REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 77 OF 2019

RAPHAEL WAMBUA MULWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon M. Opanga- SRM dated 2nd September, 2019 in Kangundo SO Case No. 10 of 2019)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

RAPHAEL WAMBUA MULWA.....ACCUSED

JUDGEMENT

1. The appellant, **Raphael Wambua Mulwa**, was charged in the **Kangundo SO Case No. 10 of 2019** with the offence of defilement contrary to 8(1) as read with section 8(3) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that between 1st September, 2018 and 30th September, 2018 in Kangundo Sub County within Machakos County, he intentionally caused his genital organ, namely penis to penetrate the genital organ namely the vagina of LMN, a child aged 15 years.

2. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that during the same period at the same place he intentionally caused his genital organ, namely penis to come into contact with the genital organ namely the vagina of LMN, a child aged 15 years.

3. In support of its case the prosecution called 4 witnesses. According to PW1, the complainant, she was aged 15 years having been born on 27th December, 2004 based on her birth certificate which she identified. Though she was not related to the appellant, she knew him since their home was a distance from hers.

4. On 1st September, 2018, PW1 was at home with her younger brother, who was playing with his cousin while PW1 was washing plates. Their mother had gone to church. After taking the plates back into the house, PW1 the passed by running towards the Mpesa shop and informed her that he was going to withdraw some money. The appellant however turned back and told PW1 *"nipe"* and when PW1 asked him what he was demanding, the appellant got hold of her, pushed her into the house, took off her skirt and panty and pushed her onto the sofa. On that day, PW1 testified, the appellant wore a black trouser and the shirt he was wearing in court during the hearing. According to PW1, the appellant defiled her twice but no one went to her rescue despite her raising an alarm. After the incident, the appellant left after threatening to harm her if she disclosed what had taken place. Though her mother returned at 6.00pm, PW1 who continued with her chores did not inform her of what had transpired.

5. Towards the ends of September, PW1 became ill as she was vomiting a lot whenever she took food and upon being taken to the Hospital by her mother, she was examined and was found to be pregnant. It was after this that she disclosed to her mother who was responsible. When the appellant was confronted, he admitted and offered to marry PW1 but later denied and the matter was reported to the police. A p3 form was filled in and she identified the p3 form, lab request form and treatment notes.

6. According to PW1 prior to the incident, no one had defiled her.

7. In cross-examination, PW1 denied that she used to go to the appellant's home whenever her mother chased her from home.

8. PW2, **ANK**, PW1's mother testified that in October, 2018, PW1 returned from school complaining that she was feeling unwell and kept vomiting all the time. Upon being asked what was wrong, she said that she was having abdominal pains. Upon examining her breasts, PW2 formed the view that's he could be pregnant and in December, 2018 when she took PW1 to the health centre, she was examined and found to be one month and two weeks pregnant. It was then that PW1 informed her of the incident. Upon confronting the appellant, she denied the allegation and said that he was ready to take the oath. However, when confronted by the appellant's brother and the village elders, the appellant stated that PW1 was an active good girl and proposed to marry her after she gave birth and requested to be given time till he was paid.

9. PW3, **Dennis Otwal Olang**, a clinical officer at Kangundo Level 4 Hospital, examined PW1 on 12th February, 2019 following a history of defilement. Pregnancy, HIV, Urinalysis and VDRL tests were done and while the other tests were negative, there was a bacterial infection in her urine. She also had no discharge and her genitalia was normal. PW1 gave a history of defilement though she could not recall the date. At the time of the examination, she was pregnant. The witness exhibited the P3 form, lab request form and treatment notes.

10. PW4, **Cpl Modista Kashuru**, the investigating officer was assigned the matter on 12th February, 2019. After recording the statements of the witnesses, she left with the OCS and two officers and the assistant chief to Maiyuni where the appellant was arrested. According to her investigations PW1 was due to deliver in July 2019 and was 15 years old. She exhibited PW1's birth certificate. She requested that upon the child being born, DNA test ought to be taken to confirm paternity.

11. Upon being placed on his defence, the appellant gave sworn evidence in which he denied that he committed the offence. According to him, he was called by members of *nyumba kumi* who told him that the girl had been taken to hospital claiming that the pregnancy was his. According to him, had he been a rapist, he would have fallen ill by then.

12. In cross-examination, he admitted that he knew PW1's home and that he usually saw her. In his view, there was no grudge between him and PW1 or PSW2. It was his evidence that he requested for a DNA test to be taken to establish f he defiled PW1 or not.

13. In her judgement, the learned trial magistrate found that the pregnancy of PW1 was proof that she had sexual intercourse with a man. The Court found that in the absence of bad blood between the appellant and PW1, there was no reason why PW1 would make untrue allegations against the appellant. She therefore found the evidence of PW1 believable. The learned trial magistrate was persuaded by the fact that PW1 was only15 years old and still bore the innocence of a young person free from malice or ill-will. Though in his defence, the appellant requested for DNA to be done, the court noted that he closed his defence before the child was born. It was however found that the fact of rape or defilement is not proved by way of DNA test but by evidence. The court therefore found that there was penetration and that the appellant was positively identified to have defiled PW1 who was 15 years old.

14. In the result, the prosecution was found to have proved its case and the appellant was convicted accordingly and sentenced to10 years imprisonment.

Determination

15. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

16. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

17. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

18. As regards the age of the complainant, it is not in doubt that PW1 was 15years at the time of the incident. This was sufficiently proved by the birth certificate which was exhibited. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it** was observed as follows:

"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

19. As regards the identity of the Appellant as the assailant, in this case, it is clear that the appellant was well known to both PW1 and PW2. The appellant himself admitted this fact. Accordingly, there was no mistaken identity.

20. The next issue is whether the Complainant was penetrated and if so who penetrated her. The fact of pregnancy of PW1 is clear evidence that there was penetration of PW1's genital organ with the genital organ of a male person.

21. The next question however is whether it was in fact the appellant who defiled PW1. The offence is alleged to have taken place on 1st September, 2018. According to PW4, PW1 was due for delivery in July, 2019. That would have been about 10 months from the date of the alleged defilement. It would seem that by the time the appellant testified on 18th July, 2019, PW1 had not given birth since the learned trial magistrate noted so in her judgement.

22. The learned trial magistrate seemed to have been convinced by the fact that there was no grudge between the appellant and PW1 or PW2 in her finding that it was the appellant who defiled PW1. It is clear that apart from the evidence of PW1 there was no other independent evidence linking the appellant to the offence. Lack of grudge, per se, cannot be the basis of finding an accused person guilty. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"…*The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful…There are spiteful people about*." [Emphasis added].

23. While it is true that DNA results is not a mandatory requirement for proof of commission of sexual offence, in cases where the evidence on record is insufficient it may well be prudent to direct that DNA examination be undertaken. In this case, save for the fact of pregnancy, PW3 who examined PW1 admitted that there was not much in terms of evidence available by the time he carried out the examination. The appellant suggested that DNA test be taken but it seems that the prosecution did not see the sense in that request.

24. If I understand the learned trial magistrate correctly, the proposal by the appellant that DNA test be done was not possible because the appellant closed his case before PW1 gave birth. It must be noted that the appellant was just being magnanimous to the prosecution by making such a proposal. The prosecution ought to have sought from court indulgence so as to have that procedure undertaken since the due date for delivery by PW1 was not far away. It was not upon the appellant to delay his case in order to facilitate the production of evidence which could either exonerate him or convict him.

25. As I have said in the absence of the independent evidence which could have been availed had the prosecution diligently prosecuted the case, but which was unavailable by the time the prosecution closed its case, the evidence availed, considering the time lapse between the act and the examination was barely sufficient to prove the ingredients of the offence. In addition, the conduct of the appellant in readily acceding to undergo the traditional oath and to subject himself to DNA test was uncharacteristic of a person who was seeking to obstruct justice. In **David Merita Gichuhi vs. Republic Nairobi Criminal Appeal No. 158 of 2003 (Tunoi, Githinji, JJA and Onyango Otieno, Ag.JA),** the Court of Appeal noted that:

"It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18th April, 1999 when Bakari met him…Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18th April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to

console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction."

26. Upon considering the evidence placed before the trial court and the submissions made by the parties in this case, I find the conviction of the appellant unsafe. Accordingly, I allow the appeal, set aside his conviction and direct that he be set at liberty forthwith unless otherwise lawfully held.

27. It is so ordered.

Read, signed and delivered virtually in open Court at Machakos this 3rd day of June, 2021.

G V ODUNGA

JUDGE

In the presence of:

The Appellant

Mr Ngetich for the Respondent

CA Geoffrey