



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 40 OF 2019

PAUL MWENJE KOMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 7th November, 2019 of Hon. D. Sure, SRM, in Engineer CMCR No. 42 of 2017)

JUDGMENT

1. The appellant, Paul Mwenje Komu, was convicted in the lower court with defilement contrary to **Section 8 (1) (4)** of the **Sexual Offences Act** No. 3 of 2006. The particulars were that in the month of March, 2017 at [particulars withheld] Village in Kinangop, (he) intentionally caused his penis to penetrate the vagina of LNK a child aged 16 years. He was sentenced to 15 years imprisonment.

2. Aggrieved, the appellant filed petition of appeal which he later amended through counsel. The amended appeal raises seventeen grounds condensed as follows:

- i. Grounds 1 to 3 summarized as reliance on extraneous statements to convict the appellant.*
- ii. Grounds 4 to 6 summarized as the child born being as a result of defilement.*
- iii. Ground 7 learned trial magistrate failed to acknowledge bias between the families of the appellant and the victim.*
- iv. Ground 8 and 14 on the reliance by the trial court that a pregnancy was a result of defilement.*
- v. Ground 9 No penetration proved.*
- vi. Ground 10 Age of complainant not proved.*
- vii. Ground 12. Learned trial magistrate did not account that the complainant had had another child thus age was in serious question.*
- viii. Ground 15 no-compliance of regulation 6 of the Sexual offences (Medical treatment) regulations 2012.*
- ix. Ground 16 that the trial court failed to note that the gestation period of a human being is 9 months.*
- x. Ground 17 learned trial magistrate failed to acknowledge current trends in sentencing of the appellant which was harsh considering that the sentencing section was not mandatory.*

3. In a charge of defilement under **Section 8 (1) (4)** of the **Sexual Offences Act**, the prosecution's duty is to prove the element of the charge and offences, namely:

- a) Penetration of the complainant.
- b) Identity of the person responsible for penetration.

c) The age of the complainant.

4. The evidence on record is briefly as follows: the complainant (PW1) and the appellant are cousins. According to PW1 sometime in March 2017 she was going to the shops when she met the appellant. He called her and when she approached him, he pulled her into his house and took her to his bed. He then removed her underwear and warned her not to tell anyone or else he would beat her. He spread her legs while she lay on her back, took his penis and inserted it into her vagina. He again threatened her to a severe beating if she told anyone.

5. PW1 said she was seventeen years old at the time of the incident. After she went home she told no one. Later on, her legs started swelling and she knew she was pregnant as she missed her monthly periods. She then told her mother what had happened and they reported at Kinangop Police Station. In cross-examination PW1 confirmed that the child was born on 28th October, 2017, and denied having any other relationships with other men.

6. PW2, TK stated that she was complainant's mother. She said the complainant was born on 15th October, 2000 and had the Birth Certificate (MFI 2) which was later produced as P. Exhibit 2 by the Investigating Officer PW4. It appears that in March 2007, PW1 was aged 16 ½ years.

7. PW2 said she noted her daughter was unwell, had put on a lot of weight and was vomiting frequently. She asked her what the matter was, and PW1 told her that in February, 2017 she had an encounter with her cousin the appellant but was afraid to report it. PW2 decided to report the matter to the police. They were sent to Engineer Hospital where she was examined and her pregnancy confirmed. In cross-examination, she said they reported the matter after she realised the complainant was pregnant.

8. PW3, Dr. Julius Ntwiga was in charge of Engineer Hospital and examined the complainant. He produced the P3 form which shows that the complainant reported to the police on 4th September, 2017. The history given to him was that the complaint had been defiled by a person known to her in 2017. He examined the complainant and found an abdominal mass showing her to be 32 weeks pregnant; he saw an old tear on her labia minora; and wart like lesions around her vagina opening. The hymen was not visualized. An ultra sound confirmed a live foetus of 33 weeks. He recommended DNA test for profiling. He signed the P3 on 4th September, 2017 and produced it as P. Exhibit 1.

9. PW4 the Investigating Officer PC Leah Kiiru of Kinangop Police Station stated that she was at the station on 4th September, 2017. The complainant and her mother came and made a report of a defilement which took place in March 2017. She referred them to hospital, and later gave them a P3 Form which was filled. She recorded witness statements, and summoned the appellant, and arrested him. The complainant was 16 years old and pregnant. She also produced the complainant's Birth Certificate as P. Exhibit 2.

10. In cross-examination she said that the complainant was accompanied by both her father and mother, and was six months pregnant.

11. The accused gave an unsworn statement in which he denied defiling the complainant or that she was pregnant with his child.

12. I now turn to the elements of the offence that must be proved.

Age of the Complainant

13. This is not seriously in dispute. The Birth Certificate was produced by PW4 as P. Exhibit 2, it shows that complainant was born on 15th October, 2000 and was 16 ½ years old at the material time.

Penetration (and the issue of paternity of the child)

14. "Penetration" is defined in Section 2 of the Sexual Offences Act as follows:

"Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

15. The evidence of PW1, unless it is false, clearly discloses that she was penetrated. Her testimony, denied by the appellant, was that he called as she headed for the shops; that he pulled her into his bedroom, removed her clothes, and had sex with her. This is how she put it in her own words:

".....he slept on top of me. He then spread my legs apart while I was lying on my back, he then took his penis and he put it inside my vagina."

She said she did not tell anyone because he threatened to beat her. The beans spilt after she realized she was pregnant when she missed her periods.

16. In cross-examination she said she delivered the child herself of the pregnancy on 28th October, 2017. There is no doubt of her being penetrated. That date has, however, been seized upon by the Appellant to show he could not have had sex with her in March 2017, because human gestation ordinarily takes nine (9) months. In this case the birth occurred merely seven (7) months after the alleged rape.

17. That the complainant was penetrated was further confirmed by the medical examination conducted by PW3 Dr. Silas Ntwiga. He found she had an old tear in her labia minora and was pregnant. There can be no possibility, therefore, unless through virgin conception, that the complainant was not penetrated.

18. The only question that arises is whether there was penetration by the appellant or by someone else. The appellant argued that the complainant was not a virgin and had previously given birth. He argues at length concerning why DNA results were not given, and expresses serious doubt as to the paternity of the child; he states that there is no conclusive evidence of penetration by him since the old tear in the labia, genital wart and unvisualised hymen could be expected since the complainant had previously had a child.

19. The state argues, correctly in my view, that the issue for determination is defilement and not paternity; that it is obvious that just because DNA evidence was not adduced to prove paternity, does not mean that defilement did not occur. The DPP relied on the case of **Williamson Sowa Mbwanga v Republic [2016] eKLR** where the Court of Appeal held as follows with respect to DNA in defilement cases:

“As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM’s child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM’s child, which is a different question from whether the appellant had defiled PM.” (Emphasis added)

20. I have carefully perused the evidence recorded in the proceedings. The first reference I see of evidence concerning PW1 having a child is where she says that she delivered the child in October, to be precise, on 28th October, 2017. She denied other sexual encounters saying in cross-examination:

“The child was born on 28th October, 2017. It is not true that I had other relationships with other men.”

21. The other evidence regarding the complainant’s child or children was given by DW2 Susan Mwangi and DW3 Joseph Mwangi Komu. DW2 testified that the complainant had an earlier child, and that it was the second child that the accused was being alleged to have sired. DW2 thought it unlikely that the complainant’s child belonged to the accused, who is her son. DW3 JK is the accused’s father. He said that the complainant had earlier given birth and it was not clear whether the accused was being charged for the first or second child.

22. It must be said here as an aside, and purely for information and this is not in any way determinative of the issues herein, that there are numerous widely published cases of children born prematurely as early as six months. So the conflation of paternity with defilement is partly understandable.

23. The complainant thus caused confusion by saying she had not had any relationships with other men which has misled the appellant to conflate the issue of paternity with that of defilement.

24. The accused also argued that he was framed and implicated by the complainant when she became pregnant on account of the sour relationship they had arising from land disputes he had with the complainant’s parents. Whilst this is an interesting and enticing argument, it rings hollow in light of the fact that the issue was not raised by the accused when he cross-examined either PW1 or PW2, both from the family he accused of framing him. I therefore found the appellant’s assertion on that basis as not credible. The issue of the family dispute is not made any more credible or relevant simply because the appellant’s father and mother, DW2 and DW1, also repeated in their evidence.

25. I think enough has been said about the defilement. The evidence of the complainant was plain and clear. The trial magistrate believed it and found it to be credible. She had a first-hand opportunity to hear the evidence and check the demeanour of the witnesses.

26. Nothing has been placed before me that shows that the trial court’s determination was unfounded or not based on evidence on record; or that it was mistaken or that she misunderstood the evidence. Accordingly, I see no basis to interfere with the conviction for defilement; and on that ground the appeal fails.

27. I must however, make it very clear that though I have agreed with the trial court that there was penetration and thus defilement by the appellant, I make no finding as to the paternity of the child or children of the complainant. Indeed, if it is a fact that she has two children, and there is no evidential reason to doubt it, it is highly likely that she has been having sexual relations with another man or men whose children she has sired. Thus no finding is made herein on paternity of the complainant’s child or children as this was not an issue for determination in the criminal case.

Sentencing

28. The appellant has urged that the sentence of fifteen years imprisonment by the lower court was harsh and inappropriate. The appellant has relied on the principles of sentencing in respect of mandatory sentences as established by the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR**.

29. On this issue, the DPP conceded that sentencing was improper and stated that the state has no objection to resentencing.

30. I have perused the proceedings and note as follows in respect of post-conviction proceedings:

“State Counsel : No records. Accused was an adult at the time of the offence.

Mitigation : My parents rely on me. I pray for non-custodial sentence.

Sentence : Mitigation record duly noted. My hands are tied with Section 8 (3) of the Sexual Offences Act.

Accused is sentenced to 15 years in jail.”

31. The trial court fell into the error identified under the **Muruatetu** principles of treating a mandatory minimum sentence as disentitling her to exercise her judicial discretion in sentencing. As a result she held that she was bound to award the mandatory sentence and no other. Judicial discretion cannot be fettered by statute if it results in an unconstitutional act, or to prejudice or violation of the fundamental rights of an accused.

32. Accordingly, the sentence meted was improper and the appeal succeeds on that issue.

Disposition

33. Ultimately, and in conclusion, this court finds and holds as follows:

- a) The conviction of the appellant is hereby upheld as the appeal thereon fails.
- b) The sentence of the lower court is hereby found to have been unlawful and is hereby set aside.
- c) The appellant shall be sentenced on a date to be fixed in court after a full hearing during which mitigation shall be considered.

Administrative directions

34. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

35. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

36. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 3RD DAY OF MAY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Gichuki for the Appellant
3. Paul Mwenje Komu – Appellant present in Naivasha Maximum Prison
4. Court Assistant – Quinter Ogutu