



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJADO

CRIMINAL APPEAL NO. 23 OF 2018

DAVID WAFULA WANGILA.....APPELLANT

VERUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence in Criminal S.O No. 27 of 2017 at the Chief Magistrate's Court at Kajiado (Hon. S.M Shitubi, CM) delivered on 14th November, 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (4) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on diverse dates between February and July, 2015 in Isinya Sub County within Kajiado County, he intentionally caused his male organ to penetrate the female organ of RN, a child aged 16 years.

2. The appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on diverse dates between February, and July, 2015 in Isinya Sub County, within Kajiado County, he intentionally touched the buttocks and breast of RN, a child aged 16 years.

3. The appellant denied both counts and after a trial in which the prosecution called 5 witnesses and the appellant's defence, he was convicted on the main count and sentenced to fifteen years imprisonment.

4. The appellant was aggrieved with both conviction and sentence and lodged this appeal, raising the following grounds, namely;

1. That the trial court erred in law and fact in convicting him when the case was not properly investigated.

2. That the trial court erred in law and fact in convicting him despite the fact that the documentary evidence was obtained contrary to Article 50 of the constitution.

3. That the trial court erred in law by relying on insufficient evidence to convict him.

4. That the trial court erred in law and fact by relying on inconsistent and contradictory evidence.

5. That the trial court erred in law and fact when it conducted an unfair trial in violation of Article 50 (2), (c), (g) ad (h) of the constitution.

6. That the trial court erred in law and fact by dismissing his defence.

5. The appellant filed supplementary grounds of appeal dated and filed on 3rd December, 2019 stating;

1. That the trial court erred in law and fact by failing to avail him the statutory defence under Section 8(5) and (6) of the Sexual Offences Act.

2. That the trial court erred in law and fact by imposing a harsh and inappropriate sentence of 15 years.

6. During the hearing of the appeal, the appellant relied on his written submissions filed on 3rd December, 2019 and urged the court to allow his appeal, quash the conviction and set aside the sentence.

7. In the written submissions, the appellant submitted that the prosecution did not prove the case against him beyond reasonable doubt as the ingredients of the offence were not proved. He relied on Fappyton Mutuku Ngui v Republic [2012] eKLR and Charles Wamukoya v Republic (Criminal Appeal No. 72 of 2013).

8. The appellant further argued that the standard of proof was not met in this case and relied on Amos Kinyua Kugi v Republic [2015] eKLR for the submission that the duty of proofing a case is always on the prosecution and must do so beyond all reasonable doubt and the duty does not shift to the accused.

9. According to the appellant, any doubts in the prosecution's case should go to the accused. He relied on Elizabeth Waitiegeni Gatimu v Republic [2015] eKLR. It is the appellant's submission that the trial court had found that the victim's conduct was suspect; that she was hovering on the him (appellant) as a trap but still held that her hands were tied by the law. The appellant blamed the trial court for disregarding the statutory defence under section 8(5) and (6) of the Act and relied on Duncan Mwai Gichimu v Republic [2015] eKLR.

10. The appellant argued that the complainant engaged in a consensual sexual relationship and although it was alleged that she was a student and evidence was led to that effect, the prosecution evidence showed that her intention was to marry him and that even PW2 admitted as much. According to the appellant, the test of reasonable belief as contained in section 8(5) (6), should be objectively applied by a reasonable bystander.

11. He again argued relying on Duncan Mwai Gichuhi v Republic [2015] eKLR, that it was possible for one to believe that a girl of 16 years was over 18 years, and that it is difficult to differentiate between a girl of 16, 17, 18 or even 19 years. The appellant further submitted that PW3, the doctor, testified that the victim was sexually active but not that she was defiled.

12. The appellant also blamed the trial court for imposing a harsh sentence by sentencing him to the mandatory sentence. He relied on Evans Wayala Wanyonyi v Republic [2019] eKLR which held that mandatory sentence cannot stand.

13. The respondent did not file submissions though given time to do so.

Determination

14. I have considered this appeal; submissions by the appellant and the authorities relied on. I have also perused the record of the trial court and considered the impugned judgment. This being a first appeal it is the duty of this court as the first appellate court to re-evaluate, reanalyze and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that. (See Okeno v Republic [1972] EA 32).

15. Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal again held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.”

16. And in victor Owich Mbogo v Republic, criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

“It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify.”

17. **PW 1, RN** testified that the appellant was her boyfriend having known him in December, 2013; that the appellant then lived alone but his wife came in February 2014 and that she did not know that he was married. According to the witness, the appellant worked as a barber and when his wife learnt that she was the appellant's friend, she was furious and this forced PW1 to go and live far away and started working.

18. PW1 learnt in November, 2014 that the appellant had chased his wife away and returned and they continued with their friendship. She conceived in 2015 and informed the appellant but the appellant's first reaction was that he was not responsible. She told the court that she would go to the appellant's house because she was just at home. She did not tell her mother but continued going to school where she was examined and it became clear that she was expectant. She went to hospital at Isinya with the appellant who paid Kshs 15000 for her medical attention and promised to take responsibility. The appellant however disappeared and her mother reported the matter to police and the appellant was arrested.

19. She testified that she gave birth on 21st December, 2015 and when the appellant came out of remand, he took her to his home promising to marry her. He also promised that they would take her to school and take care of the child. However, the appellant's mother complained that she had spent a lot of money in the case. She stayed with the appellant. She told the court that she was born in 1989 and gave birth when she was 16 years old. She also told the court that she lived well with the appellant as husband and wife.

20. **PW2 AZC**, who said she was mother to PW1, testified that on 13th July, 2015 PW1 started feeling sickly while in school. She asked her what was wrong but PW1 did not tell her. She took PW1 to Hospital where she was examined and found to be pregnant. When she was asked who was responsible she said it was the appellant. She took PW2 to the appellant's place but the appellant denied that he knew PW1

although PW1 insisted that it was him. She reported the matter to police. The appellant was arrested and charged but PW1 wanted the appellant to marry her. According to PW2, the complainant was born in 1999. She also stated that she used to see the appellant and he was married. She now stays with PW1 and her child.

21. In Cross-examination, the witness told the court that she did not know the appellant; that the appellant took PW1 to Western and that DNA examination result showed that the appellant was the biological father to the child.

22. **PW3, Stephen Kamwasi Lekayian**, a clinical officer attached to Isinya Health Centre testified that he saw PW1 in August, 2015 who had been taken to the facility with a history of defilement. She was then 16 years old. On physical examination, he found no physical injuries, no discharge from the private parts, the hymen was missing and there were no bruises. Lab results showed that she was pregnant. He filled a P3 form on 3rd August, 2015. He could not tell the age of the pregnancy because the test was done on her urine.

23. According to the witness, the broken hymen was not fresh. He concluded that she was sexually active who had sexual intercourse repeatedly. He also examined the appellant but he had no injuries. He sent samples to Kajiado for examination but results showed that he had no syphilis, or any STD's. He was also HIV negative. He produced P3 form for PW1 and lab results as PEX 2 and PEX 3. Respectively. The P3 for the appellant and lab results were produced as PEX4 and 5.

24. **PW4 Nelly Maweu Papa**, a government analyst based at the Government Chemist, Nairobi testified that she received a request from No. 88875 CPL Grace Munya of Isinya police station to analyze certain items and determine paternity namely; blood sample from the appellant; blood sample from the complainant and blood sample from the child. On examination and analysis, she concluded that there was a 99.999% chance that the appellant was the biological father to the child. She prepared a report on 2nd August, 2016. She produced the exhibit memo and report as PEX 6(a) and 6(b) respectively.

25. **PW5 No. 88875 CPL Grace Munga** of Isinya Police Station testified that on 1st August, 2015, she was called by her colleague Kiyoo who informed her of a case of defilement that had been assigned to her for investigation. She called the victim, took her and the appellant to Isinya Health Centre for examination but was referred to Kajiado County Hospital where she took them for examination. The doctor at Isinya filled the P3 form after examination at Kajiado County Hospital. She then recorded statements from witnesses and charged the appellant.

26. She also testified that DNA examination was done after PW1 had delivered and she escorted the samples to the Government Chemist Nairobi after the court allowed extraction of samples from the appellant. The report was produced as PEX 7. She also obtained a birth certificate for PW1 which she produced as PEX 1.

27. When put on his defence, the appellant testified on oath that he came to Isinya in 2014 and set up a barber shop while his sister worked in the same flower farm with PW2. One day his sister went with PW2 to a shop nearby to borrow food which the appellant guaranteed for a while. Later PW2 went with PW1 who lived with some two working ladies. PW1 would wash cloths for people and do baby-sitting.

28. According to the appellant, one day PW2 went and told him that since he had assisted her so much, she was giving him her sister. The appellant told her that he was not ready to marry from outside but would marry a lady from his community.

29. PW2 pestered him for a while. Later in January, 2015, PW1 went and asked him to marry her but declined and he told her that he knew their manners. She told him that she would change. When he asked her why she was staying alone, she told him that her mother had died and her father lived up country. He advised her to inform her parents/father so that they could decide. She left for one week and later came with her father and grandmother. They talked and agreed. He told PW1 that he would marry her though he was not ready and had no stable job. PW1 had Kshs. 1500/- which she said they could use.

30. They stayed for some time but one day PW2 went and asked him why he had informed PW1's father yet this was an arrangement between her and him. He told her that since she had informed him that she was sister to PW1, they thought it wise to let PW1's father know.

31. After sometime, PW2 went and told him that she had borrowed Kshs, 50,000 and asked them to help her pay the money. PW1 told her that they would not pay and asked her to go and pay. PW2 started taking goods from the shop claiming that he and PW1 would pay. According to the appellant, PW1 had a birth certificate and identity card which showed that she was born in 1995.

32. He told the court that one evening in July, PW2 went with 2 people and took PW1 to a hospital at Isinya. He was taken to a small room, PW1, PW2 and two other women said that they wanted her to terminate the pregnancy. He declined, questioning why he had not been told of the pregnancy. They told him that if he had Kshs. 50,000 the pregnancy would not be terminated. They gave him about 30 minutes to borrow Kshs. 35,000 which he gave to PW2. He also gave her his barber machine. He was to pay Kshs 7,000 per month. He also gave them a further Kshs. 1500/-. Thereafter the appellant and PW1 lived peacefully as husband and wife. According to the appellant, PW2 wanted them to be assisting her while PW1 wanted them to assist her father.

33. The appellant further testified that on 25th July, 2015 PW1 requested for money to take to her father and when PW2 learnt of it, she had him (appellant) arrested. When PW1 was informed, she went to the police station and informed the police that they were husband and wife and that she was not a child. The officer who was investigating the case abandoned that case. According to the appellant, it was after that incident that PW5 took over the case as the investigating officer took him to court.

34. The appellant told the court that PW1's copy of birth certificate and identity card were in the house and When he was arrested he left the identity card and birth certificate in the house; that after he was arrested, he stayed in remand for 7 months and when he was released on bond, he found that PW1 had been married to someone else after PW2 told her that he had escaped. Later PW1 escaped from the second man and went back to him. When the issue of the case arose, he advised PW1 to stay with her parents until the case was over and that it was the investigating officer who advised him to move out from the house if PW1 had insisted in staying with him in that house.

35. PW1 felt he was chasing her and vowed to have him arrested and he was indeed arrested and charged. Things were taken from his house during his absence. In cross-examination, he told the court that the birth certificate and identity card were stolen from the house by PW2; that he was arrested on 25th July, 2015 for this case and on 1st May, 2017 for the assault case when things were taken from his house. He stated that the things had been in the house from the time PW1 moved in with him.
36. He further told the court that he did not ask PW2 the question of the birth certificate because he did not expect another birth certificate for PW1 to be produced. Shown PEX1 (birth certificate) he told the court that though it showed that it belonged to PW1 and that she was born in 1999, the one he had was different and that he knew PW1 through PW2 who introduced herself as sister to PW1.
37. After considering the above evidence, the trial court believed the prosecution evidence, convicted the appellant and sentenced him prompting this appeal.
38. The appellant has challenged his conviction and sentence on a number of grounds. He not only argued that the prosecution did not prove its case beyond reasonable doubt, but also that the trial court erred by failing to appreciate his defence which was plausible. He also blamed the trial court for not considering the statutory defence he raised under section 8(5) and (6) of the Act. The prosecution did not offer any submissions to the appellant's appeal.
39. The appellant faced a charge of defilement. In order to secure a conviction, the prosecution was required to prove three ingredients namely; age, penetration and identity of the perpetrator. This must be done through cogent evidence from witnesses and other admissible evidence. In that respect, I will first deal with penetration and identity of the perpetrator.
40. PW1 testified that she had a relationship with the appellant in 2014 but ran away when the appellant's wife came to visit him and learnt of their escapades. She however returned and lived with him after the appellant chased his wife away. She conceived in 2015 and gave birth in November same year. The evidence of PW3, the clinical officer also confirmed that PW1 was sexually active and that a lab test confirmed that she was pregnant.
41. The appellant himself conceded that he had a relationship with PW1. According to him, the relationship was started by PW2 who brought PW1 to his place and asked him to marry her. He also testified that he met PW1's father and grandmother who agreed to their arrangement to get married. They thereafter lived together as husband and wife. The appellant does not therefore dispute the fact that he had a relationship with PW1. His case is however that she was his wife and they lived as husband and wife.
42. PW4, the Government Analyst also testified that she conducted DNA analysis on the samples sent to their facility which confirmed that the appellant was the biological father of the child. On the basis of the above evidence, the issue of penetration and that of identity of the person responsible was proved beyond reasonable doubt.
43. That brings us to the last issue of age. The prosecution case was that PW1 was a child of 16 years at the time she was defiled. They relied on the evidence of PW2 who told the court that she was born in 1999 and PEX1, a Birth Certificate which showed that she was born on 19th October, 1999. The birth was registered on 7th February, 2013 while the Birth Certificate was issued on 27th February, 2013.
44. PW1 testified that she knew the appellant in December, 2013 after she completed her standard 8 class and they became friends. In her evidence in chief, she told the court that she was 16 years when she got the child and that she was born in 1989. The fact that PW1 was born in 1989 was not corrected during reexamination.
45. The appellant told the court in his defence that when he met PW1 she had a birth certificate and identity card which showed that she was an adult. The documents were in the house and he left them in the house when he was arrested. He also told the court that PW2 told him that PW1 was her sister and that their mother had been deceased.
46. According to the appellant, all was well until PW2 started demanding that he assist her with money. She was also not happy that he had met PW1's father and grandmother. He also said that he was forced to give out money to assist the complainant procure an abortion and although he declined, he was forced to borrow KShs. 35,000. He also gave to PW2 his barber machine.
47. There was no attempt on the part of the prosecution to challenge the appellant's evidence that PW1 was an adult who had an identity card and that she was born in 1989 as she had testified in chief. The prosecution did not also challenge the appellant's claim that PW2 was extorting money from him and was unhappy when PW1 wanted to assist the complainant's father.
48. According to the appellant, it was the Birth Certificate and Identity Card the complainant had that made him believe that she was an adult. He testified that the documents were in the house and they must have been taken from the house while he was in remand. The appellant further stated that PW1 was taken to him by PW2 who introduced herself to him as a sister to PW1 and wanted him to marry PW1. She is also said to have told the appellant that their mother was deceased.
49. The appellant also raised the defence under section 8(5) and (6) of the Sexual offences Act. Subsection (5) provides that it is a defence to a charge under section 8 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. Subsection (6) states that 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.
50. The appellant was clear in his testimony that PW1 had an identity card which made him believe that she was an adult. He also testified that before he agreed to live with her, he demanded to see her father given that he had been made to believe that her mother was deceased. He testified that indeed he met the complainant's father and grandmother who did not tell him that PW1 was a minor. It was the appellant's case that PW2 was not happy on learning that he had met PW1's father. That evidence was not shaken in cross examination. The appellant

even asked for time to get the documents only to find them missing given that he had been arrested a second time and left the complainant in the house. If the appellant was not telling the truth would he have gone to look for the documents?

51. In my respectful view, the appellant raised a valid defence that the trial court did not consider and therefore fell into error. Had the trial court considered the circumstances the appellant found himself in, including the possibility that PW1 may have had an identity card and another Birth Certificate thus an adult, the trial court would probably have come to a different conclusion.

52. I have perused the trial court's record and noted that **PW2** testified as **AZC**. However, according to the Birth certificate, (PEX1), PW1's mother is **Agnes Nzilani Joseph**. The prosecution did not explain this discrepancy given the appellant's evidence that PW2 had told him that PW1's mother was deceased. She had also told the court that PW1 was her daughter and that she used to see the appellant but she did not say where.

53. The appellant further told the court that PW1 wanted them to assist her father which PW2 was not happy about. According to him, PW2 wanted him and PW1 to assist her and not PW1's father.

54. In criminal trials, the prosecution is required to prove its case beyond reasonable doubt. In **Stephen Nguli Mulili v Republic** [2014] eKLR, the Court of Appeal observed that:

"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases..."

55. In **Bakare v State** (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified on that principle stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

56. It is also a principle of law that where the prosecution's case leaves doubts or gaps, the doubt should go to the accused. The Court of Appeal stated this position in **Pius Arap Maina v Republic** [2013] eKLR, thus;

"[T]he prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."

57. In its judgment, the trial court was clearly disturbed by the case and in particular the complainant's conduct. The court stated:

"I now turn to the conduct of the complainant. Her evidence was that she knew the accused in 2013 soon after finishing standard 8. She says that he was her boyfriend and that at first she did not know that he was married. He lived alone and had promised to marry her. She said how she had to run away and hide deep in maasailand after she heard that neighbours had talked about her overtures and accused's wife was hostile. She was away till 2014 when she got information that accused had chased away his wife. Come January 2015, she was back in town and chasing after him. This time she became pregnant. It is the pregnancy that appears to have triggered the report to police. In her words..."we got pregnant. I informed him. At first he said that it was not his pregnancy...He told me that he would marry me..."

58. The court then continued.

"Her evidence tallies with the accused's on the aspect of being asked to pay the doctor and his machine being retained. The conduct of this girl is disturbing. She appears to have been hovering over the young man who lived alone while his wife resided upcountry like a bait, a trap..."

59. The court then concluded:

"My hands are tied by the law despite the fact that there is now a baby, the product of the escapades, I find the accused person guilty as charged and convict him on the main count..."

58. I have considered the appeal and reevaluated the evidence myself. I have considered the appellant's defence and weighed against that of the evidence of the prosecution. I have also taken into account the statutory defence put forward by the appellant as well as the circumstances of this case.

59. The prosecution did not dispel the fact that there was a possibility that the complainant had two Birth certificates. The evidence of PW2 that she was mother to the complainant and that of the appellant that she had told him that the complainant was her sister left doubts on what the truth really was. The appellant further testified that PW2 wanted him to continue assisting her as she had done before the appellant and the complainant got into the relationship.

60. Further still, the appellant argued that the initial investigating officer dropped out of the case when he realized that the complainant had

an identity card and that was how the new investigating officer PW 5 came into the picture. This is reflected in her testimony that she was called by her colleague informing her that the case had been allocated to her. This was on 1st August 2015 and according to her, the appellant was in remand. This is despite the fact that from the charge sheet, the appellant was arrested on 3rd August 2015 and appeared in court on the same day.

61. The appellant was clear that PW2 was demanding money from his and she was not happy that the appellant had got in touch with the complainant's father whom he and the complainant were willing to assist against PW2's wish. The trial court appreciated the fact that the appellant had to even surrender his machine in one of the schemes by PW2.

62. Taking all these into account, I am satisfied that it was unsafe to convict the appellant on the basis of the evidence on record which was full of doubts. In the circumstances, I find merit in the appeal. Consequently, the appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 9th day of October, 2020.

E.C. MWITA

JUDGE