REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 209 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.930 of 2015

by Hon. S.N. Mwangi – S.R.M.)

ELIJAH KAMAU NGIGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

Elijah Kamau Ngigi, the appellant, was convicted for the offence of ***Defilement*** contrary ***to Section 8(1)*** as read with **Section 8(4) of the Sexual Offences Act** by ***Hon. S.N. Mwangi SRM*** on 17/11/2017.

The particulars of the charge are that on unknown date in the month of August 2014 in Laikipia County unlawfully and intentionally caused his penis to penetrate the vagina of ***RMW,*** a deaf girl aged 17 years.

In the alternative, the appellant was charged with committing an indecent act with a child contrary to ***Section 11(1) of the Sexual Offences Act;*** that on unknown date in August 2014 unlawfully and intentionally caused his penis to come into contact with the vagina of ***RMW*** a girl aged 17 years.

After a full trial, the court convicted the appellant on the principal charge and sentenced him to serve 15 years imprisonment. Being aggrieved by the conviction and sentence, the appellant preferred this appeal.

The grounds of appeal filed by Waichungo & Co. Advocates can be summarized as follows;

1. **That the complaint's age was not proved;**

2. **That penetration was not proved;**

3. **That there was lack of corroboration of the complaint's evidence;**

4. **That there was no evidence in form of DNA to link the appellant to the offence;**

5. **That there was no evidence to corroborate the complainant's evidence;**

6. **That the appellant's defence was not considered;**

7. **That the charge was not proved to the required standard.**

The appellant therefore prays that the conviction be quashed, sentence be set aside and he be set at liberty.

This is a first appeal and it behoves this court to re-examine all the evidence tendered before the trial court, analyze it and make its own conclusions but making due allowance for the fact that it did not hear the witnesses or see them testify. I am guided by the decision in ***Okeno vs Republic 1973 EA 32*** where the court stated as follows;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Ruwalla 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 Peter v Sunday Post (1958) EA 424."

The prosecution called a total of three witnesses in support of its case.

The complainant ***RMW (PW1),*** being deaf, was declared a vulnerable witness and testified through an intermediary – ***Esther Amondi Andiye*** a sign interpreter.

PW1 told the court that she was 15 years at the time of testifying. She recalled the year 2014, a teacher called her to his house when she was passing by going to visit a friend. ***PW1*** identified the teacher as the appellant; that he led her to his house, started talking about sex as they watched television; that it started raining and he asked to have to sex with her. The teacher touched her, kissed her, lay her on the bed and removed her clothes. He then inserted his penis into her vagina and they had sex 3 times on that day. She later went home and did not tell anybody about it. She was at school in [Particulars withheld] and missed her periods. A teacher took her to hospital and upon examination, she was found to be pregnant. The matter was reported to Sipili Police Station and the mother asked who was responsible for the pregnancy and she told the mother that it was the teacher. She gave birth on 01/08/2015 to a baby boy and she identified the appellant as the person who defiled her. ***PW1*** denied that the incident happened in the grazing field and that it is her mother who led to the appellant's arrest.

The Complainant was examined by ***Dr. Joseph Kamau – PW2*** on 08/11/2015. He found that the complainant was deaf and unable to talk, and was 35 weeks pregnant.

PW3 Sgt. Anna Mwikali received a report from PW1's mother who complained that a teacher had defiled PW1 who was deaf. PW3 recorded the mother's statement while the complainant's statement was recorded by an officer who understood sign language. The witness' statement indicated that ***PW1*** had been defiled on diverse dates and that she was 17 years old. According to PW3, the complainant was defiled at their home and that the complainant named the appellant as ***Kamau*** with whom she had been friends. ***PW3*** stated that it is the complainant's mother who showed her the appellant's house.

When placed on his defence, the appellant gave an unsworn statement in which he said he was a school labourer, lives in Maina Village in the same plot with the complainant. He denied knowing anything about the case. He said they had an issue several times and he was not sure whether PW1 had a grudge against him. He said that though the complainant had alleged that incident occurred at a cow shed, she changed and said it was in his house; that the complainant framed him and that is why the mother refused to come to testify.

Mr. Waichungo Counsel for the appellant submitted that there was no medical report produced to prove ***PW1*** was deaf or a letter from the special school nor was the mother called to give the history of the complainant.

Counsel also submitted that the complainant's age was not proved; that at the time of her testimony, she said she was 18 years old and that in 2014, she was 14 years old. That she did not state the date of birth and no document was produced to prove the date of birth and hence PW1 should have been subjected to an age assessment.

It was also the defence submission that penetration was not proved; that PW1's mother did not testify to corroborate PW1's evidence; that the prosecution failed to call for DNA of the child to prove that the appellant was the father.

Counsel also submitted that there was contradictory evidence as to where the incident occurred, in the appellant's house or in her mother's house.

The prosecution case was further faulted for failing to call the complainant's mother as a witness; that the appellant alleged a grudge with the complainant's mother who failed to attend court even after a warrant of arrest was issued. Counsel also urged the court to reduce the sentence if the conviction is not quashed.

In oppossing the appeal, ***Ms. Rugut***, learned counsel for the State submitted that ***PW1*** was declared a vulnerable witness and the court ordered that the interpreter do act as an intermediary; that the doctor confirmed that ***PW1*** was deaf and could not talk and there was no need for a medical certificate. As regards the complainant's age ***Ms. Rugut*** argued that the same was proved as the doctor confirmed the age and that it need not be proved by birth certificate document. In regard to proof of penetration, ***Ms. Rugut*** submitted that ***PW1*** vividly explained that the appellant inserted his penis in her vagina and even demonstrated it in the court and it was not necessary to do a DNA test to confirm the paternity of the child.

On the identity of the appellant, counsel argued that, he is a person well known to PW1 and placed him at the scene of crime.

An offence of defilement is proved when the following elements are proved by the prosecution beyond reasonable doubt;

1. Proof of penetration;

2. Proof of age of complainant;

3. Identity of the perpetrator.

The appellant has faulted the prosecution for not producing a medical certificate to confirm that the complainant was deaf. In my view, I do not think that such certificate was necessary. The investigating officer received PW1 at the police station and was aware that PW1 was unable to talk. The Doctor PW2 confirmed the same. After learning that PW1 was deaf, the court appointed an interpretation intermediary under ***Section 31(2) of the Sexual Offences Act.*** The court properly directed itself and found no reason to fault the decision to appoint an intermediary for PW1.

Whether PW1's age was proved;

At the time of testifying, PW1 said that she was 18 years old, that is on 06/02/2017. She said she was 16 years old in 2015 and that at the time the incident occurred in 2014. PW1 was 14 years old. ***PW2*** examined ***PW1*** on 08/10/2015. He estimated the age of the complainant to be 17 years old. Though it is not necessary to avail a birth certificate or birth notification to prove a victim's age, I think the evidence of PW1 and PW2 were totally at variance as to what PW1's age was in 2014. Was she 14 years old or 16 years?

In defilement cases, proof of the age of the victim is crucial because it is a determinant on what sentence will be meted in the event the accused is convicted. In ***Hilary Nyongesa vs Republic (2010) eKLR,*** the court said;

> **"Age is such a crucial aspect in Sexual Offences that it has to be conclusively proved.....**
>
> **And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."**

In **Musyoki Mwakavi vs Republic (2014) eKLR** the court said;

> **"Apart from medical evidence, the age of the complainant may also be proved by both certificate, the victims parents or guardian and observation or common sense..."**

The court in the above case had followed the decision of ***Francis Umoroni vs Uganda Court of Appeal Criminal Appeal 2/2020.*** In the instant case, I do not agree with the Magistrate's finding that the available evidence put the complainant's age at below 16 and 18 years. If the complainant was 14 years in 2014, then she falls in a different cluster from that of 15 years to 18 years when it comes to sentencing. I think that in this case, in absence of documentary evidence a proper age assessment should have been carried out on the complainant. I am satisfied that the complainant's age was not proved to the required standard.

Proof of penetration;

Penetration is defined under ***Section 2 of the Sexual Offences Act*** as the ***"partial or complete insertion of the genital organs of a person into the genital organs of another person"***

PW1 vividly narrated what was done to her; that the appellant started to touch her breasts, kissed her, removed her clothes and then, inserted his penis into her vagina and that he repeated it three times on the same night before releasing her. PW1 did not reveal this incident to the mother or anyone else till it was later found out in May 2015 when PW1 was found to be 35 weeks pregnant. I am satisfied that from PW1's narration of the events that there was indeed penetration.

The appellant faulted the prosecution for failure to carry out a DNA test. As noted earlier, PW1 did not disclose what had happened to her till she was found to be 35 weeks pregnant. The courts have repeatedly held that medical evidence or DNA is not necessary to prove a defilement or rape. This was the holding in ***AML vs Republic (2012) eKLR*** where the Court of Appeal stated;

> **"The fact of rape or defilement is not proved by DNA test but by way of evidence."**

See also **Kassim Ali vs Republic Mombasa Criminal Appeal 84/2015.**

In this case, once the trial court believed the complainant's evidence that there was penetration, medical evidence was not necessary. It is irrespective of whether the child who was born was the appellant's. It would however been helpful to the court had the prosecution gone further to establish whether or not the child belonged to PW1 and the appellant or was sired by somebody else.

Ordinarily, there is no requirement in law that a particular number of witnesses be availed to prove a fact because a fact can be proved by one witness, unless the law requires otherwise. ***(See Section 143 Evidence Act).*** It is only in situations where the evidence adduced by the witnesses called is insufficient, can the court draw an adverse conclusion as to why a particular witness was not called.

That position was confirmed in ***Donald Majiwa Achilwa & 2 Others vs Republic (2009) eKLR*** the court of appeal said as follows;

> **"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case though. Some of these witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurally of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case, is entitled to infer that had that witness been called, his evidence would have tended to be adverse to the prosecution case.** See also ***Bukenya & Another vs***

Uganda (1972) EA 549."

Who defiled the complaint?

The appellant also complained about the failure of the complainant's mother to testify. Although the court issued a warrant of arrest against the complainant's mother, the State counsel told the court that she had agreed to attend court but she did not appear and the prosecution closed its case. In my view, the said witness was very key in this case to confirm the identity of the perpetrator. PW1 told the court that though she knew the teacher who had defiled her, she did not know his name. PW1 never told the court whether she ever pointed the teacher out to the mother or not. It is however, the complainant's mother who identified the appellant to PW3 following which he was arrested. The question is how did the complainant's mother come to know who the assailant was. The other issue is, why did PW1's mother refuse to attend court to testify. She is the person, who would have known PW1's age and disclosed who PW1 identified as the perpetrator. So far there is no evidence pointing to the appellant as the person who defiled the complainant.

I find that PW1's mother declined to come to court and withheld evidence that was crucial to the fair determination of this case. Her evidence must have tended to be adverse to the prosecution case.

I have considered the appellant's defence. Though it was a bare denial, the appellant has no duty to prove his innocence.

Having said so, PW1's age was not proved and the failure by PW1's mother to testify, left a doubt in the court's mind as to what she withheld. I find that the trial court erred in finding that the case was proved against the appellant beyond any reasonable doubt. The upshot is that the appeal has merit and it is allowed. The conviction is quashed, sentence set aside and the appellant set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **Delivered** at **NYAHURURU** this ***7th*** day of ***May,*** 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Waichungo for the Appellant

Appellant present

Mr. Mwangangi for the State

Eric – Court Assistant