REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 37 OF 2019

DAVID OCHIENG OGONDA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Winam(Hon. F. M. Rashid SRM) dated the 4th July 2019 in Winam SPMCRC No. 2 of 2018)

JUDGMENT

The Appellant, **DAVID OCHIENG OGONDA**, was convicted for the offence of **Defilement** contrary to **Section 8 (1) (4)** of the **Sexual Offences Act**. Thereafter, he was sentenced to 15 years imprisonment.

1. In his appeal, he has submitted that the conviction was based on the evidence of a hostile witness, who was thus unreliable.

2. He drew the court's attention to the fact that when the Complainant first testified, she had told the trial court that she had had no relationship with the Appellant.

3. At that point, the prosecution applied to have the Complainant declared a hostile witness, because her oral testimony was at variance with her written statement.

4. The learned trial magistrate declared the Complainant a hostile witness, and also directed that she be remanded at the Juvenile Remand Home for 3 days.

5. It was the Appellant's contention that when the Complainant testified, after being held at the Remand Home, she was forced to testify.

6. Pursuant to **Section 152** of the **Criminal Procedure Code**, a refractory witness may be committed to prison for a period not exceeding 8 days, unless he sooner consents to do what is required of him.

7. Thus when a witness who had recorded a Statement chooses to give evidence which was substantially at variance with the said Statement, he may be declared a hostile witness, and may be held in custody for up to 8 days.

8. The reason for declaring such a witness as hostile is that he was expected to give evidence in accordance with what he had recorded in his written Statement. By choosing to give evidence that was inconsistent with the written Statement, the witness was doing something which was not expected of him.

9. When the witness was committed to prison, he could be released therefrom, as soon as he consented to do that which was required of him.

10. In this case, the Appellant had the opportunity to cross-examine the Complainant at length. During the said cross-examination, the Complainant reiterated that her oral testimony was the truth; and also that the Statement she had recorded earlier, contained the truth.

11. Having re-evaluated the evidence on record, I find no basis for the Appellant's assertion that the Complainant was an unreliable witness.

12. The Appellant's second submission was that the age of the Complainant was not proved beyond any reasonable doubt.

13. Thirdly, the Appellant submitted that there was no medical evidence that could have linked him to the Complainant.

14. Considering that the said Complainant was pregnant and even gave birth before the trial was concluded, the Appellant submitted that DNA testing would have been vital, in linking him to the offence.

15. Finally, the Appellant submitted that the mandatory minimum sentence, pursuant to **Section 8 (4)** of the **Sexual Offences Act**, was unconstitutional.

16. He reasoned that such a mandatory minimum sentence deprived the court from exercising its legitimate jurisdiction which mandates it to have a discretion in individualizing an appropriate sentence, on the basis of the record of each accused person.

17. In determining this appeal, I will first address the issue of the sentence.

18. Pursuant to **Section 8 (4)** of the **Sexual Offences Act**;

> ***"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."***

19. As the Complainant, in this case, was said to have been 17 years old, the trial court sentenced the Appellant to 15 years imprisonment.

20. The record of the proceedings shows that prior to handing down the sentence, the trial court gave to the Appellant an opportunity for mitigation.

21. In the case of **FRANCIS KARIOKO MURUATETU Vs REPUBLIC [2017] eKLR** it was held by the Supreme Court that the mandatory nature of the Death Sentence, as provided under **Section 204** of the **Penal Code** was unconstitutional.

22. The Court made it clear that the Death Sentence was lawful. However, before the trial court hands down a sentence, after convicting an accused person, the said court was required to give the accused person an opportunity for mitigation.

23. In the event that the trial court had handed down a sentence without first allowing the accused time for mitigation, the appellate court may well set aside the sentence, and then direct the trial court to re-sentence the accused person, after taking into account the mitigation.

24. In this case, the record clearly shows that the trial court gave the Appellant, an opportunity for mitigation.

25. Secondly, the trial court, whilst handing down the sentence, expressly said;

> ***"The court has considered the mitigation by the accused person herein ……"***

26. Accordingly, the trial court cannot be faulted for handing down the sentence of 15 years imprisonment.

27. On the issue of Medical evidence, I find that there is no legal requirement that the prosecution should adduce the same as the only means of proving the nexus between the Complainant and the accused.

28. In this case, the Complainant was a pupil at K Primary School. The Appellant was a teacher at the same school, and he used to teach the Complainant, Kiswahili.

29. Therefore, the Complainant and the Appellant knew each other very well. It was thus a case of recognition.

30. Secondly, the acts of defilement occurred several times, and in the circumstances in which the identity of the perpetrator was obvious.

31. There was no need for any medical evidence to bring about the nexus between the Complainant and the offender.

32. On the issue of the Complainant's age, the Appellant submitted that there was no proof that the Complainant was 17 years old.

33. On the Post Rape Care Form (PRC) the Complainant's date of birth was cited as 24th August 2008; whilst on the P3 Form the estimated age of the Complainant was indicated as 17 years.

34. Meanwhile, **PW4**, who is the Complainant's mother testified that the Complainant was born on 26th August 2000.

35. In my considered opinion, the person best-suited to know the date of birth of her child, is the mother.

36. The information entered onto the PRC Form would, ordinarily, be provided by either the Complainant or her parent, who had escorted her to the medical facility.

37. Similarly, the age inserted onto the P3 Form would, ordinarily, be provided by either the Complainant or the parent or the guardian who escorted the Complainant to the Police Station.

38. When information is provided at the police station or at the medical facility where the Complainant visited after being sexually assaulted, the said information is being provided in circumstances where it is already known that it would probably be used in a court case. In other words, such information was not being provided in the ordinary course.

39. It is for that reason that documents such as Birth Certificates and Baptismal Cards are ordinarily deemed to be more reliable, as the said documents would have been obtained in the ordinary course of life events.

40. But I am alive to the fact that in Kenya, there are many parents who do not have Birth Certificates or Baptismal Cards for their children.

41. I hold the considered opinion that when a Complainant does not have a Birth Certificate or a Baptismal Card, that should not necessarily lead to the conclusion that the age of the Complainant had not been proved.

42. As I already stated, a mother would usually be the best-informed person about the date when she gave birth.

43. Just like when **PW4** testified that she was the mother of the Complainant, there was no requirement that she tenders documentary proof of Maternity. So too, when the mother gives evidence about the date when she gave birth to her daughter, I believe that such evidence, if accepted by the trial court; and if there was no legal basis for doubting it, should be deemed as sufficient proof of the Complainant's age.

44. In the result, I find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. Therefore, the appeal has no merits.

45. I dismiss the appeal; and uphold both the conviction and the sentence.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **6th** day of **May** 2020

FRED A. OCHIENG

JUDGE