REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MACHAKOS

CRIMINAL APPEAL NO. 46 OF 2018

SAMUEL NZIOKA DAVID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. I. M. Kahuya (SRM) in Machakos Chief

Magistrates' Court Criminal Case No. 24 of 2016 delivered on 10th April, 2018)

JUDGEMENT

1. The appellant faced a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars to the said charge was that the appellant on 7th September, 2016 at [particulars withheld], Kathiani sub-location Kahiani location in Kathiani sub-county within Machakos County, intentionally unlawfully caused his penis to penetrate the vagina of ASE a child aged 14 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant on 7th September, 2016 at [particulars withheld], Kathiani sub-location Kathiani Location in Kathiani Sub-county within Machakos County intentionally and unlawfully touched the vagina of ASE a child aged 14 years with his penis.

3. The appellant pleaded not guilty to the charge and was put to trial. The prosecution case was that ASE (PW1) was aged 14 years and had completed her standard eight (8) studies the previous year. She stated that her age was assessed by looking at her teeth at the hospital. She recounted that she was seated outside the plot in which the appellant also lived with his wife on 7th September, 2016 at around 7.00 pm. The appellant then greeted her and told her that they should go to the back of the plot. There, the appellant told her to remove her clothes and stand next to the wall. She did as asked. He then removed his clothes and inserted his penis into her vagina. When finished they sat then wore her clothes. Her mother came a while later illuminating using a torch and she hid. The appellant spoke to her mother while zipping up his trouser. After 10 minutes she saw the police and her mother called her out and they went to Kathiani Police Station and later to Kathiani hospital. She stated that it was not the first time she had had sex with the appellant and that it was the fourth (4th) time. She stated that she was pregnant with the appellant's child and was due to deliver in the month of March.

4. EMK (PW2) who was the mother to PW1 testified that PW1.was examined at Machakos Level 5 Hospital and found to be 14 years of age. She recounted that on 7th September, 2016 at around 7.00 pm she had come from the market and found her children at the house except for PW1. She went looking for her. When she went behind the plot she found her lying on the ground and the appellant was on top of her. She illuminated them using her torchlight. She asked the appellant why he was spoiling her child and PW1 went into hiding. The appellant asked her if he could give her money in order for PW1 to abort as she was expectant. One Florence Nduku came and PW2 asked her to call the police. That PW1 had told Catherine that she was pregnant and that was confirmed at the hospital where she was examined. She reported the matter at Kathiani Police Station and later took PW1 to hospital for examination.

5. Catherine Mbula Nzioka (PW3) recounted that on the material day at around 7.00 pm while fetching water at the gate she saw PW1 going behind the plot in company of the appellant. She informed PW2 who went to check and found the two. PW3 stated that she heard noise and went to the scene. There she found the appellant, PW1, PW2 and Florence. That the appellant was asking PW2 to forgive her for having sex with PW1. That she recorded her statement the next day. She stated that PW1 was a school goer and that she had never had differences with the appellant.

6. Florence Nduku (PW4) had on the material day at 7.00 pm come from the market with PW2. She saw PW3 talking to PW2 but could not hear what they were discussing. She later asked PW2's child M on the whereabouts of her mother and she led her behind the plot. There she found PW2 with the appellant. PW1 was at the time hiding behind banana plants. PW2 then demanded that PW1 and the appellant should go to hospital to confirm if PW1 was pregnant. The appellant stated that he had money. PW4 left and returned later and found PW2 and the appellant still talking and PW1 hiding. She suggested that the police should be called and asked a neighbour called Boi to do so. The OCS

later came and she took them to where PW2 and the appellant were and they went to the police station. She stated that she identified the appellant because she knew him and that she illuminated using her phone torch light.

7. Dorah Agona Awori (PW5) who is a Doctor a Machakos Level 5 Hospital stated that she filled a p3 form after examining PW1 on 7th September, 2016. She stated that she was 14 years of age. That PW1 stated that she had been defiled 4 times since June, 2016. That she had not seen her menses since June, 2016. Upon examination she found that PW1 had no hymen. She had no discharge or blood in her private parts and her cervix was normal. A test was conducted that revealed that PW1 was pregnant. She stated that she saw sperms and made an inference that there was penetration. She also examined the appellant and a test that revealed that he had sperms in his urine was conducted. She produced the p3 form for PW1, Laboratory test results and p3 form for the appellant in that regard.

8. PC Chepkemoi Rono (PW6) received the report on 7th September, 2016 at 8.00 PM. He stated that PW1 was in company of PW2 and reported that PW1 had been defiled by the appellant on the same day at 7.00 pm. She accompanied PW1 and the appellant to Machakos Level 5 Hospital for examination. A test was conducted and it emerged that PW1 was pregnant. An age assessment was conducted on PW1 which revealed that she was aged 14 years old and she produced an age assessment report in that regard. On 26th April, 2017 she took PW1 and the Appellant to Government Chemist for a DNA test to determine paternity of the baby. She stated that the result was positive.

9. Nelly Maurine Papa who is an analyst at Government Chemist indicated that swabs were taken from PW1 and the appellant and it emerged that the probability that the appellant fathered the baby was 99.99%. She produced the exhibit memo and the report from Government Chemist in that regard as P. Exhibit 6 and 7 respectively.

10. The appellant gave unsworn testimony. He stated that he was on the material day at Kangundo the whole day and returned at Kathiani at around 6.00 pm. He met PW2 at the corridor. She asked him what he had done to her daughter to which he responded that PW1 was only a friend to him. PW2 insisted that he had defiled PW1 and shortly thereafter the police arrested him and he was charged. He stated that he initially thought PW1 was aged 18 years as she never attended school. That he asked PW1 about her age and who told him not to worry. He stated that he was ready to take responsibility since PW1 has his baby. The appellant was convicted of the offence of defilement and sentenced to serve 20 years imprisonment.

11. Aggrieved by the conviction and sentence the appellant filed this appeal on grounds that:

a) He was convicted on inconsistent and contradictory evidence.

b) That the charge sheet did not disclose the offence.

c) That voire dire examination was not conducted on PW1

d) That his defence was not considered.

12. In his submissions, the appellant argued that he was not accorded fair trial since his file was handled by several magistrates and the matter was prosecuted by several prosecutors. He further argued that he was not informed of his right to representation. He further stated that his request to recall PW1 and PW2 was denied. On the second ground, he argued that having emerged that the sexual intercourse had been consensual, the trial court ought to have held otherwise. He in this regard cited **Omus Kiringi Chivatsi v. Republic [2017] eKLR**, **Samuel Wahini Ngugi v. Republic [2012] eKLR** and **Ahmed Sumar v. Republic [1964] EALR 483**. He submitted that even though he sought forgiveness and opportunity to care for the child, he was not given the chance and that the sentence was excessive and harsh. He further argued that the trial court failed to conduct voire dire examination on PW1 thereby her credibility and competence was not tested. He in this regard relied on **Kibageny Arap Korir v. Republic [1959] EA 92**, **J.G. v. Republic [2015] eKLR** and **Samuel Warui Karimi v. Republic [2016] eKLR**. He argued that he acknowledged that the child was his and agreed to take responsibility. That what transpired between him and PW1 could not be termed as defilement as PW1 willfully participated in the sexual activity. In support of his case he cited **Omus Kiringi Chivatsi (supra).** He argued that the prosecution did not prove its case beyond reasonable doubt since the assessment report was not conclusive and that PW1 behaved like an adult. He further argued that the prosecution case was full of contradictions.

13. The respondent on the other hand submitted that the age assessment having been conducted by a doctor was cogent. That PW1's evidence was corroborated by PW2's who testified that she was aged 14 years and that she was defiled by the appellant. That PW1's evidence was corroborated by PW2 who saw the appellant lying on top of her and who testified that he offered money for abortion. That PW1's evidence was also corroborated by the doctor's who noted that she was pregnant and that there were sperms in her vaginal area which was a sign of penetration. That the appellant was identified and PW2 who aided in his arrest confirmed that he is the same person he saw on top of PW1. Referring to Article 50 (2) of the Constitution, it was submitted that the right to legal representation depends on individual capacity unless the accused person is facing capital offence or there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. That the present case fails to meet the minimum standards that requires an accused person to be accorded legal representation by the state. On contradictions, it was submitted that the discrepancies alleged are inconsequential to the conviction and sentence. That the change of prosecution counsel was mainly caused by lack of sufficient manpower in the prosecutorial office and did not affect the substance of the charge and did not prejudice the appellant. It was submitted that the trial magistrate exhaustively examined the entire prosecution evidence in totality and weighed it as against the appellant's evidence and made a finding supported with reasons that the prosecution case displaced the defence raised by the appellant. It was submitted that the appellant's defence was a mere denial and could not dispel the overwhelming evidence tendered by the prosecution since his allegation could not hold water.

14. This is a first appeal. This court is thereby under duty to re-evaluate and re-consider the evidence afresh with a view to arriving at its own independent conclusion. While so doing, this court is minded that it did not have the benefit of seeing the witnesses' demeanor. I have given due consideration to this appeal. From my analysis of the evidence on record, it is clear to me that the appellant engaged with PW1 in sexual intercourse. The appellant in his evidence splits hairs when he on the one hand denies having been involved with PW1 and on the other

admits to having been involved with her and in fact goes ahead to agree to take parental responsibility of the baby. Despite the same, the DNA result produced in evidence revealed that the appellant fathered PW1's baby. I therefore find that the appellant engaged in sexual intercourse with PW1. Thereby penetration and identification has been established by the prosecution. This is a case of defilement. The prosecution in such case is under duty to establish the existence of penetration, the age of the victim and proper identification. In so holding, it is noteworthy that the inconsistencies and contradictions complained of by the appellant were as correctly submitted by the prosecution inconsequential since they did not shake the material facts of the case. In view of my finding that the appellant was sexually involved with PW1, the issues left for this court's determination are as follows:

a) Whether or not PW1's age was established by the prosecution.

b) Whether or not voir dire examination was conducted and the effect thereof.

c) Whether or not the appellant's defence was considered.

d) Whether or not the appellant's right to legal representation was infringed.

e) Whether the appellant's defence under section 8 (5) of the Sexual Offences Act was considered.

f) Whether or not the sentence meted on the appellant was excessive.

15. On the issue of age, an age assessment report was produced in evidence which report revealed that PW1 was 14 years of age. This court is minded of the fact that not all women deliver in hospitals or are well informed to know the need of taking out a birth certificate. PW1's age was assessed by a doctor and I find that the age was established to the required standards. See: **Francis Omuroni v. Uganda Court of Appeal No. 2 of 2000** where it was held:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"***

16. It has been vastly held that voire dire examination ought to be conducted on a child of tender years. Who then qualifies to be a child of tender years? There has been varying findings by the Court of Appeal differently constituted on the issue. In **Gamaldene Abdi Abdiraham & Another v. Republic [2013] eKLR**, the court set aside the conviction of the trial court where voire dire examination was not conducted on a complainant who was aged 13 years. In **M.K. v. Republic [2015] eKLR**, the court held that it was unnecessary to conduct voire dire examination on a complainant who was aged 15 years of age. In **JGK v. Republic [2015] eKLR**, the court was of the opinion that so long as the witness was below 18 years voire dire examination was necessary. This is an indication that the definition of a child of tender years under the Children Act has not yet been given a global importation. This could be because of the fact that children develop differently depending on their exposure. Having said so, I am fortified by the decision in **Patrick Kathurima v. Republic [2015] eKLR** where it was held that:

> ***"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of Cap 15. We are aware that section 2 of the Children Act defines a child of tender years to be one under age of ten years. the definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."***

17. Having so found, it was necessary for the trial court to conduct voire dire examination. Failure to conduct voire dire examination vitiates the prosecution case, however, in this case, PW1's evidence was cogent and corroborated and further the appellant admitted to being involved with PW1. In this regard, I am guided by the Court of Appeal finding in **Athumani Ali Mwiyi v. Republic Criminal Appeal No. 11 of 2015** where it was held:

> ***"In an appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."***

In the end, I find that the failure to conduct voire dire examination was not prejudicial to the appellant. Indeed the appellant confirmed having impregnated the complainant and agreed to take parental responsibility of the baby. The complainant was mature and candid in her evidence

18. In **David Njoroge Macharia v. Republic [2011] eKLR** The Court of Appeal pronounced itself as follows in regard to Article (2) (h):

> ***"Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

19. The Court of Appeal held the opinion that the State ought to provide legal representation to accused faced with a capital offence. That the same can also be availed through a case by case basis i.e. where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. It is my considered view that the case at hand bears no complex issues and is not of public interest. I note also that the appellant understood the charge and the case in particular and was able to conduct his case. I find that he was not prejudiced by lack of representation thereby his right to legal representation was not infringed. That ground therefore fails.

20. The trial court analyzed the prosecution case *vis a vis* that of the appellant and found that it was not watertight or rather it did not cast any doubt to the prosecution case. I therefore find that the appellant's defence was considered.

21. Section 8 (5) and (6) of the Sexual Offences Act provide that:

> ***"It is a defence 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;***
>
> ***(b) The accused reasonably believed that the child was over the age of eighteen years.***
>
> ***6) The belief referred to on sub section (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."***

The appellant merely stated that he asked PW1 her age and she told him not to worry. Clearly, the appellant did not take any cogent steps to ascertain PW1's age before engaging with her and cannot be accorded relief and the aforementioned section of the law. That ground fails.

22. On the last issue, the appellant was sentenced to serve 20 years in prison. The prescribed punishment for defilement of a child between the age of 12 years and 15 years is imprisonment for not less than 20 years. The appellant herein was given the minimum sentence available and therefore lenient and lawful.

23. In the end, this appeal fails in totality and the same is dismissed. The trial court's conviction and sentence is upheld.

Dated and delivered at Machakos this 10th day of April, 2019.

D. K. KEMEI

JUDGE