REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 27 OF 2019

(From original Conviction and Sentence in Maralal PM Criminal Case No 44 of 2018 – R K Koech, PM)

MANDELLAH LENKOKWAL..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

J U D G M E N T

1. The Appellant herein, **MANDELLAH LENKOKWAL**, was convicted after trial of ***defilement of a child*** contrary to **section 8(1) & (3)** of the ***Sexual Offences Act, No 3 of 2006***. It was alleged in the particulars of the offence that on 10/06/2017 at *[Particulars Withheld]* area within *Wamba* in *Samburu East Sub-County* of *Samburu County*, he intentionally and unlawfully caused his penis to penetrate the vagina of one **RNL**, a child aged 16 years.

2. On 08/07/2019 the Appellant was sentenced to twenty (20) years imprisonment. He has appealed against both conviction and sentence upon various grounds, including that a vital DNA report was not produced in evidence; that the trial court shifted the burden of proof to the Appellant; and that the charge was not proved beyond reasonable doubt.

3. The Appellant was represented by counsel in this appeal; he was not defended at his trial.

4. I have considered the submissions of the learned counsels appearing. Learned prosecution counsel does not support the conviction.

5. I have also read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I did not see and hear the witnesses testify, and I have given due allowance for that fact.

6. As has already been seen, the alleged defilement occurred on 10/06/2017. The Appellant was arrested on 05/01/2018 and subsequently charged. This was nearly six months after the alleged offence was committed. The Appellant was arrested and charged only after the complainant was found to be pregnant. Her child was born towards the end of March 2018, about 9 months after the alleged defilement.

7. Complaint of the alleged defilement having been made about six (6) months after the offence was committed, obviously there was not going to be any physical or medical evidence that would assist in proving one of the main ingredients of the offence, ***penetration***. That is why DNA evidence would have been crucial in this case.

8. Indeed DNA samples were taken from the complainant, the child and the Appellant and submitted to the ***Government Analyst*** for examination. However, no DNA report was ever produced in evidence despite some three (3) adjournments being granted by the trial court for that purpose! No reason at all was offered by the prosecution for this state of affairs.

9. Needless to say, a DNA report, if it were produced, would either have condemned the Appellant or exonerated him. Without any reason offered as to why such report was not produced in evidence, it must be assumed that the report would have exonerated the Appellant. This created a huge doubt regarding his guilt, which doubt should have been resolved in his favour.

10. Surprisingly, the trial court made only a casual reference to this lacuna in the prosecution case. It stated -

> ***"...Even though DNA samples were taken the prosecution closed its case before the results could be received."***

The trial court then immediately shifted the burden of proof to the Appellant by stating –

"…the accused has not challenged the prosecution evidence by adducing evidence in his defence."

11. It is trite law that in criminal trials the burden of proof never shifts to the accused, unless a statute provides so (usually in certain offences of strict liability). An accused person is not obliged to say anything at his trial, let alone adduce evidence in his own defence. It is always the burden of the prosecution to prove the charge against the accused to the required standard – ***proof beyond reasonable doubt***.

12. For the two reasons given above, the Appellant's conviction is not safe at all and cannot be allowed to stand. Learned prosecution counsel properly conceded the appeal.

13. In the result, this appeal is allowed in its entirety. The Appellant's conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 25TH DAY OF JANUARY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 4TH DAY OF FEBRUARY 2021