REPULIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 18 OF 2018

MARTIN KURIA GITHUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with an offence of defilement contrary to section 8(4) of the Sexual Offences Act No. 3 of 2006. The prosecution alleged that the Appellant on the night of 20th March 2017 in Lamu West Sub-County within Lamu County intentionally caused his penis to penetrate the vagina of **JBCA** a child of 17 years.

2. The Appellant was further charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the aforementioned Act. The particulars of the offence are that the Appellant on the aforementioned date, time location intentionally touched the vagina of the said complainant a child aged 17 with his penis.

3. After a full trial the Appellant was found guilty of the offence of defilement, convicted and sentenced to 15 years imprisonment to fifteen years imprisonment. He was dissatisfied by the judgement of the trial court and timeously brought the instant appeal. The appeal is based on several grounds which are as follows: that the Learned Magistrate erred in law and in fact by finding that the prosecution had proved its case beyond reasonable doubt despite the fact that the prosecution did not discharge their burden of proving all the elements of the offence to the standard required by the law.

4. That the Learned Magistrate erred in law and in fact by relying on the complainant's testimony without taking into account the period in between the offence and when it was recorded; that the Learned Magistrate erred in law and in fact by deeming the DNA test unnecessary as the matter was of defilement only thereby violating the accused right to a fair trial.

5. Further grounds are that the Learned Magistrate erred in law and in fact by exercising his discretion under Section 36(1) of the Sexual Offences Act without taking into account the circumstances of the case and lastly, that the Learned Magistrate erred in law and in fact by refusing to allow the DNA test which is an important factor in taking into account the time period between the offence and report and contradictions in the witness statements.

6. As this a first Appeal, this court is required to re-evaluate the evidence tendered in the trial court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. The role of the Court of the first instance is well settled in the case of **Pandya v R C [1957] E.A. 336** and further buttressed in the Court of Appeal decision in **Okeno Vs. Republic (1977) eKLR 32** to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze and come to its own independent conclusion on the matter. This task must have regard to the fact that I never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

7. The prosecution case is premised upon seven witness. **PW1 MWW** a teacher at [Particulars Withheld] Primary School testified that the child fell sick at school and upon having tests, she found to be pregnant. When she was interrogated by PW1 to find out who the perpetrator was, she told her she knew nothing about having sex with anyone. The minor later told her that the accused was the perpetrator of the offence. **PW2; RAMR** also a teacher at the above-said school testified that she was involved in the investigation of the matter and that the minor told them that she was defiled by the Appellant.

8. **PW3; Mr. CMJ**, the headmaster at the above-mentioned school confirmed that on the 5th of June 2017, it was found that one of their students was pregnant. He instructed PW1 to take the minor to the hospital where it was confirmed that she was indeed pregnant and she could only tell PW1 who the perpetrator was, which was said to be the accused. **PW4; SKK**, the complainant's mother testified that her daughter has been living with the Appellant since May, 2016 for purposes of school. It was the Appellant who advised PW4 that it was best for the minor to live with him because it is close to the school which suggestion she agreed to. She testified that she learnt that her daughter was pregnant after having been told by her teachers.

9. The minor/complainant testified as PW5 after having been subjected to *voire-dire* examination. In that regard the court made a finding that the minor understands the importance of telling the truth and the meaning of an oath and therefore was intelligent enough to adduce evidence before court. She testified that she was born on the 6th of April, 2000 and she produced her birth certificate herein marked as MFI-4. She stated that she knew the Appellant since 2016 as they used to attend the same church and that he was the youth teacher. She confirmed that an arrangement was made for her to stay with the Appellant in Msumarini as it was closer to the school.

10. She stated that while she was asleep on the evening of 20th of March 2017, which was her last day of her period, she woke up when she realized that she could not move, her hands were held together and her mouth covered. She tried to turn over but she could not. She further stated that she found out that her panty had been removed and someone was sitting on top of her.

11. Further that she was having pain because he was having sex with her, she realized who he was and he walked out. She stated that the lights were off but she could see how the person was walking and realized it was the Appellant. The same is because he has a distinct walking style. She also told court that the only people who were in the house were the Appellant's family including his wife.

12. She further stated that she sat on the bed and saw a whitish substance between her legs which looks like glue which she thought to be sperms. She averred that there was no blood and she had never engaged in sex before the incident. The following morning before she left for school, she asked Martin who had entered her room the previous night but she didn't get an answer. She also asked him the same after school but she did not get a response. She told the court that she asked him because she wanted him to admit that it was him.

13. She stated that the following Friday, she visited her mother and told her of the incident and that she was going to keep probing for an answer. When she returned, she kept pestering him for an answer but he refused to respond. It was her testimony that on the 25th of April 2017, she had her period which lasted for four days which was normal to her since they used to normally last for three days. Further that on the last day (the fourth day) she was in pain and she took medicine and later found that sperms came out through her genitals. It was ascertained at the hospital that she learnt she was pregnant.

14. Upon cross-examination, the complainant stated that the house has three rooms, the person who entered her room was fully clothed, that she does not know what time it was but it was dark. Upon re-examination, she stated that she saw that it was the Appellant when he reached the door where there was a light.

15. **PW6; Nicholas Charo Lewa**, a clinical Officer at King Fahd Hospital who attended the minor, filled and signed a P3 form testified that the minor was 17 when the alleged offence was committed. The clinical officer stated that the minor revealed to her that she was defiled by the Appellant. He tested the minor for HIV as well as STDs all of which was found to be negative. An ultra-sound and it was confirmed she was 11 weeks and 4 days pregnant. He produced the P3 form of the same herein marked as Exhibit 3. He also produced treatment notes which were marked as MFI 1. Upon cross-examination, he stated that he did not know who made the complainant pregnant, that he did not examine him because he was not at the hospital and he opined that a girl on her monthly period cannot be pregnant.

16. **PW7; No.81090 P.C Stanley Kiplangat**, the investigating officer in this matter. He recorded statements soon after the matter was reported. He took J to the hospital for tests. After having established that the allegations leveled against the Appellant have substance, he preferred the charges herein against the Appellant. Upon cross-examination, PW7 stated that he did not visit the scene but based on the investigation, it is the accused who committed the offence as the complainant claims.

17. From the above account of the prosecution, the trial court found the evidence adduced to have established a prima facie case against the Appellant which warranted him to be placed on his defense.

18. The defence case is based on two witnesses. DW1, the Appellant herein testified that on 29th May 2017, he returned home and told his wife that the complainant was unwell. He confirmed that the he was staying with the complainant at that time. They took her to the hospital and pain killers were administered but she did not get better afterwards. He stated that he went to the said school on a Monday where he was the chairman of the board. He stated that he met with the complainant's teacher to plan for a meeting and at 10 am he saw three girls who were being taken to hospital. He therefore inquired on the same and he was told that it was just a routine checkup.

19. He further averred that it was the complainant's mother who told him that the complainant was pregnant and that it was a teacher who told her and he told her that he would investigate the matter further. The Appellant was learnt that the complainant and her mother had been taken to the police station, and upon reaching the police station with his wife, they did not find them there and that is when the Appellant was arrested and where both asked to record statements. He denied having committed the offence and that neither did such an incident happened in his house. He also stated that he thought he was staying with the complainant as a sign of help, little did he know that his kindness was taken differently.

20. He also told the court that he asked for a D.N.A test to be carried out but the same was not done. He also questioned the fact that the minor had her period in April and that she saw sperms in April. Upon cross-examination the Appellant alleged that he was framed and that the teacher told the complainant to do so.

21. **DW2; Grace Wanjiru Musembi**, the Wife to the accused testified that her and the Appellant agreed to help the complainant by staying with her which they did. She stated that on the learnt that the complainant was unwell, she took her to the hospital and she was found to be pregnant. Further that the minor denied having ever been involved in sexual intercourse with any man and that the complainant told her that in April when she was home, she found herself with traces of semen on two nights. That it was the complainant's mother who notified her that she was pregnant. she confirmed that upon reaching the police station they found out that a report had been made that the complainant accused the Appellant of defiling her. She also mentioned that the doctor told her that the complainant was pregnant and to keep the same a secret.

22. The Trial Court also made determination of the issue of DNA, where the court exercising its discretion as granted by section 36 of the

Sexual Offences Act, denied the application for DNA by the accused. The court stated that the case before it is one of defilement and not paternity of the child and for that reason it was unable to allow the application.

Law and Analysis

23. In the determination of the appeal at hand, this court is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences herein were proved. The issue for determination herein is **whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.**

24. Section 8(1) of the Sexual Offences Act which defines defilement as:

> ***"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Section 8(4) provides as follows:

> ***"(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."***

25. The ingredients of an offence of defilement are: identification or recognition, penetration and the age of the victim. Did the prosecution prove the ingredients of the offence of defilement? The prosecution is duty bound prove these ingredients beyond reasonable doubt.

a) Whether the Age of the minor was proved.

26. It is important to note sentences in defilement cases under the Sexual Offences Act No. 3 of 2001, are predicated upon the age of the minor and as such age of a victim should be proved to enable court mete the proper sentence. The charge sheet states that the complainant was 17 years old at the time complainant was defiled. The Complainant stated that she was 17 years old.

27. I have also seen the victim impact statement which indicates that the complainant was 17 years old. Her birth certificate was also produced as prosecution exhibit Exh- No.4 which indicates that the minor was born in April 2000 which means that the minor was 17 years at the time the offence was occasioned on her. Thus, birth certificate is one of conclusive proof of age and therefore I find that the age of the victim was conclusively proved.

b) Whether the element of penetration was proved.

28. The minor claims that the Appellant herein had sexual intercourse and in so doing, he impregnated her. The evidence tendered by the clinical officer **Mr. Nicholas Charo Lewa** in form of a P3 form suggests that the complainant was indeed defiled. In his evidence, he averred that upon examining the Complainant she was 11weeks and 4 days pregnant. Thus, pregnancy is an end product of sexual intercourse if it is not medically done or otherwise is proved. Therefore, the ingredient of penetration was proved beyond reasonable doubt.

c) Whether the element of Identification was proved.

29. According to the minor the offence was committed at night. She claims that she was asleep when someone came to her bed remove her panty and start having sex with her. It is also her testimony that when she woke up, she realized that her hands were held together and mouth covered. She states that during the incident, the lights were off. She claims to see how the person walked out and realized it was Appellant. She says he has a distinct walking style.

30. When it comes to identification, useful guidance is found in ***Cleophas Otieno Wamunga vs Republic (1989) KLR 424***, where the court stated as follows: -

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

The dicta from the case of ***Abdullah Bin Wendo vs Rex 20 EACA 166*** states that:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

31. In light of the foregoing, this Court is well aware that it ought to treat evidence of visual identification with utmost caution. The offence herein is said to have been committed at night according to the victim. The court has observed and examined the conditions that existed at the time and place of the defilement and their favorableness. The identification was done at night, under difficult circumstances that is in the dark and the lights were off. Consequently, possibility of mistaken identity was very high.

32. I note that besides that evidence of identification given by the Complainant, the prosecution did not produce any other piece of evidence, direct or circumstantial in support of the complainant's averments in respect of identification of the perpetrator. The minor has not said that she was defiled severally.

33. In light of the foregoing sentiments of identification, the evidence tendered by the prosecution herein did not meet the threshold set in the above-mentioned cases on identification. It is this court's view that there is huge risk of mistaken identity in this matter hence the conviction by the Honorable trial court was unsafe.

34. The upshot of this matter is that the ingredient of identification was not proved beyond reasonable doubt. In the premises, it is my considered view that the Appeal is meritorious. The conviction of the appellant is quashed; the sentence is hereby set aside. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER, 2019.

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R. NYAKUNDI

JUDGE