



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 58 OF 2019

ERIC KIPKOECH KEMEI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable R. Yator - Principal Magistrate, delivered on 19th August, 2019 in Molo Chief Magistrate's Court Criminal Case No. 44 of 2018)

JUDGMENT

1. The Appellant herein, Eric Kipkoech Kemei, was charged at the Molo Chief Magistrate's Court with the offence of defilement Contrary to section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars stated in the charge sheet were that on diverse dates between February, 2018 and 19th April, 2018 at [Particulars Withheld] village in Londiani Sub-County within Kericho County of Rift Valley Region, intentionally caused his penis to penetrate the vagina of BN, a girl aged 16 years.
2. An alternative charge facing the Appellant was committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences act No. 3 of 2006. The details on time, place and victim were the same as those of the main charge.
3. The Appellant pleaded not guilty and the case proceeded to a fully-fledged trial. At the trial, the Prosecution called four witnesses and the Appellant, upon being put on his defence, gave sworn testimony. The Learned Trial Magistrate was persuaded that a case had been made beyond reasonable doubt on the main charge and convicted the Appellant. She proceeded to sentence the Appellant to fifteen years imprisonment.
4. The Appellant is dissatisfied by both the conviction and the sentence and has appealed to this Court. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see *Okeno v Republic* [1972] EA 32).
5. The Appellant listed the following as his grounds of appeal:
6. In the Court below, the following evidence emerged. The Complainant testified as PW1. She testified that she was 16 years old at the time of the incident and that she knew the Appellant as the owner of a shop where she lived with her cousin, EM, who was her guardian. She said that sometime in February, 2018, she had gone to the Appellant's shop to purchase a biro when the Appellant locked the shop and removed her panties, then removed his clothes and defiled her. She said that the Appellant did that again another time she had gone to buy sugar at the shop. She said that the shop is one-roomed and that the Appellant put a sack on the floor then made her lie down. She further stated that she tried to refuse but the Appellant warned her that if she told anyone he would kill her.
7. The Complainant said that the first time it happened was in the morning and the second time was at 10:00am. On both occasions, she said, the Appellant did not use protection and that on both occasions there was no one else around.
8. The Complainant said that this happened a third time when the Appellant reportedly told her to take some items to Madam Susan, a teacher at her school. She said that she was going home at around 4:00pm on that day at around 4:00pm when the Appellant sent her. He, again, reportedly locked her in the shop and defiled her again.
9. The Complainant testified that after it happened this third time she went to look for her cousin, EM who is a tailor at the shops to tell her what had happened. She said that she did not find her but that she told her later that evening while at home. EM, then, told her teacher, Susan Ng'etich who advised them to report to the Chief. They did this. However, the Complainant said that even after this during April holidays, the Appellant again pulled her from the road one day at around 4:00pm, took her to the shop and again defiled her. She said that she went

again and told EM what had happened and that this time they went to Londiani Police Station from where they were referred to Londiani Hospital. At the Hospital, she says she was examined and was found to be pregnant.

10. EM took oath as PW2. She confirmed that she was living with the Complainant in her house. She said that around February, 2018 the Complainant started getting unexplained sickness which proved not curable with medicine. She took her to several hospitals to no avail. However, on 19/04/2018 after the schools closed, she noticed that the Complainant looked pregnant. She sat her down and asked her to tell her the truth. It was then that the Complainant told her that the Appellant, whom she referred to as Eric, had locked her in his shop when she went to buy a pencil and had had sex with her. EM said that the Complainant told her that the Appellant had locked her and defiled her on four different occasions. EM said that on 21/04/2018, she took the Complainant to Londiana District Hospital where tests showed that she was pregnant. She claimed that the Appellant had tried to give her money to procure an abortion for the Complainant but she declined. She also testified that the Complainant gave birth to a baby boy on 01/10/2018.

11. The third witness was Justus Oigo Mosera, a Clinical Officer at Londiani Sub-County Hospital. He confirmed that he examined the Complainant on 21/04/2018 and found her to be pregnant. The mode of examination was obstetric ultrasound and it revealed that the Complainant was 16 weeks pregnant at the time (3-4 months) with an expected date of delivery as 04/10/2018. Based on this, the Officer was sure that there had been penetration. She produced a duly filled P3 Form, Lab request form issued, treatment chits and scan photos from the ultra-sound. He stated that he did not examine the Complainant or draw any samples from him. He also confirmed that he did not draw any specimen from the Complainant for DNA tests.

12. The final witness was the Investigating Officer, PC Mathew Kiplangat who testified that EM and the Complainant went to Londiani Police Station on 21/04/2018 with the complaint and that he issued them with a P3 Form and referred them to Londiani Hospital. He later visited the scene after interrogating the Complainant and determined that the Appellant was to be charged with the offence of defilement.

13. Put on his defence, the Appellant denied categorically that he had defiled the Complainant. He claimed that the charges were trumped up because they had had a disagreement with EM because she had a debt for items she had taken on credit at his shop. He complained that the age of the pregnancy should have given a clue that he was not the culprit; and that no tests were done to prove he was the father to the child.

14. During the hearing of the Appeal, the Appellant filed written submissions and informed the Court that he had nothing to add to them. The Learned Prosecutor, Mr. Chigiti, orally supported the conviction and sentence. He submitted that there was sufficient evidence adduced by the seven Prosecution witnesses to support the conviction. He submitted that the three ingredients of defilement: age; penetration and identification were all proved. Mr. Chigiti submitted that any contradictions or inconsistencies in the Prosecution witnesses' testimonies were minor and did not affect the overall quality of the case against the Appellant.

15. For the offence of defilement to be established, the Prosecution has to establish three elements:

- a. That the victim was a minor (in this case below 18 years old);
- b. That there was penetration as defined in section 2 of the Sexual Offences Act; and
- c. That the penetration was caused by the Accused Person.

16. In the present case, the age of the victim and the fact of penetration were not in issue at all. The victim testified intelligently that she was 16 years old as did her guardian. Also, a Child Treatment Card was produced corroborating that fact. Similarly, the fact of penetration is not contestable: scientific evidence showed that the victim was pregnant and it was later testified that she had given birth to a baby boy. The very fact of conception and delivery of a baby confirms that the victim was defiled.

17. The only question at trial was who the perpetrator was. The Prosecution insisted that it was the Appellant. That conviction was based solely on the narrative of the Complainant. The Learned Trial Magistrate was persuaded that the Complainant was telling the truth and proceeded to convict.

18. There is no doubt that section 124 of the Evidence Act permits a Court to convict for defilement on the evidence of a single witness of the victim who is a minor where the Court is persuaded that the victim is telling the truth.

19. Was the Court justified to convict on the evidence on record in this case? I have come to the conclusion that the conviction was not safe for two reasons.

20. First, I found the testimony of the Complainant unpersuasive to meet the very high threshold to convict in a criminal case. I say so for three main reasons:

- a. *One*, there are some minor details which jar upon the credibility of the narrative. For example, the minor claimed that the first time the defilement happened, she had gone to buy a biro. But her guardian, EM, claimed that the Complainant had told her that the first time she had gone to buy a pencil. A minor but a telling detail.
- b. *Two*, the story told by the Complainant about what happened in the aftermath of the defilement is markedly different than that told by the guardian, EM. The Complainant said that after she was defiled the third time she told EM in the evening. She further testified that even after that the Appellant defiled her a fourth time and it is only this time that EM proceeded to go to the Police. EM's story was that she noticed that the Complainant was getting sick and not improving on medication; and that the Complainant only confessed to her what had happened upon confrontation. These two stories are markedly different and invite questions as to their credibility.

c. *Three*, the Complainant claimed that the defilement occurred in the shop during the day – at a time when the shop was supposed to be opened. She said that the Appellant locked the shop, laid a mat on the floor and defiled her on all four occasions. On the fourth occasion, he allegedly pulled her from the road, forcibly and took her to the shop and did the same. These happenings appear implausible when claimed to have happened during the day.

21. In addition to these questions about the Prosecution narrative fingering the Appellant as the perpetrator, there is the question why, in the circumstances of this case, DNA tests were not carried out to determine the parentage of the baby conceived by the minor. It is true that our decisional law has established many times that rape or defilement is proved by evidence, not by way of DNA test only. See *AML v Republic [2012] eKLR*. However, there are instances where the absence of DNA testing when circumstances would counsel such testing would lead to inference being drawn against the Prosecution. This was such a case. In this case, the Complainant raised a complaint against the Appellant long after the first alleged defilement; and in circumstances which called for further investigation. The Appellant denied being involved; and there were inconsistencies in the narratives of the Complainant. In these circumstances, it seems readily obvious that the best way to dissolve any reasonable doubts whether the Complainant was defiled by the Appellant or not was the scientific route: to conduct a DNA test to establish the paternity of the child of the Complainant. It is difficult to understand why the Investigators did not conduct the DNA test in these circumstances.

22. Given the reasonable doubts presented by the cracks in the Complainant’s narrative and the failure to conduct DNA tests in circumstances where one was called for, it was eminently unsafe to convict in this case.

23. In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.

24. Orders accordingly.

Dated and delivered at Nakuru this 2nd day of July, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Mr. Alex Chigiti,, and the Court Assistant were in attendance by video-conference set up at the Court’s Boardroom. Representatives of the media were able to access the proceedings by watching at the Court’s Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.