REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 4 OF 2019

PETER EKAI EPUNGURE..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Sexual Offences Case No. 16A of 2018 by

the Senior Resident Magistrate – Hon. M.K. Muchiri delivered

on 8th February, 2019 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3** of **2006.** 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.**

2. He was tried, convicted and sentenced to twenty (20) years imprisonment on the charge of defilement. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal through the amended Petition of Appeal filed on 20/06/2019:-

1) That the trial magistrate erred in law in failing to take into consideration the Appellant's alibi defence.

2) That the learned trial magistrate erred in law and in fact by not conducting voir dire examination on PW1.

3) That the learned trial magistrate erred in law and in fact in failing to consider glaring inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.

4) That the learned magistrate erred in law and in fact for not ordering for DNA test to be conducted to confirm that the Appellant was the father of the child born by PW1 and this was in breach of Section 36 of the Sexual Offences Act.

5) That the learned trial magistrate erred in law and in holding that the prosecution had proved its case beyond reasonable doubt yet evidence on record did not support such a finding.

6) That the learned trial magistrate erred in law and in failing to make a finding that the evidence adduced by PW1 and PW2 about the date of birth was contradictory and inconsistent thus not safe to convict.

7) The trial court failed to take into account, appreciate and raise issues with the prosecution's failure to call material, competent and compellable witnesses without ascribing any reason or explanation to the same.

8) The learned magistrate failed to make a finding that the family of PW1 had ulterior motives against the Appellant and their aim was to unjustly enrich themselves at the expense of the Appellant.

3. He therefore sought the orders that the appeal be allowed, conviction quashed and sentence set aside.

4. When the appeal came up for hearing before me, Mr. Kahuthu for the Respondent and Mr. Pukha for the Appellant filed written

submissions which they relied upon.

WRITTEN SUBMISSIONS

5. On behalf of the Respondent it was submitted that at the trial the Appellant raised a defence of *alibi* which the trial court dismissed as being an afterthought contrary to evidence that was tendered before him. It was submitted that it was not for the Appellant to establish his *alibi* for which the following cases were submitted in support:-

*(a) **Uganda v Sebyala & others [1969 EA 204.***

*(b) **Victor Mwenda Mulinge v Republic [2014] eKLR.***

*(c) **Kiarie v Republic [1984 KLR.***

6. It was further submitted that the trial court erred in law in failing to conduct *voir dire* examination on the complainant as stipulated under **Section 19** of the **Oaths and Statutory Declaration Act** and confirmed in the cases of **JULIUS KIUNGA M'RITHIA v REPUBLIC [2011] eKLR** and **MATOVE V REGINA [1961] EA**. It was submitted that the complainant was a child of tender age as defined under **Section 2** of the **Children Act** and therefore *voir dire* was mandatory as per the cases **KIBAGENY ARAP KOLIL v REPUBLIC [1959] EA 92**, **JGK v REPUBLIC [2015] eKLR** and **PATRICK KATHURIMA v REPUBLIC [2015] eKLR**.

7. It was contended that the prosecution case was riddled with general weaknesses, contradictions and inconsistencies as to when the first report was made to the police and the age of pregnancy. It was therefore submitted that the trial court erred in law by not ordering for DNA test contrary to the provisions of **Section 36 (1)** of the **Sexual Offences Act** and therefore the prosecution case was not proved beyond reasonable doubt. It was further submitted that vital witnesses were not called and on the authority of **BUKENYA v UGANDA [1972] EA 549** an adverse inference should have been made against the prosecution case. It was contended that he Appellant's defence was not considered by the court.

8. On behalf of the Respondent it was conceded that on the authority of **VICTOR MWENDWA MULINGE v REPUBLIC [2014] eKLR,** the Appellant's *alibi* defence was not considered and that the prosecution did not apply to adduce further evidence in accordance with **Section 309** of the **Criminal Procedure Code**. It was contended the *voir dire* examination was not necessary since the complainant was a child aged fifteen (15) years. It was submitted the DNA test was not necessary to establish whether the Appellant had defiled the complainant in view of the evidence tendered. It was however conceded that since the Appellant had raised it in his defence the court ought to have considered it in the Judgement. It was contended further that the alleged negotiations and the complainant's parents on how the child born out of the defilement would be taken care of were not binding.

9. It was therefore contended that going by the evidence on record, the court should order a retrial.

PROCEEDINGS

10. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

11. The prosecution's case was that the complainant aged fifteen (15) years at the time having been born on 29/09/2003 had known the Appellant since August 2017 as a girlfriend. On 20/09/2017 he took her to his house and they had sex and from the said date they used to have sex until 28/10/2017 when she missed her period. The Appellant then asked her to procure an abortion but she declined. In cross-examination she stated that she informed the Appellant of the pregnancy in October 2017 but reported to the police on 24/01/2018 having declined to procure an abortion as suggested by the Appellant**. PW2 S.E.** her mother confirmed that she knew the Appellant had impregnated her. The Appellant then went with his parents to **PW2** to negotiate on how he will take custody of the baby but negated on the deal causing her to report to the police.

12. PW3 S.A. stated that she knew the Appellant who was her neighbour. On 8/08/2017 she heard someone call **PW1** whom she confirmed was **Emelda Esekon** and the Appellant. She called **PW1's** father to confirm whether **PW1** was at home and instructed her sister to investigate her conduct. Later she helped **PW1** carry a pregnancy test which turned out positive and she told her that the Appellant was responsible. **PW3** knew the Appellant well as married with a child. **PW4 ABDIRAHAMAN MUSA** a clinical officer conducted a pregnancy test on the complainant which turned out positive. **PW5 APC MARTHA EKAL** recorded the statement from the complainant and produced the birth certificate in respect of the same. It was her evidence that the complainant was a girlfriend of the Appellant with whom he used to have unprotected sex leading to the pregnancy.

13. When put on his defence the Appellant stated that he was aged twenty three (23) years old and a college student. He denied knowing the complainant and stated that there was no evidence that the child was his. He stated that at one time while in Naivasha a friend called him and told him that there was a girl saying that he was her husband. He confirmed having seen **PW2** in August 2017. He confirmed having admitted that the baby was his due to the respect he had for his parents. He confirmed under cross-examination that he was in Lodwar in the month of August.

ANALYSIS AND DETERMINATION

14. In the evidence tendered before the trial court as analyzed herein and from the submissions by the Advocates for the Appellant, this is yet another case where a young adult male aged twenty (23) years old at the time has found himself at cross purposes by the provisions of

Sexual Offences Act. In the mind of the complainant and the Appellant, they were boy/girl friends enjoying what is only legally allowed to adults. They did not see anything wrong and they engaged in unprotected unlawful sexual act. The complainant did not see anything wrong with their action until she missed her period and the Appellant provided the only remedy he knew best – procure an abortion - which she did not buy. This is what led to the complaint being lodged at the police station.

15. I have therefore identified the following issues for determination:-

1) ***Whether there was need to conduct a voir dire examination before taking evidence of PW1.***

2) ***Whether the prosecution case against the Appellant was proved beyond reasonable doubt.***

16. On whether there was need to administer a *voir dire* on **PW1** as submitted by the Appellant:- it is clear from the record that the same was at that time aged fifteen (15) years. For the purposes of this Judgement, I produce the record herein:-

> ***"Court: How old are you?***
>
> ***PW1: I am 15 years old.***
>
> ***Court: She is not a child of tender age. She can be sworn."***

17. The law on *voir dire* is clear as stated in **Section 19** of **Cap 15** as regards a child of tender age. The Court of Appeal in the case of **KIBAGENY ARAP KOLIL v REPUBLIC [1959] EA 92** stated that the expression child of 'tender years' for the purposes of **Section 19** the Act in the absence of special circumstances means a child of any age, or apparent age of under fourteen (14) years. **Section 2** of the **Children's Act** defines a child of tender years to be one under the age of ten (10) years. This legal position has been captured in the case of **PATRICK KATHURIMA v REPUBLIC (supra)** tendered as authority by the Appellant and in line with many authorities where the court quoted with approval in **MARIPETT LOONKOMOK v REPUBLIC [2016] eKLR** court of appeal sitting in Mombasa as follows:-

> ***". . . that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that:-***
>
> > ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."***

18. Having established that the complainant was aged fifteen (15) years, I therefore find no fault with the trial court in not conducting *voir dire*. I have looked at the recorded proceedings and I am satisfied that there was no miscarriage of justice.

19. On whether the prosecution proved its case against the Appellant beyond any reasonable doubt and whether failure to conduct DNA on the unborn child led to miscarriage of justice, it is clear from the evidence that the Appellant was put together with the complainant by **PW2** who saw the Appellant with one **Emelda** on 8/08/2017 thereby corroborating the evidence of **PW1**. There is evidence tendered by **PW2** the complainant's mother which the Appellant confirmed in his defence that upon the same getting pregnant both parents entered into some negotiations on the custody of the child conceived out of the unlawful sexual conduct of the Appellant and **PW2**. The complainant was very candid in her evidence that from 8/08/2017 they engaged in unprotected sexual act with the Appellant until she missed her period which pregnancy the Appellant wanted terminated as confirmed by **PW5**. The Appellant in his evidence admitted having known the complainant who was claiming to be his girlfriend.

20. I am therefore satisfied that the prosecution case against the Appellant was proved beyond reasonable doubt and the conviction was safe.

21. The final issue for determination is whether the sentence was lawful. Under **Section 8(3)** of the **Sexual Offences Act**, the sentence provided for is not less than twenty (20) years and under **Section 8(4)** where the child is between sixteen (16) and eighteen (18) years the sentence is for a term not less than fifteen (15) years. This being a borderline case, I will give the Appellant the benefit of lesser sentence and therefore reduce the term to imprisonment of fifteen (15) years.

22. In the final analysis, I will dismiss the appeal on conviction but allow the appeal on sentence by reducing the same to imprisonment for fifteen (15) years from the date of conviction. The Appellant is entitled to remission thereon if any.

23. The Appellant has a right of appeal while the State retains right of appeal on the sentence substituted and it is so ordered.

Dated, delivered and signed at Lodwar this 3rd day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_________________________ *for the Respondent*

__________________________ *for the Appellant*

Accused - ________________

_____________________ - *Court assistant*