REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO.25 OF 2016

SAMUEL KITSAO KATANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court

at Garsen by Hon JM KITUKU (Ag. PM) delivered on 4th December 2013 in

Criminal Case No.199 of 2013)

CORAM: Hon. Justice R. Nyakundi

Samuel Kitsao Katana in person

J Mwangi for the DPP

JUDGEMENT

The Appellant, **Samuel Kitsao Katana**, was arraigned in court on the 13th August 2013 and charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st October 2012 and 30th October 2012 in Witu division of Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of one **MK** a child of 17 years.

The accused denied the charges and the matter was set down for trial where the prosecution presented 6 witnesses in aid of its case. The Appellant was subsequently found to have a case to answer and put on his defense whereupon he chose to give unsworn testimony and did not call any witnesses.

By a 4th December 2013 decision, **Hon. J. Kituku** the learned trial magistrate, found that the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act had been proven beyond reasonable doubt and convicted the Appellant accordingly. The Appellant plead for leniency in mitigation but the trial court, in consideration of the mitigation held that the Act prevented it from exercising discretion on the sentence and entered a sentence of 15 years imprisonment hence occasioning the instant appeal on both the conviction and sentence.

In the instant appeal, the Appellant urges in his supplementary grounds of appeal that the learned trial magistrate neither gave him the benefit of being a first offender nor did they accord him the benefit of sentencing him to the least severe punishment as provided by Article 50(2)(p) of the Constitution. In essence he is convinced that the case against him at trial was proven beyond reasonable doubt.

Submissions on Appeal

The Appellant filed his submissions on 20th April 2021. The main thread of his argument is that his case was not proven to the required standard. Regarding the sentence, he urges that he while the trial magistrate did not have discretion to vary his sentence, he ought to benefit from the least severe punishment under the law. He cites **Francis Karioko Muruatetu vs. R [2017] eKLR** and the South African case of **S vs Malgas 2001 (2) SA1222 SCAL 235 PARA 25** in aid of his case.

The Respondent filed submissions dated 18th February 2021. The State, represented by **Mr. Mwangi** concedes the appeal. Counsel submits on the critical ingredients forming the offence of defilement; the age of the complainant, proof of penetration and positive identification of the assailant.

On age, it was submitted that the trial court misdirected itself by making a finding that the complainant was 16 years when the evidence on age was contradictory. It was submitted that the evidence of **PW1 MK,** the complainant that she was 18 years old having been born in 1995. That the evidence of **PW4** the Clinical officer who conducted an age assessment showed the complainant was well over 18 years. **Mr. Mwangi** submits that since the complainant did not have a birth certificate, all the court could rely on was the age assessment and the clinic immunization card. That it was the evidence of **PW2 KKK**, the complainant's mother, that the complainant was 24 years of age. Hence, counsel submitted that the age of the complainant had not been proven to the required standard.

Turning to the issue of penetration, it was submitted that this aspect of the offence was never proven at the trial court. Prosecution counsel submitted that the evidence of the clinician was that he filled the P3 form on 12th August 2013 nearly a year after the alleged offence had been committed. That the clinician never stated to the court what his findings or conclusions were but simply stated that the complainant was pregnant and went no further. He indicted the fact that in the absence of any other evidence, no effort was put into proving the paternity of the child borne out of the alleged offence. He thus prayed that the court find that this element was not proven.

Lastly, on identification, it was conceded that the appellant was well known to the complainant as they lived together as husband and wife and the parents of the complainant had acquiesced to their relationship.

In closing, Mr. Mwangi submitted that the appellant's prosecution was based on trumped up charges and the decision of the trial court ought to be overturned and the appellant acquitted.

Analysis and Determination

This is a first appeal. It is my duty analyze the evidence afresh and arrive at my own independent conclusions. I must however remember that I do not have the luxury of the trial court to observe the demeanor of the witnesses. See **Okeno v R (1972) EA 32.**

The case at trial was advanced by 6 witnesses. **PW1 MK,** the complainant testified that she was 18 years having been born in 1995, she produced a child health card MFI-1 in support of this. She stated that she knew the accused and that they had agreed to marry each other. That she met the accused in the 2012 and that they had been engaging in sexual intercourse at her parent's home where she used to sleep with her elder sister in the same room but on different beds. That when she found out she was pregnant she did not inform her mother. That the accused married her, with her parent's knowledge, in 2013. That her mother, **PW2** took her to the police station in April 2013. She was taken to Witu health center where the P3 Form was filled and an age assessment was done. She testified that she left the Appellants home in August 2013 after her mother came to take her away. That she gave birth to a child in July 2013 while staying with the accused. She conceded that she consensually engaged in intercourse with the accused.

PW2 KKK the complainant's mother testified that her daughter was 24 years of age but that she did not know the year she was born. Her testimony was that some time in 2012 the headmaster in her daughter's school had asked her to find out if the daughter was pregnant. After two weeks her two younger children told her of a man that had entered the house that night and when they wanted to scream he ran away. Three days later while laying in wait, she saw the accused entering the house where the complainant slept. That she accosted him armed with a panga but he ran away. She reported the matter to the headmaster **PW5** and gave the name of the accused who was subsequently arrested but then released. That upon his release, he eloped with the complainant. Tha the accused later came back and married the complainant's elder sister and impregnated her. She informed her sister **D** who stayed at Hindi, the same area as the accused. Together with her sister, they went and found the accused with the complainant. He was arrested by a Hindi police officer and escorted to Witu police station. By that time the complainant was pregnant. On cross-examination she stated that she knew the accused and that he had impregnated both the complainant and her elder sister. That when he impregnated the complainant she reported him to **PW5.**

PW3 KN the father of the complainant testified that he did not know when she was born. He stated that he knew the accused who had married both the complainant and her elder sister and impregnated them both. He confirmed that the accused had eloped with the complainant.

PW4 Benson Mwarabu a clinical officer at Witu health center testified that he is the one that filled the P3 Form for the complainant on 12th August 2013 regarding an incident that had occurred in October 2012. He confirmed that he conducted the age assessment on 12th August 2013 and formed the opinion that the complainant was over the age of 18 years. When given the health card, he stated that it was one for **M** but admitted to having not seen it before.

PW5 FKM testified that he was a teacher at [Particulars Withheld] primary school where the complainant attended. He stated that he did not know the age of the complainant. That in January 2013 he noticed the complainant was absent from school. When she appeared in the second week of January he noticed physical changes. Later her mother reported the complainant was pregnant.

PW6 Derick Mugwana a police constable of No. 92796 and based at Witu police station testified that on 1st April 2013 he was at the station when the complainant came with her mother and area headman and reported that the complainant had been impregnated. He produced the investigation diary No. 11/1/4/2013. On cross examination he admitted that he was not the one that arrested the accused.

This marked the close the case by the prosecution. The court found the accused had a case to answer and placed him on his defense. He elected to give unsworn testimony stating that the complainant was his wife. That he used to visit her in the presence of all parents who he referred to as his in-laws and stated that they had requested him to be giving them food. He stated that when he moved to Hindi with the complainant, her parents reported that he had eloped.

Having rehashed the evidence, I now proceed to analyze the same. This appeal turns on whether the prosecution proved its case beyond reasonable doubt. Corollary to this issue is whether, in the circumstances, the sentence imposed by the trial court was sound. The burden placed on the prosecution is founded on **Section 107 (1) of the Evidence Act** which provides:

> ***"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***
>
> ***(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".***

This duty is addressed in the English authority of **Miller v Minister of Pensions 1947 2 ALL ER 372-274** as follows: -

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be described with the sentence of course it is no doubt nothing short of that will suffice."***

Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 provide:

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

Precedent has it that the crucial elements for a charge of defilement remain to be proof that the complainant was below 18 years, proof of penetration and the positive identification of the accused person as the person that caused the penetration. See for instance **Baraka Kahindi v Republic Criminal Appeal No. 70 of 2018 [2019] eKLR** and **Festus Kandu Ngome v Republic Criminal Appeal No. 18 of 2019 [2019] eKLR**.

As stated earlier, the Prosecution concedes the appeal, admitting that the ingredients of age and penetration were not proven to the required standard. Regarding positive identification, the Court in **Anjononi & Others vs Republic, (1976-1980) KLR 1566** held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. In the instant case, that the appellant was known to the complainant is not in contest as they even admitted to living as husband and wife. The learned trial magistrate was therefore correct in finding that the identity of the appellant had been sufficiently proven and I agree with that finding.

However, matters come to a head when it comes to the age of the complainant. In **Thomas Mwambu Wenyi v Republic Criminal Appeal No. 21 of 2015 [2017] eKLR** the Court of Appeal cited with approval **Uganda v Godfrey HC CR Case No 141 of 2002, Francis Omuroni v Uganda CR Appeal No. 2 of 2008** where the court held that:

> ***"In defilement cases, medical examination, is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim parents and by observation and common sense."***

PW4 the clinical officer testified that he conducted the age assessment and formed the opinion that he complainant was above the age of 18 years at the time he conducted the examination on 12th August 2013. **PW2**, the complainant's own mother testified that her daughter was 24 years of age. **PW3** the Plaintiff's father testified that he did not know when the complainant was born. **PW5** the complainant's teacher also did not know her age. As for the complainant herself, her testimony was that she was 18 years of age, born in 1995. She relied on a child health immunization card produced as MF-1 for this testimony. I have had a keen look at the immunization card. It indeed indicates that the date of birth for the child to whom it relates is 24th September 1995. However, the name of the child indicated on the card is **M** while the complainant's name is **MK.** The names are not remotely similar. This fact was readily admitted by the clinical officer **PW4.** In the absence of a birth certificate, this document was the basis upon which the trial court decided that the complainant was under the age of 18. Clearly this was an erroneous finding in the face of the evidence to the contrary by the complainant's own mother and the clinical oficer. The learned trial magistrate thus erred in finding that the complainant was below the age of 18 at the time of the alleged offence as the evidence on record at the very least told a different story. As the age of the complainant was not properly proven, on this ground alone the conviction was not safe.

On the question of penetration, **Section 2 of the Sexual Offences Act** defines penetration to mean the ***'partial or complete insertion of the genital organ of a person into a genital organ of another person.'*** **PW1** testified that she had engaged in sex with the Appellant on numerous occasions in 2012. She was however adamant that the acts were consensual. In the face of my finding that the age of the appellant was not sufficiently proven to be below 18 years and fortified by the testimony of **PW2** that the complainant was 24 years of age, I take the view that whatever sexual intercourse occurred between the complainant and the appellant was a product of the decision of consenting adults. Ultimately, this ingredient too falls by the wayside.

In totality, it is clear to me that the conviction by the trial magistrate was not safe hence why even on appeal, the state was quick to concede. While the state was correct to concede the appeal, it ought to have gone further and complied with **Section 352A of the Criminal Procedure Code** in order to save time and have the appeal summarily allowed.

It is also not lost on this court the injustice occasioned upon the Appellant who has been languishing in prison for an unnecessarily long time for among other reasons the fact that for two years between 2018 and 2020 he could not be produced in court despite numerous production orders being issued. This surely is an indictment of our justice system.

The upshot of the foregoing is that the appeal is meritorious. It is thus allowed. The conviction against the Appellant is quashed and the sentence is set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPT 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Appellant

2. Mr. Mwangi for DPP