REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 23 OF 2020

HASSAN RANDU NZIOKA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court at Kaloleni by Hon L. N. Wasige (PM) delivered on 5th December, 2019 in SO Case No. 9 of 2018)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant herein appeals against conviction and sentence for the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence as connected with the appellant were that on diverse dates of 1st July and 31st July, 2017 at [particulars withheld] village, Kaloleni Sub-County, he committed sexual acts of penetrating the genitals of the victim **HKK** aged 16 years by use of his male genitals.

The appellant is on record having denied the offence. He went through a full trial which necessitated the prosecution to proof the charges beyond reasonable doubt. To that extent and in compliance with Law under Sections 107 (1), 108 and 109 of the Evidence Act the prosecution retains the burden and standard of proof to secure a conviction against the appellant. The weight here has to be given to the six witnesses summoned to testify on behalf of the prosecution. Their evidence in brief was of the following effect.

The first opening witnesses statement came from the victim **HKK** apparently stated on oath to be 17 years and being in an intimate relationship with the appellant. The victim admits that the relationship with the appellant was spiced with episode of sexual intercourse which to her recollection occurred on diverse dates between 1st July, 2017, 31st July, 2017 and or April 2017. According to victim, she conceived out of that intimate relationship. This outcome led her to inform the family members. The family members, who included **(PW2) EK.** In the evidence of **(PW2)** the sister to **(PW1)** she confirmed appellant was in a boyfriend/girl relationship which ultimately culminated into a pregnancy. This outcome caused the matter to be reported to the chief and thereafter to the police to conduct further investigations. It was at the hospital a medical examination was carried out to confirm that **(PW1)** was pregnant.

Further, in this trajectory, **(PW3) (KK)** the mother to **(PW1)** told the Court that she knew the appellant and in the year 2017 she came to learn that he had an affair with her daughter **(PW1).** According to **(PW3),** the relationship gave birth to a child. In course of the investigations, **(PW4) PC Winnie** of Kaloleni Police Station told the Court that on receipt of the Sexual Act complaint, it was duly investigated within the bounds of the Law. That it was established as a fact that the appellant and **(PW1)** had been in an intimate relationship. As a result of that the outcome of it was the pregnancy which medical evidence certified to be four months old. That findings was asserted by **(PW5),** the clinician of Mariakani Sub-County Hospital. The P3 Form was admitted in evidence as **Exhibit 1**.

In the course of the trial an order was made by the Court for a DNA profile that is how **(PW6) Mwaringa** came into the picture as a Government Analyst in order to satisfy the requisite forensic test for a DNA match. **(PW6)** testified that the buccal swab samples taken from the appellant and that of the victim showed a DNA match of the biological child to be from that of the appellant.

At the close of the prosecution case, appellant was placed on his defence. He elected to give unsworn testimony denying any wrong doing as

stated in the prosecution witnesses' statements. He was only to admit that they are related with the victim but not to the extent of having a sexual relationship. He denied even the DNA positive findings that revealed that he is the father of the "child". That was the litigation history in which the Learned trial Magistrate arrived at her findings in the impugned Judgment.

Determination

The appeal is on the grounds that the Learned trial Magistrate misdirected herself in holding that the offence was proved beyond reasonable doubt. That she also failed to consider the appellant as a first offender arriving at a punitive and harsh sentence. The principles governing the jurisdiction of a first appellate Court and weight to be given to the Judgment of the trial Court is clearly expressed in **Okello v R {1972} EA 32** therefore on appeal. It is the duty of this Court to go through the evidence in order to establish whether the case at the trial was proved beyond reasonable doubt as alluded to in the Judgment.

In the matter at hand in order to prove the case, the prosecution has to discharge the burden on the following elements beyond reasonable doubt:

(a). That there was prove of penetration of the female genitals of the victim by the appellant.

(b). That the act of penetration was intentional and unlawful.

(c). That the victim at the time of sexual act was aged below 18 years.

(d). That in purposes and intents it was the appellant who penetrated the victim, hence positive identification.

From the record, **(PW1)** gave graphic details of an affair with the appellant which lasted sometime, with plain recollection of dates of 2017 being of significant. The evidence by **(PW1)** on the sexual acts preceding the complaint made to **(PW3)** showed that she had been in that relationship with the appellant. That is when **(PW3)** approached the security enforcement agencies including the police to assist in bringing to book the culprits of the sexual act.

From the testimony of **(PW1)** there is sufficient evidence to prove beyond reasonable doubt that there was penetration in this case. **(PW3),** in the immediate aftermath of the **(PW1's)** condition, she did inform the police **(PW4)** in her quest to have the matter investigated. The basic facts given by **(PW3),** an inquiry was set in motion apparently to establish whether **(PW1)** had been penetrated with a male organ. Fortunately, a medical examination carried out by **(PW5)** established the victim **(PW1)** was four (4) months pregnant. The other significant findings was rupture of hymen although the external parts of the vagina remained normal.

In this case, at the earliest opportunity a DNA test was carried out as it emerged in the analyst report **(PW6)** that the stated pregnancy had DNA match of 99.9 probability with that of the appellant profile. Ordinarily, sexual intercourse is proved by evidence of a single identifying witness as expressly stated in the proviso of Section 124 of the Evidence Act. However, it can be seen from the record that in this cases not only did the prosecution proof the case through the testimony of the complainant but the facts were corroborated with circumstantial evidence from the clinical findings by **(PW5)** and subsequently DNA profile match undertaken by **(PW6).** The circumstantial evidence against the appellant was that she had sexual intercourse with the victim, whose resultant effect was a pregnancy. There was therefore corroborative evidence from **(PW5)** and **(PW6)** that on examination of **(PW1)** obviously her genitals had been penetrated and entry of the male semen into the ovary triggered fertilization and the rest as they say is history.

I will find as the trial Magistrate admit credible and reliable evidence of **(PW5)** and **(PW6)** on the issue of penetration. The appellant had given an explanation but it never went too far to rebut the overwhelming evidence consistently presented by the prosecution witnesses. The evidence of **(PW5)** and **(PW6)** tendered in respect of the medical report and the DNA match was never challenged by the appellant.

As reiterated in **Okeno case (supra),** the credibility of **(PW1), (PW2), (PW3), (PW4), (PW5)** and **(PW6)** must be left to the trial Magistrate, who had the advantage to observe the demeanor and fruitfulness of the statements made on oath as challenged at cross-examination. In essence, the element to this appeal on penetration was proved within the threshold of the Law. Secondly and most important is issue of proof of age. Having considered well the evidence of **(PW3)** and the medical assessment test on age, it is clear that the victim **(PW1)** was penetrated at the age of sixteen (16) years and as at the time of trial her age was assessed at seventeen (17) years. Those facts on age were therefore ascertainable by the medical examination including the evidence given by the mother **(PW3).** The medical assessment report was correctly admitted in evidence. It was proven conclusively that the victim was aged sixteen (16) years in 2016, bringing her within the bandwidth of children below the maturity age of eighteen (18) years prohibited from engaging in sexual intercourse.

I revert to the final element of identification evidence. Identification generally means that evidence which a witness asserts to the effect that he or she saw a person with physical features of the accused in the dock facing an indictment for the offence. In the case of **Turnbull v R {1976} 3 ALL ER 549, Simiyu v R {2005} KLR 192.** Applying the above principles recognition evidence by **(PW1)** at the time of the sexual intercourse and prior knowledge of **(PW1)** of the appellant was relevant and remained unshaken. Similarly, evidence on the DNA profile match of the appellant being the biological father of unborn child corroborated the element of identification evidence given by **(PW1).** There were no other factors which would have hampered a positive identification of the appellant.

On sentence, it is unclear what the appellant is aggrieved with. The mere fact that the sentence appears to be long or length in terms of the period to be served by itself is not a basis of interference by an appeals Court. Punishment of sexual offenders is provided for in the Sexual Offences Act. It must however be noted, sentence is a Judgment in legal parlance, said to denote the action of the Court to formally declare the accused to face the consequences of his unlawful acts. Here, pain inflicted in the form of incarceration on the offender to deter others from doing the act or omission. The behavior of the appellant was outrageous and disgraceful and should be seriously deprecated by any decent civilized society.

I am willing to be part of that class of society which abhors crime particularly to those offenders with insatiable appetite for sex with minors. It is of great importance that Courts came out strongly to protect the children of this Republic from sex predators. I wish to place on record that I have no sympathy with offenders who devour the human dignity of our children as if the country is in short supply of women of age capable of engaging in intimate human relationship. Regarding this particular ground, I find no reason to interfere consistent with Section 382 of the Criminal Procedure Code. The upshot of the foregoing assessment is that the appeal is devoid of merit. The same is accordingly dismissed in its entirety.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP

2. The Appellant