



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 162 OF 2019

STEPHEN NDIRANGU WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the conviction and sentence in Makadara Sexual Offences case no 169 of 2016)

JUDGEMENT

1. The appellant was charged with the offense of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006 the particulars of which were that on diverse dates between August and October 2016 at Kayole Estate in Embakasi Sub County within Nairobi county unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of FWN a juvenile girl aged 16 years.

2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

3. He was tried convicted and sentenced to thirteen (13) years six (6) months imprisonment. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:

a) The learned trial Magistrate erred in law and in fact by holding that it is hard to believe that the minor had lied about the two occasions she had sex with the accused, without any proof beyond reasonable doubt that the accused had had sexual intercourse with the said minor on any occasion.

b) The learned trial Magistrate erred in law and in fact by holding that the testimony of PW 2, PW3, PW4 and PL6 was consistent with PW1, the minor's testimony, despite the fact that the testimony had many contradictions

c) The Learned Trial Magistrate erred in law and fact by holding that the accused testimony that he never had sexual intercourse with the complainant, on the date the alleged offence occurred, was contradiction of two consistent testimonies of PW1, PW3 and PW6 as;

i) The DW4 testimony which was sworn evidence remained unchallenged that on the date of the alleged offence she was in the accused house with their child

ii) PW3 and PW6 never visited the accused house on the date of the alleged offence on a later date.

d) The learned trial Magistrate erred in law and in fact in holding that the accused had directed the minor to where he lived, which was different from the house he, the accused and his wife lived in, when no such evidence was ever presented in court.

e) The Learned Trial Magistrate erred in law and in fact in holding that the accused had been properly identified by the minor as the perpetrator when such identification had not met the threshold of burden of proof beyond reasonable.

f) The learned trial Magistrate erred in law and in fact by holding that the case for the prosecution was proved against the appellant whereas the conduct of the complainant was consistent with that of an adult. The statutory defence as contained under Section 8(1) as read with (5) and (6) of the Sexual Offences Act was therefore spelt out in evidence but denied by the trial court.

g) That the Learned Trial Magistrate erred in points of law and fact by failing to realize that the whole of the prosecution case was riddled with material contradictions which were enough to displace the prosecution's narrative.

h) That the Learned Trial Magistrate erred in law and in fact in failing to consider current judicial precedents as regards sentencing in defilement cases where the conduct of the complainant was that of an adult and by conduct consented to the sexual intercourse.

4. The appellant therefore sought that the appeal be allowed and the conviction and sentence set aside.

SUBMISSIONS.

5. When the appeal came up for hearing, the appellant filed written submissions which were high lightened by his Advocate Mr. Ochieng, while Ms Ndombi opposed the same by way of oral submissions. It was submitted by the appellant that the main issue for determination was whether the conduct of the complainant accorded the appellant, the defence under Section 8(5) of the SOA as stated in the following cases:

a) **ELIUD WAWERU WAMBUI V. R [2019] eKLR** Where the court held that a person was more likely to be deceived to believe that a child was an adult if the child was in the age bracket of 16 to 18 years old and that closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.

b) **MARTIN CHARO V R [2016] eKLR** where the court held that sub section (6) does not mean that the accused must have to prove beyond reasonable doubt that he took steps to ascertain the age of the complainant.

6. It was submitted that the conduct of the complainant was material before one is convicted of the offence of defilement. It was contended that from the evidence presented in court, the complainant and the appellant were in a relationship and that she behaved as an adult and gave consent to the sexual act. It was therefore submitted that the complainant behaved in a manner that deceived the appellant.

7. It was submitted further that it was therefore not safe to convict the appellant on the strength of the evidence on record, which showed that the complainant had sought to engage in sexual activity with the appellant, and willingly engaged in the activity until her mother instigated the charging of the appellant.

8. It was finally submitted that the ingredients of the offense were not proved beyond reasonable doubt as the original birth certificate which would have confirmed the complainant's age was not tendered in evidence and that the appellant sought for a DNA test of the baby conceived out of the sexual act but the same was not granted thereby violating his rights under Article 50(2) (j) and (k) of the constitution.

9. Ms Ndombi in opposing the appeal submitted that the age of the complainant was proved through the birth certificate which confirmed that she was born on 29/7/2000 and was therefore 16 as corroborated by the P3 form produced by PW5 Dr Shako and the evidence of her mother and father both who confirmed the date of her birth and the fact that she was a student at the time, she submitted that penetration was proved, so there was no need to conduct DNA on the child.

10. On the conduct of the complainant it was submitted that the appellant was a conductor on a matatu which was driven by the complainant's father and the appellant knew that she was a student thereby displacing the defence under section 8(5) which she submitted was an afterthought. She submitted that the appellant was known to the complainant's family and therefore his identification was not mistaken.

PROCEEDINGS.

11. This being a first appeal, the court is under a duty to subject the evidence tendered before the trial court to fresh scrutiny, analysis and re-evaluation so as to come to its own conclusion though giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses as was stated in the case of OKENO vs REPUBLIC [1972] EA 32 and as followed thereafter by Superior Courts.

12. The prosecution case was that PW1 FW then a student at [Particulars Withheld] Secondary school, came to know the appellant who was a conductor in a Matatu which was being driven by her father in the month of August during school holidays. The appellant used to go to their house and the complainant and her siblings also used to take a ride in the matatu driven by their father, it was during one of those rides when the appellant asked of her number which she gave him, and from that time on the appellant would call her and greet her. One day in the month of August, the appellant called her on phone and invited her to his house, the direction to which he gave her, to a palace called Kanisani, which she went to and in her words "he took me to the bed room and then he asked me to remove my clothes and I did and he then removed his clothes, then he had sex with me."

13. She went back home and did not tell anyone what had happened. She later on went back to school. On 1/10/2016 when she was on school break, the appellant once again called her on phone and invited her to his house, he then as had become their norm told her to go to the bed room and she told him that she did not want, but the appellant just took her to the bedroom and they had sex without using condom. She then returned to school and lo and behold she missed her period.

14. Her mother was later on called by a friend who told her that she had heard the appellant tell someone that the complainant was pregnant and when taken for test it was confirmed that she was two months pregnant. At the time of trial, she was six months pregnant. It was her evidence that she had never had sex with anyone before the appellant.

15. In cross examination she stated that the appellant forced her into sex against her wish and that the appellant had told a friend that he wanted her to get an abortion. Her evidence was corroborated by PW2 GRN her mother, who confirmed that she was born on 29/7/2000, and that she knew the appellant who was her husband's conductor. It was her evidence that on 24/ 11/16, a friend of hers told her that she had

heard the appellant say that he had had sex with pw1, who was pregnant and advised her to observe her. It was then when the complainant told her that she had missed her period and that the appellant was responsible. She then reported to the police. The complainant later on had a miscarriage.

16. PW3 GMK the father was told by the complainant that the appellant who was his conductor was responsible for the pregnancy. She took them to the appellant's house but found the door locked. It was his evidence that when the appellant was arrested, he went to the DO's office and talked with him. The appellant told him that he had wanted to ask him for forgiveness. He had known the appellant for 1-2 years having worked in the same matatu and that the same knew the complainant as his child whom he used to carry in the matatu from school to home and back.

17. PW4 ROSE NGENO WAWERU a nurse examined the complaint on 24/1/2016 who confirmed having had unprotected sex with her boyfriend. On examination, her hymen had an old tear and positive pregnancy test. **PW5 DR SHAKO** confirmed that she was five months pregnant. **PW6 PC KELO** interviewed the appellant who explained that the complainant was his girlfriend. He stated that the appellant had been arrested by AP officers.

18. When put on his defence, the appellant testified that he was a conductor in a matatu which was driven by the complainant's father, who used to bring her to the car and would stay with her the whole day. In the process they got to know each other. It was his evidence that she would come at 8am and go back home at 8pm. In the month of September her mother was told to investigate her movement by another woman and on that day the complainant did not tell her anything. On 24/11/2016 he was arrested while at work and he thought that it was because he did not have a PSV badge and uniform, only to be later on informed that it was a case of defilement.

19. DW2 DENIS MAGOMA stated that the appellant called him and told him that he had been arrested due to uniform PSV and badge. When he visited him at the station, they were told that he had been arrested on defilement. He stated that he did not know the complainant. **DW3 OSCAR SHIKUKU** confirmed that he used to work with the appellant who was arrested and at the station they were told that he had a charge of defilement. He did not know the complainant; neither did he know where the appellant lived. **DW4 RUTH WANJIRU**, the appellant wife stated that they used to live together but did not know where he would be during the day.

JUDGEMENT OF THE LOWER COURT

20. In convicting the appellant, the trial court found that the fact that it was shown by medical evidence that the minor was pregnant was proof that there was penetration. She further found as a fact that the complainant believed that the house the appellant took her to was his, thereby contradicting the evidence of the wife of the appellant and that and that both PW3 and the Investigating officer visited the house and found it looked. On identification she found that the appellant was known to the complaint, her father and mother and therefore the same was identified on the strength of the case of **PAUL ETOLE AND ANOTHER V REPUBLIC CR. 24 OF 2000 UR**.

DETERMINATION.

21. From the record of appeal and submissions herein, the main issue for this courts determination is whether the defence under Section 8(5) Of The Sexual Offences Act was available to the appellant. It must be stated for record purposes that the appellant did not raise this defence before the trial court. It is therefore clear that the trial court cannot be faulted for not making a finding on an issue which was not conversed before it. Justice F. Ochieng in the case of **RANNY OMONDI AKUMU v R [2019] eKLR** had this to say on the issue;

“11. By raising the issue for the first time, before an appellate court, the Appellant has deprived the court of an opportunity to delve into the factual circumstances, which may have informed the matter about which he was now complaining.

12. An appellate court is ordinarily enjoined to make determinations on issues which were being raised to challenge the decision or the process of the trial court.

13. When an issue is raised for the first time, at the appellate stage, the determination on that issue cannot be said to be one that was made in an appeal.”

22. The Court of Appeal in the case of **JAPHETH MWAMBIRE MBITHA v. R [2019] eKLR** on the same issue rendered themselves as follows;

“[12] On the first issue, the question of a defective charge sheet was not among the grounds raised on first appeal let alone during the trial. This issue has been raised for the first time in this second appeal. This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:

“... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

Needless to say, the Court declined to entertain fresh issues on appeal. In line with that finding, we too are disinclined to address the allegations of a defective charge sheet as it is a new matter and there is no opinion by the two courts below on this new issue which was introduced for the first time on second appeal. Put differently, the appellant cannot fault the first appellate court for failing to make a finding on an issue that was never advanced at the hearing of the first appeal. Consequently, that ground of appeal should of necessity fail.”

23. This being a first appeal as stated herein and upon looking at the evidence on record against the appellant submissions, it is clear that the appellant knew that the complainant was a student, her father was his driver in the matatu where they were both working and according to the complainant's evidence her father used to carry her in the said matatu including her siblings. The appellant knew or ought to have known that she was a student and therefore her action of going to the appellant's house could not have been construed to be behaving as an adult. It cannot be said that the appellant was deceived to believing that the complainant was an adult based on the evidence on record.

24. I therefore find and hold that this case is distinguishable from the two cases cited by the appellant, that is the case of **ELIUD WAWERU WAMBUI V REPUBLIC** where The court of Appeal had this to say on the defence;

“ Act provides as follows in section 8(5) and (6):

“(5) It is a defense to a charge under this section if-

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defense should be read disjunctively if the two sub-sections are to make sense.

We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.”

25. I further find that the conduct of the complainant herein is distinguishable from that of the complainant in **MARTIN CHARO v REPUBLIC (supra)**, the complainant herein was a school going girl and it is clear from her evidence that during the second sexual contact she declined might be having met her Damascus experience and the appellant carried her into bed. The complaint cannot be said to had consented as her testimony as regards the first sexual contact too was that “he lied to me and took me to the bedroom”. This to me means that the Appellant deceived her as to the nature of what they were doing. The appellant's contention that they were in a relationship is not a defense to an act of defilement where the law clearly prohibits the act.

26. As regards proof of the age of the complainant, as submitted by Ms. Ndombi, the record of the proceedings shows that the same was proved through the testimony of the minor as corroborated by her father and mother, the birth certificate and the P3 form thereon. The production of a photocopy of the birth certificate does not mean that case was not proved.

27. I further find and hold that since penetration had been proved, DNA result would have only corroborated the same and the appellant did not suffer any prejudice by the same not being conducted. There is on record evidence that the complainant suffered a miscarriage before the conclusion of the case and it was therefore not possible to carry out DNA. The Appellant further did not deny having had a sexual relationship with the minor. The appellant was identified by ways of recognition and in view of the evidence of the father of the complaint I am satisfied that his conviction was safe and free from error.

28. The appellant did not make any submission on the sentence passed against him neither did he raise it in his Petition of Appeal and sentence, being a discretion of the Trial Court I shall not interfere with the same.

29. In the final analysis I find no merit on the appeal herein which I dismiss and affirm the trial courts judgement both on conviction and sentence thereon. The appellant has a right of appeal.

And it is ordered.

SIGNED DATED AND DELIVERED AT NAIROBI THIS

11th DAY OF June 2020 through Google Teams.

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J. WAKIAGA

JUDGE