REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 33 OF 2017

NDORO CHAKA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal case

Number 1328 of 2015 in the Principal Magistrate's court

at Kwale Hon. P. K. Mutai (RM)

JUDGMENT

1. The appellant herein, **NDORO CHAKA**, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the charge were that on diverse dates between 1st September 2015 and 4th December 2015 at [Particulars Withheld] village, Lungulunga Location of Kwale County within Coast Region did intentionally and unlawfully cause his penis to penetrate the vagina **CMJ** (*particulars withheld*) a child aged 15 years.

2. The appellant pleaded, not guilty, to the charge and a trial was conducted in which the prosecution presented the evidence of 4 witnesses. PW1, the complainant, testified that she was on 1st September 2015, at home when the appellant came and took her as his wife and that they eloped to Border Area where the appellant's brother resides. She stated that they engaged in sexual intercourse during the period that they lived together and that their respective families engaged in dowry negotiations, but that her father later reported the matter to the police by which time she was already pregnant with the appellant's child. On cross examination, she testified that she was married to the appellant who introduced her to his parents as his wife.

3. PW2, JN, was the complainant's father. He testified that the complainant disappeared from home on 10th October 2015 and that he reported the disappearance to the police who upon conducting investigations, found the complainant in the appellant's house and that the complainant was pregnant at the time she was found.

4. PW3, PC Livingstone Koech, testified that he received a missing person's report on 11th October 2015 and that he later learnt that the complainant, who had allegedly eloped with the appellant, was pregnant. He produced the complainant's birth notification as Exhibit 3. The said notification indicated that the complainant was born on 24th December 2000.

5. PW4, Twaha Salim, was the Clinical Officer. He testified that he examined the complainant and found her to be 12 weeks pregnant. He produced the P3 form and treatment notes as exhibits.

6. When placed on his defence the appellant tendered an unsworn statement in which he denied committing the offence and only explained the circumstances under which he was arrested.

7. At the close of the trial, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant who was then sentenced to 20 years imprisonment thereby triggering the instant appeal in which the appellant has set out the following grounds of appeal:

> ***1. That the learned trial magistrate erred in law and in fact by finding my conviction and sentence without considering that the same was not safe for the age of the complainant was not proved beyond any reasonable doubt.***

2. That the learned trial magistrate erred in law and in fact by convicting and sentencing me without considering that section 36(1) of the Sexual Offences Act No. 3 of 2006 was not done to establish the complainant's allegations.

3. That the learned trial magistrate erred in law and in fact by convicting and sentencing me without considering that the prosecution did not prove its case to the required standard of law.

4. That the learned trial magistrate erred in law and in fact by convicting and sentencing me without considering my reasonable defence statement.

8. At the hearing of the appeal, the appellant submitted that the case against him was not proved to the required standards as no DNA analysis was done on the baby allegedly born as a result of the alleged defilement so as to establish his paternity in view of the fact that the prosecution's case was mainly founded on the complainant's pregnancy.

9. For this argument, the appellant relied on the decision in the case of **Arnold Kililo vs Republic Criminal Appeal No. 57 of 2011** wherein the court held that:

"Having been found to be pregnant, the investigation officer would have been vigilant to seek to establish the paternity of the child beyond reasonable doubt through DNA or any other clinical finding. I find that the investigating officer was casual in the investigation. He relied on the pregnancy as the main evidence but that per se could not incriminate the appellant."

10. On identification, the appellant submitted that the same was not proved beyond reasonable doubt and was not supported by any material evidence.

11. On his part, Mr. Isaboke, learned counsel for the state, submitted that the DNA issue has been raised as an afterthought and that under Section 36 of the Sexual Offences Act, there is no mandatory requirement that DNA analysis be done on the baby, as long as the trial court believes the complainant's testimony.

12. As the first appellate court, this court is under a duty to re-consider and reanalyze the evidence tendered before the lower court afresh with a view to arriving at my own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings. ***See Okeno v Republic* [1973] E.A. 32**; ***Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570**.

Analysis and determination

13. I have considered the instant appeal and the rival arguments of the appellant and the state. The main issue for determination is whether the prosecution's case was proved beyond reasonable doubt.

14. The ingredients of the offence defilement are the age of the complainant, penetration and the identification of the appellant as the perpetrator of the offence. (See the case of **Dominic Kibet Mwerang Vs Republic (2013) eKLR)**.

15. On age, I find that there was sufficient proof that the complainant was 15 years as at the time of that she was alleged defiled. I say so because the complainant's birth notification that was produced as an exhibit showed that the complainant was born on 24th December 2000 which means that she was 15 years old as at 1st September and December 2015 when the offence is alleged to have been committed.

16. On penetration, it is clear that the complainant was defiled as it was proved that she was already 3 months pregnant as at the time PW2 allegedly found her in the appellant's house.

17. Turning to the identification of the appellant as the perpetrator of the said offence of defilement, I note that the only evidence that the trial court relied upon in convicting the appellant was the testimony of the complainant and her father, PW2. According to the complainant, she was married to the appellant and their respective parents were in the process of negotiating the dowry. PW2, on the other hand testified that her daughter (PW1) disappeared from home to an unknown destination thereby prompting him to make a missing person's report to the police. To my mind, there was material contradiction in the evidence of PW1 and PW2 as while PW1 maintained that her 'marriage' to the appellant had her parents' blessings as they were negotiating he dowry, PW2 stated that he did not know of the complainant's whereabouts. I therefore find that the glaring contradiction in the testimonies of PW1 and PW2 cast doubt on their truthfulness and credibility and ought to have alerted the trial magistrate to be a little more cautions in accepting their testimonies without corroboration by other independent witnesses more so considering the fact that the complainant denied the allegation that he had any intimate relationship with the complainant. It is on the basis of this anomaly that counsel for the state submitted that the court should order for a retrial so as to introduce the DNA analysis report on the complainant's baby.

18. This court notes that the mere fact that the complainant was pregnant does not necessarily mean that the appellant was responsible for said pregnancy. The duty of the prosecution was to prove its case beyond reasonable doubt as it is not for the court to fill in the gaps in the prosecution's case. In this I note that it was alleged that the complainant cohabited with the appellant for about 3 months before his arrest. To my mind, such cohabitation could not have happened in secrecy and the least that the prosecution could have done would have been to present a witness to confirm the alleged cohabitation or present a DNA analysis report of the complainant's baby in order to settle the issue of paternity. I am guided by the decision in the case of **Keter vs Republic [2007] e KLR** wherein the court held:

"The prosecution is not obliged to call superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

19. Counsel for state submitted that the court should order for a retrial so that the DNA analysis can be done on the complainant's baby to establish his paternity. I find that the proposal for a retrial is not tenable in the circumstances of this case as not only will it be prejudicial to the appellant whose trial commenced in 2015 and has already served 2 years out of his 20 years sentence but will also go against the real reason purpose for an order for a retrial which is not to assist the prosecution fill the gaps in their case.

20. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> ***"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."***

21. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**: -

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
>
> > *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'*

22. That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

> ***"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."***

23. In this case and for the reasons that I have already stated in this judgment, I find that the interests of justice will not favour an order for a retrial.

24. For the above reasons and having regard to the jurisprudence in the above cited authorities I find that the instant appeal is merited and I therefore allow it. Consequently, I hereby quash the conviction, set aside the sentence and direct that the appellant may be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at Nairobi this 11th day of March 2019.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8th day of April 2019.

NJOKI MWANGI

JUDGE

In the presence of:

Appellant present

Ms Marinda for the Director of Public Prosecution

Mr Oliver Musundi – Court Assistant