REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.21 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.2366 of 2014 by: Hon. V. Ochanda – R.M.)

SAMUEL GATIMU WANJIRU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

This appeal arises from the judgment of Hon. V. Ochanda R.M. in Nyahururu Cr.Case.2366 of 2014 where the appellant Samuel Gatimu Wanjiru, was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between June, 2014 and 28/9/2014, in Nyahururu Town, Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of WMN a girl aged 13 years old.

In the alternative, the appellant faced a charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.

The appellant was convicted on the main charge and sentenced to 15 years imprisonment. The alternative charge was left in abeyance.

The appellant is aggrieved by the said conviction and sentence meted on him. He filed this appeal through the firm of Gakuhi Chege Advocates, citing the following grounds of appeal:

1. That the trial magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the appellant caused his genital organs to penetrate the genital organ of the complainant;

2. That the trial magistrate erred in law and fact by failing to find that the medical evidence did not positively connect the injuries to the time of the offence and hence the appellant.

3. That the trial magistrate erred in law and fact by failing to find that the prosecution evidence was full of glaring contradictions and discrepancies that could not sustain the charge facing the accused;

4. That the trial magistrate erred in law and fact by failing to find that the prosecution had not medically connected the appellant to the offence;

5. The trial magistrate erred in law and fact by not considering to order for DNA test since a child was born out of the alleged offence and DNA results would have confirmed if the appellant was the father of the child;

6. That the trial magistrate erred in law and fact by not considering that the complainant had been expelled from school due to being pregnant;

7. That the trial magistrate erred in law and fact by finding that the prosecution had proved the charge of defilement beyond reasonable doubt;

8. That the trial court erred in law and fact in finding a conviction that was against the weight of evidence;

9. That the trial magistrate erred in law and fact by not considering that the appellant was a first offender and did not consider to seek pre-sentence report;

10. That the sentence is too harsh and I pray that it be quashed and set aside;

The appellant therefore prays that the conviction be quashed and sentence be set aside.

In the appellant's submission, the grounds were summarized into four, issues being:

1. Whether the prosecution evidence was full of contradictions and discrepancies that could not sustain the charge;

2. Whether the medical evidence positively connected the appellant to the offence;

3. Whether the conviction went against the weight of the evidence;

4. Whether the offence of defilement was proved to the required standard.

This being a first appeal, it behoves this court to re-examine all the evidence that was tendered before the trial court, analyze it and draw its own conclusions. This court however takes into account the fact that this court did not have an opportunity to see or hear the witnesses testify, an opportunity which the trial court had. I am guided by the decision in *Okeno v Republic (1972) EA 32*.

The prosecution called a total of four witnesses – PW1, WMN, the complainant, told the court that she was born on 21/6/1997 as supported by the birth certificate; that she had known the appellant for long because he used to work for her grandmother by name TM. She told the court that she had known the appellant from January, 2014, when they started having sex with him when she was still in school.

That she stopped going to school in January, and that her mother sent her away when she noticed that she was pregnant. She moved to live with the appellant in June, 2014 till he chased her away on 28th September, 2014 and she went to seek help from Mama Stella. I believe she was referring to PW2. PW2 NWN testified that she saw PW1 on 28/9/2014 about 8.00 p.m. at the market. On enquiring what she was doing there, she explained that she had been married to Gatimu but that the he had sent her away. PW2 took PW1 to report at the Police Station where she left PW1. She noticed that PW1 was pregnant.

PW3 Sgt. Anne Mwikali then of Nyahururu Police Station gender desk recalled that the complainant was taken to her on 28/9/2014; that the girl claimed to have been married by Gatimu who had sent her away. She booked the report, took her to hospital for examination and it was established that she was pregnant.

On 29/9/2014, PW1 led the police to Gatimu's house where the appellant was arrested. They also summoned PW1's grandmother who seemed to be colluding with the appellant. PW2 obtained PW1's birth certificate from her step father which confirmed that she was born on 21/6/1997. PW3 said that PW1 stayed in police custody till she gave birth.

The complainant was examined by Dr. Joseph Karimi of Nyahururu Sub-County Hospital who found her hymen missing and filled the P3 form. A pregnancy test was done and she was found to be about 12 weeks pregnant.

The appellant was placed on his defence. He opted to give a sworn statement. He recalled the 29/9/2014 when police went to his house with the complainant.

He admitted that he used to do casual jobs for the complainant's grandmother. He was interrogated and forced to accept PW1 as the wife. He did not know what was going on.

Ms. Ndegwa, the appellant's counsel, in support of the grounds of appeal, filed written submissions which she highlighted.

She submitted that the complainant's testimony was full of contradictions; that to base a conviction on evidence of the complainant alone under Section 124 of the Evidence Act, the court must be satisfied that the complainant is saying the truth. Counsel urged the court to find that the inconsistencies raise doubt in the prosecution case and the doubt be resolved in the appellant's favour.

Counsel also urged that the basis of the finding that there was defilement is because the complainant was pregnant but it was not determined who the father of the child is; that the appellant asked for DNA testing but it was never considered and no ruling was made thereon. Counsel further urged that the lapse by the trial magistrate in failing to order for a DNA test should be resolved in favour of the appellant.

As regards the sentence, counsel submitted that though the charge indicated that the complainant was 13 years, at the time of the charge evidence showed that she was 17 years and the conviction should have been Under Section 8(4) of the Sexual Offences Act; that the prosecution did not amend the Charge Sheet although they were aware that she was 17 years old. Counsel urged the court to acquit the accused on that basis.

Ms. Rugut, learned counsel for the State opposed the appeal. She urged that the complainant gave a detailed account of having been in a sexual encounter with the appellant in 2013 and 2014; that the appellant never enquired from PW4 about her age; that the court considered the evidence with caution Under Section 124 of the Evidence Act and believed the complainant; that the complainant told the court that she lived with the appellant for 4 months, she was found to be 12 weeks pregnant which fell within the dates she lived with the appellant; PW1 took the police to the appellant's house from where he was arrested. Counsel urged that the defence was properly rejected. As regards the sentence, counsel submitted that the appellant did not suffer any prejudice and it can be cured by Section 382 of the Criminal Procedure

Code.

As regards DNA testing, counsel submitted that an application for DNA testing was made, the prosecution did not oppose it and it is the court that indicated that it would give directions but never gave any. Counsel urged that if the court finds that DNA testing was necessary, it should order a retrial.

I have given the evidence before the trial court and submissions due consideration.

What constitutes an offence of defilement:

To prove a charge of defilement, the prosecution has to establish that the following elements exist:

1. *That the complainant is a minor;*

2. *That there was penetration;*

3. *The identity of the perpetrator.*

The birth certificate of PW1 was produced in evidence. It indicates that the complainant was born on 21/6/1997. In 2014, the complainant was 17 years old. The charge indicates that the complainant was 13 years but that is not correct. PW1 was indeed a minor.

Whether there was penetration:

Section 2 of the Sexual Offences Act defines penetration to mean:

> "*..the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

PW1 testified that she started engaging in sex with the appellant in January of 2014. Although she claimed to have been sent away by the mother when she found her to be pregnant, that cannot be the case because as of September, 2014 when examined, she was only 12 weeks pregnant.

Under Section 143 of the Evidence Act, a fact can be proved by evidence of one witness. Section 124 of the Evidence Act also provides that the court can base a conviction on evidence of one witness in a Sexual Offence if the court believes the witness to be truthful and gives reasons for the said belief. There is no longer requirement for corroboration.

PW1 narrated in detail that when she lived with the appellant, he would insert his penis into her vagina and have sex with her. Her evidence was tested in cross examination but was never shaken.

In fact, in cross examination PW1 told the appellant that her belongings were found in the appellant's house. That was never disputed. I have no reason to doubt PW1's testimony. She was very consistent as to what transpired between her and the appellant. The appellant engaged in sexual intercourse with a child. It did not happen once. The complainant said she lived with the appellant for four months and they engaged in sexual acts during that period. There is totally no reason why PW1 would frame the appellant. PW1's testimony was credible. This court has no reason to arrive at a different finding from that of the trial court.

Whether there are inconsistencies in this case that would vitiate the conviction:

The manner of treating contradictions in a case was considered in *Jackson Mwanzia Musembi v Republic 2017 eKLR* where the court cited with approval the Ugandan decision of *Twahangane Alfred v Uganda Cr.App.No.139/2001 (2005)UG CAA 6* where the court said:

> "*With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore mere contradictions unless the court shows that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."*

The complainant's testimony is that she knew the appellant because he worked for the grandmother. The appellant admitted as much. The identity of the appellant is not an issue. PW3 confirmed that PW1's grandmother was suspected to have colluded with the appellant to have the complainant married to the appellant due to the grandmother's conduct. However, no action was taken against her because she died.

Although there were inconsistencies on the period when the complainant left home, they were minor and do not go to the core of the charge. PW1 only moved in to live with appellant later in June to September, 2014. On 28/9/2014, she reported to PW2 that she had been cohabiting with the appellant. PW2 in turn handed PW1 to the police who were led to the complainant's house on 29/9/2014 following which he was arrested. The issue here is whether the appellant defiled the complainant not the pregnancy. The court is satisfied that for the four months the appellant defiled the complainant and the inconsistencies were minor.

Whether failure to amend the charge was prejudicial to the appellant:

The appellant complained that the charge was defective because the age of the complainant was said to be 13 years whereas the evidence

indicated that she was 17 years. Failure by the prosecution to amend the charge to reflect 17 years cannot be prejudicial to the appellant because age is only relevant in a charge of defilement as respects the sentence. Since the complainant was 17 years, the appellant should have been sentenced under Section 8(4) of the Sexual Offences Act. The appellant was sentenced to 15 years. Under Section 8(4) of the Sexual Offences Act, the appellant was liable to be sentenced to a minimum of 15 years.

Having been sentenced to 15 years, the appellant did not suffer any prejudice.

Whether failure to order DNA testing was prejudicial to the appellant:

It is the defence case that the appellant requested the court to allow for a DNA testing. However the court did not make any order. It is therefore, their submission that there was no medical evidence or DNA linking the appellant to the offence.

Section 36(1) of the Sexual Offences Act states as follows:

> *"Section 36*
>
> *(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."*

The above provision was discussed by the Court of Appeal in *Robert Mutungi Muumbi v Republic Cr.Ap.52/2014 (Malindi)* where the court stated:

> *"Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms.*
>
> *Decisions of this court abound which affirm the principle that medical and DNA evidence is not the only evidence by which commission of a sexual offence may be proved."*

In *AML v Republic (2012) eKLR*, the court stated *"The fact of rape or defilement is not proved by a DNA test but by way of evidence."*

The same position was restated in *Kassim Ali v Republic Cr.A.84/2005 (MSA).*

From a reading of the above decisions; a DNA testing was not necessary. This is because the issue before the court is not the paternity of the child born by PW1 but whether PW1 was defiled and an offence of defilement is proved by either direct or circumstantial evidence but not necessarily DNA or medical evidence. Even if PW1 was impregnated by another person, but the appellant had sexual intercourse with PW1, it still amounts to defilement because the complainant was still a child and had no capacity to consent.

The issue of pregnancy and the child born thereafter, is a separate issue all together which can be dealt with outside this case. I stress that the issue before this court is whether PW1 was defiled.

PW1 testified that the appellant knew that she was attending school before they started living together. There is no evidence that the appellant enquired whether or not she was an adult. The appellant therefore took advantage of her knowingly and his defence is a sham. It was properly rejected by the trial court. The conviction is sound and there is no reason for this court to interfere.

On the last issue, *whether the sentence is excessive*: As observed earlier, PW1 was 17 years at the time of the alleged offence. The appellant was erroneously charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The appellant should have been sentenced under Sub-Section (4) which provides that upon conviction, one will be sentenced to a term not less than 15 years imprisonment. The sentence was within the bracket under Section 8(4).

In exercise of this court's discretion and in view of the current trend on sentencing doing away with minimum sentences, I hereby set aside the sentence of 15 years imprisonment and instead, sentence the appellant to 12 years imprisonment. The sentence will run from the date the appellant was sentenced by the trial court on 28/12/2016.

The appeal succeeds to that extent.

Dated, Signed and Delivered at *NYAHURURU* this *18th* day of *October,* 2019.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – State Counsel

Ms. Ndegwa for appellant

Nyagah – Court assistant

Appellant - present