding the fact that the appellant testified that he witnessed one Hinzano defiling the complainant and did not report it, the prosecution failed to prove that the appellant was the perpetrator and therefore failed to discharge its duty of proving its case beyond reasonable doubt.

42. The case before us is criminal in nature and as such the prosecution ought to have proven its case beyond reasonable doubt and not on a balance of probability as was the case before the trial court.

43. The Appeal therefore succeeds, the conviction is quashed, and sentence set aside and the Appellant set at liberty forthwith unless lawfully detained.

It is so ordered.

Dated, Signed and Delivered in open court this 5th day of February, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE