



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 6 OF 2019

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M. KESSE DELIVERED ON 31ST JANUARY 2019 IN CRIMINAL CASE NO.1 54 OF 2016)

KEVIN WEKESA WAMALWA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) , (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 1st July 2016 and 7th August 2016 at [particulars withheld] within Transzoia County intentionally caused your penis to penetrate into the vagina of CNW a child aged 13 years old.**
2. The alternative count was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the diverse dates between 1st July, 2016 and 7th August, 2016 at [particulars withheld] within Transzoia County intentionally caused the conduct between your genital organ namely penis and the genital organ namely vagina of CNW a child aged 13 years.**
3. The appellant was convicted and sentenced to serve 20 years' imprisonment hence this appeal. The summary of the evidence as adduced during trial is worth considering at this juncture before venturing into the merits or otherwise of this appeal.
4. **PW1** the Complainant testified that she was born in the year 2003 and was a class 7 pupil at [particulars withheld] primary school. She said that she had a child with the appellant who was born on the 19th April, 2017 and named CW. She said that she entered into a love relationship with the Appellant in the year 2016 around February and they had sexual intercourse around June and August of that year which resulted in her pregnancy.
5. As a result of the said sexual intercourse she felt sick and she was taken to the hospital by her father and tests were done which became positive. She was beaten by her father and she went to the Appellant's home where they were both arrested and taken to the police station.
6. On cross examination she said that she loved the Appellant and that this was her first lover. She was happy and enjoyed sexual intercourse with the Appellant and that were it not for the pregnancy she would not have complained.
7. **PW2 JMW** the father to the Complainant testified that the Appellant was his student as at 2016. He said that he received information that the complainant was unwell and he took her to the hospital. After examination it was found that she was pregnant and upon asking her she said that it was the appellant who was responsible. He reported the matter and he was issued with a p3 form which was later filled.
8. **PW3 LINUS LIGARE** from Kitale County Referral Hospital produced the P3 form which he filled after examining the complainant and found that she was already carrying a three months old pregnancy.
9. **PW4 P.C MARY LUMASI** from Kitale police station carried out the investigation after the matter was reported by the Complainant's father. The minor had been examined and she had the P3 filled. She then organised for the arrest of the appellant who was arrested together with the minor. She said that at the time of the arrest the Appellant was 23 years old although there was no evidence when pressed during cross examination. She also said that they did not carry out any medical test to ascertain that the appellant was the father to the child.
10. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he was arrested while in his house and that he did not know the Complainant.

ANALYSIS AND DETERMINATION.

11. The parties were ordered to file their written submissions which they did and the court has had time to peruse the same. The state has conceded to this appeal for the simple reason that no DNA test was undertaken after the child was born as it would have been necessary taking into consideration the complainant's assertion that she had never engaged herself in sexual intercourse with anyone else.

12. The state submitted that there was no adequate medical evidence to link the appellant with the offence other than the P3 form and that in the absence of DNA exercise the appellant ought to have been granted the benefit of doubt.

13. The Appellants counsel on his part has raised similar sentiments in his submissions and prayed that on that ground alone the Appellant ought to be granted the benefit of doubt and the appeal allowed.

14. The duty of this court is to re-evaluate the evidence as presented during trial and come up with an independent finding noting that it did not have the benefit of seeing the witnesses' demeanour unlike the trial court. See **OKENO V.REP (1972) E. A 32.**

15. The three cardinal ingredients of the offence of defilement are now known namely, the age of the victim, the identity of the perpetrator and whether there was penetration.

16. The age of the minor was proved by the production of the certificate of birth which indicated that she was born on 9th November 2003.

17. On the issue of penetration, the pregnancy and later the giving birth of the child sufficiently proved that there was penetration. This was corroborated by the production of the treatment notes as well as the P3 form by the Clinical Officer.

18. Was the Appellant the perpetrator? There was no direct evidence that the Appellant was found in a compromising situation with the Appellant. It was however the minors evidence that the Appellant befriended her when her mother sent her to buy slippers sometimes in February 2016.

19. This court has read very well the minors evidence and clearly although there was no independent witness who saw her with the appellant, the fact that she kept on going to the appellant meant that they had a common relationship. As a matter of fact, at the time of his arrest both the Appellant and the Complainant were together. This was further demonstrated by the minor's evidence that she went to the Appellant's home sometimes in September 2016 after she was beaten by her father.

20. The minor on cross examination stated that

“At no time did I reveal to my parents my relationship with Kevin. It was good a relationship when it lasted. I never knew Kevin's age. He was a good age for a relationship with me.”

21. The minor in the opinion of this court was truthful as provided by the *proviso* to Section 124 of the Evidence Act. There was no any iota of evidence to suggest that the minor may have been involved with any other man except the appellant. The cat came out of the bag when she became pregnant otherwise non would have known.

22. Was there any need of undertaking a DNA exercise as submitted by the appellant as well as the respondents in their submission's? This would have been necessary if indeed there was some evidence of the minor perhaps having been involved in other sexual escapades. In this case the evidence of the minor was more direct and her conduct all through does not point out to having been involved with any other man except the Appellant.

23. Section 36(1) of the Sexual Offences Act states as follows;

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

24. The above law empowers the court to direct a person charged to provide samples for test including DNA but the same is not couched in mandatory terms. It should however be noted that that DNA is not the only evidence required to prove sexual offence. Penetration is the essential ingredient and not necessarily pregnancy alone.

25. The court in **AMBROSE MWAWINDO NGWATU V. REPUBLIC MLD CA CRIMINAL APPEAL NO.54 OF 2013 (2016) eKLR** stated as follows;

“In a defilement case, it is not an essential ingredient of the offence that the complainant must conceive a child. In the instant case, conception was a factual matter that is not part of the actus reus in a charge of defilement. Section 36 (1) of the Sexual Offences Act allows the trial court to direct that a DNA test be conducted. In the instant case, the trial court directed that a DNA test be conducted and none was done. We are satisfied that no prejudice was occasioned to the appellant by absence of the DNA test because penetration was proved by the testimony of PW1. Neither the appellant nor defence witnesses controverted the evidence on penetration. In a charge of defilement, what is required is proof of penetration not proof of paternity. We agree that proof of paternity may be proof of penetration when fertilization and sexual intercourse takes place in accordance with the order of nature. However, paternity is not proof of penetration in in-vitro fertilization. In the instant case, from the testimony of PW1, we are satisfied that there is direct evidence on record to the required standard that proves penetration of the appellant's genital organs to the complainant's genital organs.”

26. This court in the premises finds that there was direct evidence that the appellant had sexual relationship with the minor, otherwise called defilement and no one else. He was in fact, as per the testimony of the Investigating Officer arrested with the minor.

27. On that account therefore the court does not agree with the submissions by the parties herein that DNA should have been conducted. This appeal ought to fail on this account and the same is dismissed.

28. On the question of sentencing, it is evident that the period given by the act Section 8(3) thereof of 20 years is mandatory and as it were the courts hands are tied. The courts have of late however considered the constitutionality of the mandatory sentence in light of the Supreme Court's decision in the **FRANCIS K MURUATETU & ANOTHER REPUBLIC SC PETITION NO.16 OF 2015(2017) eKLR** that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional since it denies the courts the jurisdiction to exercise discretion whether to impose death sentence or not depending on the case. That mandatory sentence the Supreme Court found failed to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

29. The Court of Appeal set out the factors to be considered in sentencing under the act when it observed the following in **DISMAS WAFULA KILWAKE V. REPUBLIC (2018) eKLR**.

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

30. In the case at hand it is evident that the minor seemed to have had some family issues as her mother had separated with her father and she was staying together with her step mother. As a matter of fact, after the incident she went and stayed with her maternal grandmother.

31. The Appellant as well was a young man who had just completed school. He was actually taught by the minor's father whom he described as *“my son, a neighbour and my student”*. He completed his fourth form in 2016 the period the incident occurred. There was no evidence as per the testimony of the investigating officer that he was 23 years. Its however clear that the two were love birds till the pregnancy set in.

32. Section 354 of the Criminal Procedure code empowers this court to alter the nature of the sentence increase and or, reduce.

33. In view of the above findings it is the considered opinion of this court that subjecting the appellant to such a long period of 20 years in custody may not be an appropriate sentence in the circumstances. The attitude of the minor as well ought to be considered. She literally stayed with the appellant and she would sneak to his house whenever a chance appeared. Obviously the innocent child who apparently was named after the appellant needs care and protection.

34. For the above reasons the sentence of 20 years' imprisonment is hereby set aside and substituted with a sentence of **three years' imprisonment** from the date of the lower court judgement, namely **30th January 2019**.

35. Orders accordingly.

Dated, signed and delivered at Kitale via zoom this 4th day of June 2020

H. K. CHEMITEI

JUDGE

4/6/2020