



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL NUMBER 18 OF 2019

SHADRACK KIMANZI MWANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Criminal Case No. 625 of 2014 Judgement delivered by Hon. Kibet Sambu-SPM)

JUDGEMENT

1. Shadrack Kimanzi Mwangi, the Appellant herein, was charged with the offence of defilement Contrary to **Section 8(1) (3) of Sexual Offence Act Number 3 of 2006 vide Mwingi Senior Principal Magistrate's Court Criminal Case Number 625 of 2014**. The particulars of the offence were that on diverse dates between 13th May, 2014 and June 2014 at Mwingi Township within Mwingi Central District within Kitui County, the appellant defiled (name withheld) a child aged 15 years, ten months.
2. The record of proceedings reveals that the Appellant denied committing the offence and the prosecution called five witnesses inclusive of the Complainant. The summary of the evidence are as here below: -
3. The Complainant (PW1) **MA (PW1)** testified on oath and stated that, on the night of 13th May, 2014, she was alone at her father's house and the Appellant who had been sent by her father to the house, made sexual advances to her which she declined. That the Appellant then forcefully had sex with her. She stated that she did not report the incident to anyone including her father out of fear. She however told her father almost five months after the incident vide a letter dated 21st September, 2014. After the revelation, her father took her to Mwingi Police Station from where she was escorted to Mwingi Level 4 hospital. Tests were done and it was discovered that she was pregnant. She testified that she had since delivered a baby girl, FA.
4. The Complainant's father, **JJ (PW2)** testified that he found a letter dated 21st September, 2014 from his daughter stating that the Appellant had defiled her and impregnated her. He stated that, he reported the matter to the police who escorted the daughter to Mwingi Level 4 hospital where she was confirmed to be pregnant. He stated that he knew the Appellant as he had commissioned him to repair his television set at his house.
5. The witness produced the letter dated 21st September, 2014; written by the Complainant, the Complainant's birth certificate, treatment notes and laboratory tests carried out at Mwingi District Hospital.
6. A Clinical Officer, **Dorcias Nduni**, (PW3) attached to Mwingi Level 4 hospital produced treatment notes in evidence on behalf of her colleague Pauline Monica. She confirmed that the Complainant had been attended to a Mwingi Level 4 Hospital following a history of defilement by someone known to her.
7. A government analyst, **Nelly Maureen Papa** (PW4) based at the government chemist at Nairobi confirmed that she analyzed swabs from the Appellant, the complainant and baby FA in their laboratories. She confirmed that the DNA results concluded that the Appellant was the father of FA, the complainant's daughter.
8. PC Kenneth Wekesa was (PW5) he confirmed that he interrogated the Complainant after the matter was reported at the Mwingi Police Station. He stated that he confirmed that the Appellant had been engaged by the Complainant's father to repair his television set. He stated that the Appellant sexually assaulted the Complainant which resulted with her getting pregnant. He also stated that he escorted the Appellant, the Complainant and baby FA to the government chemist laboratories in Nairobi where DNA samples were taken.
9. When placed on his defence, the Appellant conceded that, the victim's father asked him to fix his T.V aerial in his house on 20th June,

2014 during World Cup Competition and that he agreed and went to do so at his house which was within Mwingi Town. He claimed that he was to be paid for his services later and that when he went to ask for payments, on 22nd September, 2014, he was arrested on allegation that he had defiled his daughter.

10. He claimed that the DNA examinations and the results were compromised and/or doctored, stating that when they were taken to Nairobi Government Chemists where their samples were extracted, the Complainant's father accompanied them and behaved suspiciously after the samples were taken from him, the victim and the victim's child. According to him, he saw the Victim's father go back to the Government Chemist's office and that he did not know what he did while inside the Government laboratory.

He denied committing the offence, stating that he was respectable person in Mwingi Town where he was well known.

11. **Rebecca Mwikali (DW2)**, the Appellant's wife testified and admitted that the victim's father went to the Appellant's shop and requested the appellant to go and fix his T.V at his home. She added that, the Appellant went as requested and came back shortly. She recalled that, after several months, she saw the police officers going to their house where they arrested the Appellant without uttering a word.

12. **Joseph Mwanzi Maluki (DW2)** the Appellant's father, testified and did not offer much in terms of defence. He only blamed the victim's father of rushing to the police instead of notifying him first with a view to sorting out the problem. He expressed remorse and asked the trial to pardon his son.

13. The trial evaluated the evidence tendered and found that, the age of the victim was established to be 15 years at the material time.

14. It also found that, the DNA results positively linked the Appellant with the commission of the offence and on the basis of the same, it convicted the Appellant and sentenced him to 20 years' imprisonment.

15. The Appellant felt aggrieved and lodged this appeal. He has raised the following grounds namely: -

*(i) That the trial court erred by convicting him based on insufficient evidence and evidence obtained contrary to **Article 50(4) of the Constitution**.*

(ii) That the trial court erred by failing to note conspiracies, contradictions and inconsistencies in the Prosecution Case.

(iii) That the prosecution did not discharge its burden of proof to the required standard.

(iv) That the trial court, erred by shifting the burden of proof to him.

(v) That the trial court relied on hearsay evidence.

(vi) That the age of the victim was not established.

(vii) That the trial court erred by not finding that, there was a grudge between the victim's father and him over payments of services he had rendered.

16. The Appellant in his oral submissions, contends that he was framed by victim's father to avoid paying for services he had rendered to him adding that he had fixed his TV set without payment.

He submits that, when he went asking for his dues in September 2014, he was arrested for an offence he did not know. He added that, when he went to the victim's home to fix the aerial and the T.V, there was no one in the compound as the Complainant's father never allowed anyone in that compound. He suspected the Complainant's father to be responsible for the pregnancy of his own daughter.

17. He further faulted the trial court for allowing someone other than the author of the P3 to tender the medical evidence. He suspected that the author of the P3 avoided coming to testify as he did not want to lie.

18. He further submits that, though DNA sample were extracted from him, the victim and the baby, he does not agree with the results, claiming that the same may have been doctored.

19. The State through Mrs. Kabaale opposed this appeal.

20. On the victim's age, the Respondents points out that the age was well established, stating that the birth certificate tendered as P. Ex. 1 established the age to be 15 years 10 months at the time of the offence.

21. The State contends that, it's case was proved to the required standard adding that, all the ingredients of the offence to wit penetration, age and positive identification of the Appellant were established.

22. Mrs. Kabaale points out that, the victim gave her testimony which she contends was clear, credible and consistent. The State adds that, the victim gave a vivid account of what took place. She testified that the appellant used the opportunity to commit the offence.

23. The Respondents also contends that, the medical evidence (treatment chit P Ex 3 and laboratory results P Ex 4) proved their case beyond

doubt adding that, there is no doubt that the Appellant is the father of the victim's child.

24. The Respondent disputed the Appellant's allegation that his defence was not considered pointing out that, the allegations of non-payments of his dues and doctoring of DNA results at Government's Chemist were not proved.

25. On sentence, the State supports the sentence contending that, the same was commensurate with the offence committed against a victim aged 15 years, ten months.

26. I have considered this appeal and the response made by the State. The Appellant is charged with the offence of defilement Contrary to **Section 8(1)(3) of the Sexual Offence Act**. The Section provides that any person who commits an act which causes penetration with a child is guilty of the offence termed defilement. The sanction prescribed under sub section (3) states that, any person found guilty of defiling a minor aged between 12 years and 15 years is liable to imprisonment for a term not less than 20 years.

27. This is a first appeal and the work of the first appellant court is to re-evaluate the evidence and re-asses them with a view to making own conclusions vis a viz, the conclusion made by the trial court.

28. Going by the description and definition of the offence for which the Appellant was convicted and sentenced, it is true that the key ingredients necessary to sustain a conviction are: -

(i) Penetration of the male member into the genitalia of the female victim.

(ii) Age of the victim.

(iii) Identity of the offender.

29. I will begin with the age of the victim. This is a key ingredient that must be established by the prosecution in cases of defilement. The age of the victim is a key determinant when it comes to the conviction and sentence to be meted out.

30. The Appellant claims that, the age of the victim was not established, but I have considered the evidence laid before the trial court in respect to this key ingredient and find that, the victim's father tendered birth certificate (PEx. 2) serial No. 961341, which shows that the victim was born on 14th July, 1998. The offence was said to have taken place between May and June 2014. The victim stated that, she was defiled on 13th May, 2014 which means that she was 15 years, ten months old as correctly submitted by the Respondent in this appeal.

The child was 2 months' shy of becoming 16 years old. I am satisfied that the prosecution's case established the age of the victim to the required standard in law.

The Appellant's contention regarding the age of the victim, can only find traction if he was only contesting the sentence meted out against him. I will get back to that issue later in this judgement.

31. On the issue of penetration and the identity of the offender, this court finds that the evidence of the victim, **(PW1)** the father **(PW2)** and **(PW4)** was material in this regard. The victim clearly recalled that, on 13th May, 2014 at around 8PM, while at home all by herself, the Appellant went there with a view to fixing a television set at the request of her father. The defence have conceded that fact. The girl stated that the Appellant while at it, forcefully had sex with her and left. The girl was to discover later in early September, that she had conceived, upon which she wrote an emotional letter to her father. That letter dated 21st September, 2014 was tendered as P.Ex. 1.

32. This court finds that, the evidence tendered by PW1 and PW2, even without factoring in the DNA results, positively established the identity of the offender. The Appellant himself stated that, the victim's father had engaged him to fix the aerial and T.V set given that, the world cup competition had set in. The Appellant's own wife (DW2) also confirmed that fact. Therefore, in my considered view, the DNA results were just a confirmation or corroboration of the fact well established.

33. The Appellant contends that, the DNA results may have been manipulated, but looking at the evidence tendered, there was nothing tendered to prove the Appellant's allegation. This court has considered the evidence tendered, together with the Appellant's own submissions. The victim's father was not in my way in a position of influence. He was a tailor as compared to the Appellant who says he was a renown and respected businessman in Mwingi Town dealing with electronics. I do not find any basis why a respectable government institution as a government chemist would be manipulated or have any reason to compromise or doctor the DNA Results.

34. I am not satisfied with the allegations that the Appellant was framed, because the narrative that the victim's father was indebted to him do not hold any water. The Appellant never tendered any evidence that he was not paid for what he was contracted to do. He did not explain why it took several months for him to ask for it payments for what he was contracted to do of course it is evident that he did much more than he had been asked to do. The victim's emotional letter to his dad (PW2), is pointer to what activities the appellant got entangled in after fixing the TV.

35. The Appellant has faulted the prosecution for not calling the authors of P3, medical chits and Post Rape Care (PRC) form. I have considered this allegation and I find that, the sufficient basis as required under **Section 33 of the Evidence Act** was laid out prior to allowing a **Clinical Officer, Dorcas Nduni (PW4)** to testify on behalf of her colleague one Pauline Monica who was said to be unwell and admitted at the Hospital at the time. I find that, the trial court was well placed and correctly found that it was in the interest of time and justice to allow PW4 testify on behalf of her colleague. If anything the Appellant suffered no prejudice at all because, even if the trial court was to discount the evidence of PW4, the medical evidence (DNA results) tendered by PW5 was sufficient to establish penetration had taken place because

of the fact that, the DNA results showed that the Appellant was definitely the father of the child born out of the act of defilement. The DNA results coupled with the evidence of PW1 and PW2 in my view, on their own, proved beyond doubt that the Appellant had defiled the minor. The trial court in my view, was correct to reach that conclusion. The conclusion was arrived at on the basis of the overwhelming evidence tendered by the prosecution.

36. On sentence, it is uncontested that, the victim was aged slightly above 15 years of age. I have looked at the provisions of **Section 8(3) of the Sexual Offence Act** which State;

“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.”

Section 8(4) of Sexual Offence Act provides as follows: -

“A person who commits an offence of defilement with a child aged sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”

The above subsections show a *laguna in law* of victims aged 15 years and 16 years of age. This court is prepared to take position that the punishment prescribed in regard to the age of the victim (i.e. between 15 years and 16 years), should be the one prescribed under **Section 8(4) of Sexual Offence Act** which prescribes a sentence of not less than 15 years.

This court finds that, the conviction of the Appellant should have been under **Section 8(1) (4) of the Sexual Offence Act** rather than **Section 8(1) (3)** of the same Act, in view of the fact that the victim was aged above 15 years. In fact, the victim’s father stated that, she was 16 years, which I find to be well supported by the medical documents tendered and birth certificate which shows that, she was less than two (2) months shy of being 16 years of age at the material time of the offence.

This court agrees with the Respondent that the offence left a dent on the life of the victim, which is quite evident from the letter she wrote to her father, (PEX. 2). The girl was quite devastated. She stated in part in the emotional letter;

“.....naona kama hii ndio mwisho wangu wa dunia.....”

she went on to ask her father for forgiveness, asking him not to forsake her;

“.....usiniache niteseke hivi duniani.....”

The girl stated that, she could not face her father with the news of pregnancy at the time, and hence the reason she decided to write the said letter. I find that, though I have found that, the minimum sentence prescribed is not less than 15 years, due to the aggravating circumstances to wit impregnating a school girl and denting her career and social prospects, the Appellant deserves more than 15 years and I consider 17 years to be appropriate in the circumstance.

The long and short of this is that, the appeal is merited but only to the extent that the conviction of the Appellant under **Section 8(1) (3) of Sexual Offence Act** was erroneous. The same for the reasons advanced is set aside. In its place he is, for the afore stated reasons convicted for the offence of defilement under **Section 8(1) (4) of Sexual Offence Act**.

The sentence of 20 years is set aside and he is hereby sentenced to serve **17 years** from the date of conviction (**6th June, 2019**).

Dated, Signed and Delivered at Kitui this 12th day of July, 2021.

HON. JUSTICE R. K. LIMO

JUDGE