**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL 25 OF 2019**

***(CORAM: F.M. GIKONYO J.)***

*(From the conviction and sentence of Hon. A.N. Sisenda Resident Magistrate in Narok SOA No. 59 of 2017 on 6th June 2019)*

**SHADRACK KIPKOECH.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The Appellant was convicted of the charge of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that in diverse dates between April and September 2017 in Narok South Sub county within Narok county unlawfully and intentionally caused his penis to penetrate the vagina of JC a child aged 13 years. He was charged in the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that in diverse dates between April and September 2017 in Narok North Sub County within Narok County, unlawfully and intentionally committed an indecent act by rubbing his penis at the vagina of JC a child aged 13 years. The Appellant was found guilty and sentenced to serve 20 years' imprisonment.

2. The Appellant being aggrieved by the said decision and has lodged this appeal in which he raised eight (8) grounds, namely;

> ***i. That the learned trial magistrate erred in matters of law and fact by convicting and sentencing the appellant a harsh and excessive sentence on substantial prosecution side.***
>
> ***ii. That the learned trial magistrate erred in points of law and fact by holding that, the case for the prosecution was proved against the appellant whereas penile penetration was not adequately proved.***
>
> ***iii. That the learned trial magistrate erred in points of law and fact by holding that, the case for the prosecution was proved against the appellant whereas the age of the complainant was not properly ascertained to justify the charges or the sentence passed.***
>
> ***iv. That the learned trial magistrate erred in points of law and fact by holding that, the medical evidence tendered was prove of defilement, while on the face of evidence tendered did not prove that the complainant was defiled.***
>
> ***v. That the learned trial magistrate erred in points of law and fact by failing to objectively analyze the appellant's defence of alibi and erred by not giving reasons why his evidence was either not admissible; this was a great error in law and the appellant was prejudiced.***
>
> ***vi. That he prays that this court do review his sentence in light of section 216 and 329 criminal procedure code as read with Francis Muruatetu and another V Rep Petition 15 of 2015.***

**Appellant's submission.**

3. The Appellant in his submission sought leave of the court to amend his grounds of appeal in accordance with section 350 (2) (f) of the Criminal Procedure Code as follows;

***i. That the learned trial magistrate erred in law and fact when convicting the Appellant without finding that the prosecution side failed in summoning the crucial vital witness who was to be recalled to testify contrary to Section 150 of the CPC.***

***ii. That further the learned trial magistrate erred in points of law and facts when convicting the Appellant in this matter while being so much impressed with his mode of arrest without him finding it was a victim of the circumstances in this case.***

***iii. That the learned trial magistrate erred in law and fact by holding that the medical evidence tendered was prove of defilement while on the face of the evidence tendered did not prove that the complainant was defiled.***

***iv. That the learned trial magistrate erred in law and fact by holding that the case for prosecution was prove against the Appellant whereas the age of the complaint was not properly ascertained to justify the charges or the sentence passed.***

***v. That the learned trial magistrate erred in points of law and fact by failing to objectively analyze the Appellant's defence of ALIBI and erred by not giving reasons why his defense was either not admissible or admissible, this was a great error in the law and the Appellant was prejudiced.***

4. That the prosecution has a duty to recall the prosecution witness as the court has ordered. The Appellant was not granted the said opportunity to cross examine despite the order being issued.

5. That the people who saw the Appellant in 2015 were not part of the prosecution witness.

6. That according to Section 124 of the Sexual Offense Act the complainant was truthful that nothing had happened during the said relationship.

7. The mode of arrest of the Appellant is doubtful. PW2 and PW7 contradicted themselves. That the mode of arrest was not conducted according to police act and the Appellant was not given a fair trial according to Article 50(2) of the Kenyan Constitution.

**8.** The Complainant claimed to be 15 years. Her mother claimed her daughter was born in 2004. PW4 the clinical officer stated the complainant was 13 years. The Appellant submitted that the age of the complainant was not conclusively proved as per the law. He alleged also that penetration was not proved. He cited the case of ***Walter Nyangau Ombati Vs Republic [2020], Macharia Vs Republic [1975] EA193.***

**9.** That the trial court did not take into account the decision in ***Francis Muruatetu And Another Vs Republic[2017],Geoffrey Mutai Vs Republic [2018]*** and ***Calvin Kariuki Vs Republic [2020]eKLR.***

**10.** That the Appellant gave an unsworn statement and called no witnesses in his defense. His defence was an alibi and the trial magistrate rejected his defense without giving cogent reasons. He urged the court to look at the case of ***Saitoti Ole Nkongoini Vs R [2018] Eklr and Charles Makori Misati Vs Republic [2020] eKLR.***

11. That the prosecution failed to prove its case beyond reasonable doubt. He urged the court to be guided by the decision in ***Kinyanjui Vs Republic [2004] eKLR .***

12. In the end the Appellant prayed that the appeal be allowed, conviction quashed, sentence set aside and the Appellant be set at liberty.

**Respondent's case**

13. **Ms Koina**, learned prosecution counsel submitted that the complainant (PW1) became friends with the Appellant in 2015. They continued with their friendship until 2017 when the complainant met with the Appellant and had unprotected sex with him in his rental house in Kirobon. Subsequently in August 2017 they had unprotected sex with the Appellant which resulted in the pregnancy. The complainant informed the Appellant of the pregnancy who in turn told her not to worry.

14. PW4 Simon Kipida the clinical officer who examined the complainant testified that upon examination, the complainant was found to be pregnant. Her hymen was also broken. P3 form treatment notes and post rape care forms were all tendered into evidence. PW4 corroborated the complainant's testimony in proving penetration. Therefore, the prosecution proved the fact of penetration.

15. The complainant testified that she was born in 2004. She tendered her birth certificate which indicated her date of birth to be 23rd April 2004. The complainant's testimony was corroborated by PW2, her mother who confirmed that indeed the complainant was born on 23rd April 2004. The birth certificate was produced into evidence as by PW7 the investigating officer. Therefore, the age of the complainant was proved to be 13 years hence a child below the age of 18 years.

16. The Appellant was a person known to the complainant. The complainant testified that she became friends with the Appellant in 2015 but nothing happened between them until the school holiday of April 2017 when the Appellant sexually abused the complainant for the first time and subsequently in August 2017 that resulted in a pregnancy. The complainant testified that in December 2017 the Appellant told her to leave home and go to his place. The complainant ran away from home to the Appellant's house where the Appellant was arrested. The complainant's testimony was corroborated by PW2 and PW3. PW2 stated that in December 2017 she left home for a chama meeting. On coming back, she found the complainant missing. She later traced the complainant in the Appellant's rented house at Kirobon. The Appellant surrendered to the police and was arrested.

17. PW3 Edwin Cheruiyot testified that he was the Appellant's landlord. He confirmed that on 9th December 2017 he saw the complainant in the Appellant's house and assisted PW2 trace her in the Appellant's house. Therefore, the prosecution demonstrated without an iota of doubt that the Appellant was the perpetrator of the offence herein.

18. Upon the Appellant being put on his defence, he chose to give unsworn testimony. He did not give any evidence in account of the months of April, 2017 and August 2017 when the offence was committed. He claimed that on 4th December 2017 he was informed by his village elder that Joyce (PW2) had reported him for quarrelling with her. That on 6th December 2017 he was called by CPL Maritim to the police station and he obliged. At the station he was charged with threatening Joyce. He was locked up in the police cells up to 11th December 2017 when he was charged in court. The trial court considered the Appellant's defence and found it to be consisting of mere denials hence dismissed it. The Appellant's defense was an afterthought. He never brought up the issue of having a grudge with the complaint's mother (PW2) during cross examination of any of the prosecution witnesses. Therefore, the trial court rightly dismissed his defence.

19. On the issue of mandatory sentence as addressed in the decisional case of ***Muruatetu***, **Ms Koina** submitted that it is against morality for a man to have sexual intercourse with a child. It is therefore for the preservation of the society's sense of morality that the offence exists. There is no evidence that the Appellant is remorseful. On the contrary he denied any wrong doing right up to conviction.

20. The offence herein led to pregnancy when the complainant was in standard 8. This must have disrupted and cut short the Complainant's studies. The circumstances herein call for a much severe punishment. The Sexual Offences Act enjoined the courts to mete out severe sentences to send a strong message that the society is up in arms to fight this scourge. Sentencing is supposed to take into account the individual circumstances of the accused person as well as a possibility of reform and re adapting, public interest and the interest of the victim and the relations.

21. Taking into account the aggravating and mitigating circumstances in this case there is need to punish so as to discourage potential offenders from committing similar acts. The aggravating circumstances herein outweigh the mitigating circumstances.

22. Therefore, she concluded that there is no reason to interfere with the learned trial magistrate's sentence of 20 years imprisonment. She urged this court to uphold the sentence and conviction of the trial court and dismiss the appeal for lack of merit.

**ANAYSIS AND DETERMINATION**

23. This being the first Appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first Appellate Court are set out in the case of ***Okeno Vs Republic [1972] EA 32*** where it was stated as follows: -

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

**Issues**

24. In view of the above, I have perused the lower court record, the grounds of appeal in the petition of appeal and submissions presented, this appeal is against conviction and sentence. I have considered the evidence adduced before the trial Court and I should determine: -

> **i. Whether the offence of defilement was proved beyond reasonable doubt; and**
>
> **ii. Whether the sentence of 20 years' imprisonment was harsh or excessive in the circumstances.**

**Elements of offence of defilement**

25. Under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act:

> **8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(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."**

26. The specific elements of the offence of defilement arising from Section 8 (1) of the Sexual Offences Act which the prosecution must prove beyond reasonable doubt are:

1) Age of the complainant;

2) Proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and

3) Positive identification of the assailant.

27. See the case of ***Dominic Kibet Mwareng v Republic [2013] eKLR***, where Ndolo J. stated as follows:

> ***"The critical ingredients forming the offence of defilement are;***
>
> ***i. age of the complainant,***
>
> ***ii. Proof of penetration***
>
> ***iii. Positive identification of the assailant."***

**Age of the complainant**

28. In ***Edwin Nyambogo Onsongo Vs Republic (2016) eKLR*** the Court of Appeal held that: -

> ***"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

29. The complainant testified that she was born in 2004. She tendered her birth certificate which indicated her date of birth as 23rd April 2004. The Certificate of Birth is proof that the age of the complainant was 13 years at the time of the offence. I so find and hold.

**Penetration**

30. Penetration is defined in Section 2(1) of the Sexual Offences Act as:

> ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***

31. Was there penetration of the complainant- a child aged 13 years?

32. The complainant testified that she had sex with the appellant on two occasions-in April and August- during school holidays. The last encounter resulted into pregnancy. P3 form produced showed both labia were normal, hymen was broken and no other body injuries. The broken hymen and the fact that the girl conceived confirmed that her genitalia was penetrated. Accordingly, there was penetration.

**Was the appellant the perpetrator?**

**33.** The million-dollar question in law is whether the appellant is the one who caused the penetration with the child herein.

34. The evidence adduced by the prosecution shows that the Appellant was a person known to the complainant. The complainant testified that she became friends with the Appellant in 2015 but nothing happened between them until the school holiday of April 2017 when the Appellant sexually abused her for the first time and subsequently in August 2017; the latter encounter resulted into a pregnancy. According to the complainant, in December 2017 the Appellant told her to leave home and go to his place. The complainant ran away from home to the Appellant's rented house where the Appellant was arrested. The complainant's testimony was corroborated by PW2 and PW3. PW2 stated that in December 2017 she left home for a chama meeting. On coming back, she found the complainant missing. She later traced the complainant in the Appellant's rented house at Kirobon. The Appellant surrendered to the police and was arrested.

35. PW3 Edwin Cheruiyot testified that he was the Appellant's landlord. He confirmed that on 9th December 2017 he saw the complainant in the Appellant's house and assisted PW2 trace her in the Appellant's house.

**36.** These evidence adduced by the complainant is that that the Appellant was a person known to her for a considerable period of time. they were friends. She gave succinct details of their relationship which ended up in sexual abuse of the complainant by the appellant as a result of which the complainant became pregnant and at the request of the appellant eloped with and lived with him in appellant's rented house. The fact the two eloping and living together was corroborated by the evidence of PW2 and PW3. The evidence by the complainant was clear that the appellant had sex with her, thus, penetration in the sense of the law. Her testimony as well as the other corroborating evidence shows she was not under any delusion in recognizing the Appellant as the person who penetrated her genitalia.

**37.** In any event, her evidence was cogent and consistent as to the sexual encounters with the appellant and that it was the appellant who caused penetration with her. Thus, her evidence on identification was by recognition and was not attended to by any mistaken identity as to the perpetrator of the offence- the appellant. Such clear and cogent evidence on identification of a sexual predator may, in law, solely found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with Section 124 of the Evidence Act. In this case however, there is sufficient corroboration that the appellant caused penetration of the complainant- a child aged 13 years.

38. Before I make my conclusion on the matter, I am aware that the Appellant offered evidence of *alibi*. In law, the prosecution bears the burden to unravel the alibi either by checking it out or through cogent evidence of its witnesses. The defence alibi was completely routed by the evidence of the complainant as well as PW2 and PW3. The said evidence is believable and coherent. Nothing shows that the appellant was lying. There was also no grudge between the mother of the complainant and the accused. Thus, the alibi is unraveled.

39. The evidence by the prosecution leaves no doubt that the Appellant caused penetration of the complainant. Accordingly, I find that the prosecution proved beyond reasonable doubt that the appellant caused penetration with a child- the complainant who was aged 13 years at the time. The offence of defilement was duly proved. The conviction was therefore proper.

40. In the upshot, I find the appeal on conviction to be without merit and is hereby dismissed.

**Of sentence**

41. The Appellant argued that the sentence is manifestly excessive in the circumstances of this case. The trial court applied Section 8 (3) of the Sexual Offences Act to convict. The section provides:

***"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."***

42. I will determine whether the sentence is appropriate sentence on the basis of the circumstances of the case.

43. The victim is a child of tender years. She was in school. The appellant knew of these facts. But, he decided to use an unfair advantage to secure and satisfy his sexual desires on the minor. The result was a pregnancy which totally demolished the innocence and life of the child. The child will forever live with the shame and great mental trauma caused to her by this savage act of sexual debauchery.

44. Needless to state that, in law, a child has no legal capacity to make a decision to engage in sexual intercourse. Similarly, children cannot cede away the protection granted by the law in order to engage in conduct or activity which steal their innocence, sabotage their education and other opportunities, or take away their rights and protection. In that respect there is need to protect children from sexual predators.

**45.** Thus, the Court considers the offence to be quite an egregious act committed against a child of tender years. The society also view these to be offences of which extreme societal desire to get rid of society of these wickedness and sexual perversion has been expressed publicly and formally through Sexual Offences Act. The kind of conduct in this case is one that the SOA was intended to punish. See ***James Okumu Wasike (2020) eKLR.***

46. Although the appellant is a young person, the manner the offence was committed and the prevalence of these offences in this area which comes as early child marriage, compels a deterrent sentence. Accordingly, I find 20 years' imprisonment to be appropriate sentence. I uphold the sentence meted upon the appellant by the learned trial court.

**47.** I should however consider Section 333(2) of the Criminal Procedure Code. The Appellant was in custody during trial. The sentence shall commence from the date of arraignment in court that is; **11th December 2017**.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 13TH DAY OF JULY, 2021.**

**.....**

**F. M. GIKONYO**

**JUDGE**

**In the presence of:**

1. Mr. Karanja for the Respondent

2. Appellant in person

3. Mr. Kasaso – CA

**.....**

**F. M. GIKONYO**

**JUDGE**