



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 3 OF 2019

BETWEEN

STEPHEN KALULU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maua Criminal Case SO No. 29 of 2018 by

Hon. W. Wanganga (RM) on 10th December, 2018)

JUDGMENT

1. The Appellant **STEPHEN KALULU** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) which was allegedly committed on diverse dates between 09th February, 2018 and 22nd June, 2018 against **I.M** aged 16 (sixteen) years.

2. *In a judgment dated 10th December, 2018, the Appellant was convicted and sentenced to serve 10 years' imprisonment.*

Appeal

3. Aggrieved by this decision, the Appellant lodged the instant appeal on 03.01.2019 mainly on the ground that the prosecution case was not proved beyond reasonable doubt and that the defence was not given due consideration. The appeal was argued by way of written submissions which both parties dutifully filed.

Prosecution case

4. In her evidence in chief, the complainant disowned her statement that Appellant had defiled her and stated that she was defiled and impregnated by a man called Rasta. It was her evidence that one Kendi beat her causing her to loose the pregnancy. On 24.06.2018, **PW4 JOEL BARIU** a ranger at Ndumuru camp received a request from OCPD Igembe North to arrest a suspect who was allegedly cohabiting with a minor. He sent his junior colleagues **PW2 NATHAN KABAYA MURUNGI**, **PW2 STEPHEN KANYITHIA** and **PW7 CHARLES KOOME** who went to accused's house within Ndumuru Camp that was identified by Appellant's ex-wife **PW5 BEATRICE KENDI** and from there arrested Appellant and the complainant. An ultrasound marked **PEXH. 4** revealed that the complainant had undergone an abortion. **PW6 FAITH KAGENDO**, a clinical officer examined complainant on 26.06.2018 and as shown on the P3 Form **PEXH. 5** noted lacerations in her labia minora and labia majora caused by her pushing of the baby during the abortion. Evidence that complainant was 16 ½ years was demonstrated by an age assessment report **PEXH. 7**. This case was investigated by **PW8 PC DANIEL KANGOGO** who preferred charges against the Appellant.

Defence case

5. In his unsworn defense, Appellant denied the offence. He blamed his former wife **PW5 BEATRICE KENDI** for framing him after he accused him of impregnating the complainant whom she beat causing her to loose the pregnancy.

Analysis and Determination

6. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190**

that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

7. I have considered the appeal in the light of the evidence as adduced before the trial court and submission filed by the Appellant and on behalf of the state and I will address the issues for determination as hereunder.

Age of complainant

8. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorize the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

9. That complainant was 16 ½ years was demonstrated by an age assessment report **PEXH. 7**. I therefore find that the learned trial magistrate's finding that complainant's was a minor was well founded.

Penetration

10. Section 2 of *the Act* defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."

11. An ultrasound marked **PEXH. 4** revealed that the complainant had undergone an abortion. **PW6 FAITH KAGENDO**, a clinical officer examined complainant on 26.06.2018 and as shown on the P3 Form **PEXH. 5** noted lacerations in her labia minora and labia majora caused by her pushing of the baby during the abortion.

12. The foregoing no doubt confirms that penetration had occurred as was rightfully found by the learned trial magistrate.

Identity of the offender

13. The evidence that the prosecution heavily relied upon in an attempt to prove the charge of defilement was that of **PW2 NATHAN KABAYA MURUNGI, PW2 STEPHEN KANYITHIA** and **PW7 CHARLES KOOME** who stated that they arrested Appellant and the complainant from the same house on 24.06.2018 a fact that was denied by both the complainant and the Appellant.

14. The prosecution did not lead an iota of evidence to demonstrate that complainant was in Appellant's house between 09th February, 2018 and 22nd June, 2018 when she was allegedly defiled. Hence, the learned trial magistrate's finding that the arrested of Appellant and complainant from the same house, 2 days after the period she was allegedly defiled was corroborative evidence of defilement was with respect, against the weight of evidence.

15. And whereas it is a fact that complainant was defiled and impregnated, the learned trial magistrate completely ignored complainant's evidence in chief that exonerating the Appellant and implicated one Rasta as the perpetrator.

16. The duty of a magistrate is to hear cases and determine them on merit and not to necessarily convict even when the evidence does not support the charge. An acquittal as well as a conviction is a lawful verdict of a court.

17. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

DATED THIS 04H DAY OF OCTOBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - **Kinoti**

Appellant - **Present in person**

For the State - **Ms. Mwaniki**