REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 11 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. Juma Chief Magistrate

in Narok CMCR No. 1876 of 2015 on 28th February 2019)

WLN.....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 December 2013 and august 2014 at [Particulars Withheld] area in Narok North Sub County within Narok County unlawfully and intentionally caused his penis to penetrate the vagina of A.N., a child aged 13 years. He was charged in the alternative with the 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 December 2013 and august 2014 at [Particulars Withheld] Area in Narok North Sub County within Narok County, unlawfully and intentionally committed an indecent act by rubbing his penis at the vagina of A.N. 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 five (5) grounds;

i. That the trial court misdirected itself in law and fact in convicting the Appellant yet the DNA report exonerated the Appellant as the father of the child, the product of the alleged defilement.

ii. That the scientific test (DNA) conducted as per the provisions of section 36(1) of the Sexual Offences Act no. 3 of 2006 to ascertain whether or not the Appellant committed the offence of defilement excluded the Appellant from the offence.

iii. That the learned trial magistrate misdirected her mind and erred in law in delivering a speculative judgment that was not premised on the analysis of evidence.

iv. That the sentence meted was harsh, excessive in the circumstances and bad in law.

v. That the trial court erred in law and fact by convicting the Appellant when the mandatory ingredients of the offence of defilement had not been proved beyond reasonable doubt.

Evidence

3. During trial, the prosecution called 7 witnesses to testify against the appellant. PW1 the complainant testified that she had sexual intercourse with the Appellant and that was only one occasion when the two made love in the month of August 2014 which resulted in the pregnancy.

4. PW1 testified that she lied to her parents that she spent the night at her grandmother's house. She told the court that she met the appellant

on the road and that she had gone to collect a book from the Appellant. She could not tell the court which book she had gone to collect from the Appellant.

5. PW1 confirmed that in her initial complaint and report to the police she did not confess or give the name of the accused to the police as the person who defiled her in August 2014. In the initial report to the police therefore, the victim did not mention the Appellant as the perpetrator of the offence of defilement.

6. The victim could not also recall the title of the alleged book she purportedly had gone to collect from the Appellant's house. In cross examination, the victim confessed to have conceived a second child during the pendency of the trial but she told the court that she does not know the person who is responsible for that pregnancy. Further the victim did confirm that there exists unresolved grudge between the two families.

7. It was the victim's testimony that in the month of August 2014 she had sexual intercourse with the Appellant for the first time and she conceived as a result of that sexual intercourse. She testified that she went back to school and soon thereafter she was tested and found to be pregnant.

8. PW2; MOS, the genetic father of the victim testified that he learned about the pregnancy when he was summoned by the victim's school. That he then reported the matter to the police and further corroborated the testimony of the victim that the victim lied to him and his wife that the fateful night she spent the night at her grandmother and not at the homestead of the Appellant. He denied that the daughter, the victim herein got married to one SE.

9. PW3 MS the mother of the victim asserted that she learnt of the said pregnancy when she visited the school in the company of her husband. She stated that her daughter got married but returned home and she does not recollect to whom she got married to whether SE or not. Her evidence in re- exam denies that the victim got married.

10. PW4 Hillary Kiptoo a clinician from Narok district hospital who examined the victim on March 2015 testified that the victim was 28 weeks and 22 days pregnant when the scan was performed. He found that there was no hymen, it was 'long standing broken' and he concluded that there was defilement.

11. PW5 an administration police constable Mwangi Nganga testified that he arrested the accused at Delamere in Naivasha grazing stock.

12. PW6 Benard Kipngetich a government analyst from the government chemist department produced the DNA report authored by his colleague, Nelly Moureen Papa the maker of the said report. The report excluded the appellant as the biological father of the child born out of the unlawful sexual act.

13. PW7 Simon Mwaura the investigation officer testified that he took over the file from his colleague PC WANJA, he did not carry out investigations on his own. He produced the exhibit memo which confirmed that the blood samples of the parties were extracted and submitted to the government chemist for DNA analysis. He further stated that the victim was married.

14. The Appellant was put on his defence. He gave a sworn statement and denied the offence. He testified and reiterated that he did not have an affair with the victim neither did he have sexual intercourse with the victim. He wondered that the victim could not recall the date she allegedly spent the night at the Appellant's house. The Appellant maintained that he lives with his parents and does not own a house of his own. He stated that he does agree with the DNA results that he is not the biological father of the child, a product of the alleged offence.

The appellant's submission

15. The appellant seems to derive premium advantage from the fact that DNA excluded him from being the father of the child. Therefore, he urged that he did not engage in the sexual intercourse resulting in the pregnancy hence there was no penetration. He cited the case of ***Eliud Ouma Agwara V Republic [2016] eKLR, AY V Republic[2018] eKLR , Bonface Kyalo Mwololo V Republic [2016] eKLR, Solomon Kosen V Republic [2020] eKLR, Scoffield Biko Ogweno V Republic HCRA 45 Of 2015,***

16. The Appellant submitted that the credibility and disposition of the victim to speak the truth was questionable. He cited that case of ***Ndungu Kimany Vs Republic [1979] KLR 282***.he put forward 6 questions to that effect.

17. Why did the victim fabricate a false story and repeat it on oath that her pregnancy was caused by the appellant which position has been disproved by scientifically acceptable DNA test?

18. If she chose to lie on oath about her pregnancy what else did she not lie about in her testimony?

19. If she chose to lie on oath that she does not know the name of the person who is responsible for her second pregnancy and further deny knowledge of SE to whom she got married to, what then made the learned magistrate believe that she was telling the gospel truth in her testimony about defilement?

20. If she admits having lied to her parents that she spent the night at her grandmother what makes her testimony trustworthy?

21. If she can lie that she had visited the homestead of the appellant to collect a book which she cannot recall the title of the textbook what makes her evidence believable?

22. Did she really have any sexual intercourse with the appellant in the month of August 2014 or at all? Him as a father of the child, the product of the alleged crime and proof of penetration.

23. The Appellant submitted that the substance of this appeal is that the totality of the evidence creates doubt as to the veracity of the evidence and that such doubt should have been resolved in favour of the Appellant more so because the DNA report exonerated him. He cited the case of ***K. Anbazhagan V State of Karnataka And Others*** cited in ***James Mwangi Mukumbu V Republic [2016] eKLR*** where the three judge bench addressed the manner of exercise of jurisdiction by the appellate court while deciding an appeal.

24. That DNA test is a tool used to resolve paternity disputes in family suit as well as in criminal cases such as rape and defilement. He cited Section 36 of the Sexual Offences Act. They relied on the definition of DNA in the modern scientific evidence; the law and science of expert testimony, by **David I. Faigman Et, 2012-2013 Edition Vol 4 Page 117** and the case of ***Lemour V State Of Florida 802 So. 2d 402 (2001)***

25. That the offence was not proved beyond reasonable doubt. He relied in the case of ***Hassan Annata V Republic [2019] eKLR.***

26. The DNA results having not connected the Appellant with the complainant's child confirms that the appellant is not the father and therefore not connected the Appellant with any previous acts of defilement on the complainant. He cited the case of ***Sawe Vs Republic [2003] KLR 364*** cited in ***Republic V Geoffrey Cheruiyoyt Alias Erik Kiprotich Kirui [2015] eKLR, Republic V David Kibet Kiplangat [2014] eKLR, Ann Ekimat V Republic [2014] eKLR, Francis Chege Maina V Republic [2014] eKLR, Terekali And Others V R [19520 Vol 19 EACA 259*** cited in the case of ***Dahale Tarasi V Republic [2003] eKLR.***

27. That the Appellant's age was only brought to the attention of the trial court during mitigation. The Appellant was 22 years old at the time of conviction and 16-17 years at the alleged time of commission of the offence. The trial court at that point should have ordered for age assessment. He relied on Section 18 of the Children Act. The law prohibits the unlawful arrest and deprivation of liberty of a child and is explicit that no child shall be subjected to torture and other cruel and degrading treatment. He further supported it with reliance. In Article 25(a), 29 and 53 of the Constitution, and Section 143(1) of the Children Act.

28. That the arrest, conviction and sentence of the Appellant violated his constitutional rights under Articles 53(1) (d) and (f) of the Constitution.

29. The Appellant invited the court to share the sentiments in Article 27 of the Constitution, Eldoret ***Constitutional Petition No. 6 Of 2013, Siaya Criminal Appeal No. 155 of 2016; G.O. Versus Republic [2017], Poo (a Minor) V Director Of Public Prosecutions & Another (2017)*** to the extent that the law is not discriminatory rather its application is what may be discriminatory.

30. That the prosecution did not prove its case beyond reasonable doubt that the Appellant was the perpetrator of the offence. The totality of the evidence leaves a reasonable doubt in the mind of the court as to whether in August 2014 the victim engaged in sexual intercourse at all with the appellant in particular and this court is bound by law to resolve that doubt in favour of the Appellant. He therefore urged this court to be guided by the case of ***CMZ V Republic [2016] eKLR*** where the court was faced with as similar legal challenge.

31. In the end the appellant prayed that the conviction and the sentence was not safe and that it should be quashed and set aside.

Respondent's case

32. On the part of the Respondent, **Ms Torosi**, learned prosecution counsel submitted that DNA testing is discretionary power and there is no mandatory obligation on the court to order the same. That in this case DNA testing was not necessary. This is because the minor identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witness and believed the complainant that it was the Appellant who violated her. That further the trail court found material corroboration of the complainant's evidence.

33. The appellant was not charged with the offence of impregnating the complainant. DNA results *per se* are not evidence as to be the determining factor of whether or not there was a defilement by a particular person.

34. The trial court disregarded evidence of the expert witness who carried out the DNA analysis and gave reasons. The court in its view questioned the manner in which specimen were taken and escorted for analysis and found it to be unreliable.

35. The court considered all the evidence brought before it. The complainant PW1 all through was consistent that it was Appellant who had sexual intercourse with her. She was unshaken and was consistent on her word.

36. As a general rule of evidence under Section 124 of the Evidence Act an accused person is not liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to this section makes an exception in sexual offences.

37. PW4 Benjamin Tum the clinical officer examined the complainant and corroborated the complainant's evidence that she was defiled. The complainant's virginity and hymen was long broken. The clinical officer produced a P3 Form noting the same. Therefore, from PW1 and PW4's evidence it is evident that the ingredient of penetration was proved to the required threshold.

38. The complainant testified that on 22/8/2017 that she was 13 years. She produced her birth certificate which showed that she was born on 6/6/2013 which was produced as exhibit 1. Therefore, the age of the complainant was proved beyond any reasonable doubt.

39. That the defense of the Appellant was considered by the trial magistrate but it did not challenge the prosecution's evidence.

40. She concluded that the conviction was safe as against the Appellant and urged this court to uphold it as well as the sentence.

ANAYSIS AND DETERMINATION

41. 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 demeanour. 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.)"***

42. In view of the above I have perused the lower court record. I have considered the evidence adduced before the trial Court and wish to consider whether the ingredients for the offence of defilement were proved beyond reasonable doubt.

43. The ingredients of the offence of defilement were well stated in the case of ***Dominic Kibet Mwareng v Republic [2013] eKLR,*** by Ndolo J. 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

44. 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."***

45. In proof of the complainant's age, she produced her birth certificate (exhibit 1) which showed that she was born in 2000. The birth certificate proves the victim was 14 years old at the time of the offence. And, therefore a child. Age the complainant was proved beyond reasonable doubt.

Penetration

46. P3 form produced showed she was normal, no bruises, her virginity and hymen was long broken. The broken hymen and the fact that the girl conceived confirmed that her genitalia was penetrated. But was the appellant the person who caused the penetration?

Identification

47. The prosecution must prove beyond reasonable doubt that the appellant is the one who penetrated the complainant – a child- and therefore committed the offence of defilement. PW1, the complainant testified that she had sexual intercourse with the Appellant on only one occasion in the month of August 2014 which resulted in her pregnancy. DNA examination was done on, after the birth of the child. The results excluded the Appellant from being the father of the child born out of the alleged defilement. DNA testing provides a scientific proof of biological parenthood of a person. In cases of defilement, the fact that the victim became pregnant as a result of sexual intercourse with a child is proof of penetration and identity of the culprit. Except, it is a different thing altogether if the pregnancy was conceived through other modern fertilization and conception methods. Of great evidentiary importance, however, is that in criminal cases, defilement or rape, DNA result that proves a person to be the biological father of a child conceived through defilement is proof of penetration by the person so found to be the biological father of the child. I wish, however, to disabuse the appellant of the notion that, because he was excluded by DNA results, he did not defile the victim. He may have caused penetration of the child at other time which did not result into a pregnancy and so not covered by the DNA result. Nonetheless, such must be proved through other evidence as required.

48. I take note of the fact that the complainant testified that it is the Appellant who first had sex with her and that she was certain that he was the father of the child. The DNA results is contrary to her testimony; this aspect of her testimony casts doubt on credibility of the testimony. See the case of ***Eliud Ouma Agwara v Republic [2016] eKLR,*** where Makau J, stated as follows:

> ***"The DNA results having not connected the appellant with the complainant's child as a result of the alleged result of defilement and the complainant having not connected the appellant with any other previous act of defilement or having not stated that she***

has had an earlier encounter with another person who could in view of the DNA results be said to be the father of the child, meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. The appellant should have been accorded the benefit of doubt. The trial Court fell into an error when it held that DNA results could never be a defence in an offence of defilement as the Court did not properly evaluate and analyze the evidence which prosecution was relying upon thus as a result the defilement of the complainant she became pregnant meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. It was therefore apart from proving defilement the duty of the prosecution to prove as they alleged the complainant has had no other sexual intercourse with any other person prior to the date of defilement to prove that as a result of the alleged defilement PW1 became pregnant, bore the child whose DNA test report connected the appellant with the act of defilement."

49. See also Odero J, in the case of ***Simon Gichuki Maina v Republic [2016] eKLR*** where it was stated that:

"Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.

Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case. I therefore quash the appellant's conviction on the charge of defilement. The subsequent sentence of 25 years' imprisonment is also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held."

50. It bears repeating that, that exclusion by DNA result does not absolve any other sexual intercourse with the minor which may be proved through other evidence. It is the onus of the prosecution to properly tie or connect through evidence, the penetration of a child to the accused. I am aware of the proviso to section 124 of the Evidence Act which permits conviction on the sole evidence of a child who is the victim of sexual assault as long as the court has recorded the reasons of believing the child. I have found that the fact that DNA report excluded the Appellant as the father of the child routs the core of the testimony by PW1- the victim child which was to the effect that she had sex once with the appellant which resulted into the pregnancy. In addition, there was no other cogent and strong evidence which proved any other penetration of the victim by the appellant. I wonder why no efforts were made to establish the person who impregnated the victim herein. It is also strange that the first report to the police did not contain the name of the suspect. These matters cast doubt on whether the Appellant defiled the complainant. It also cast doubt on the credibility of the evidence by the complainant. Such is reasonable doubt which should be resolved in favour of the appellant. Accordingly, the appeal succeeds. I allow the appeal. The conviction against the Appellant is hereby quashed and sentence of 20 years' imprisonment is set aside. The Appellant is hereby set free unless lawfully held.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 12TH DAY OF JULY, 2021.

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent

2. Appellant in person

3. Mr. Kamwaro for the Appellant

4. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE