REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NUMBER 50 OF 2018

TIMOTHY KARIUKI KEMO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment of Honoruable G.H Oduor (CM) delivered on 22nd May 2018 in Nakuru Chief Magistrate's Court Criminal Case No 205 of 2010)

JUDGMENT

1. The appellant Timothy Kariuki Kemo was charged and convicted for the offence of defilement contrary to **Section 8(1) as read with Section 8(4) of the Sexual Offences Act of 3 of 2006**, and sentenced to 15 years imprisonment on the 22nd May 2018.

The victim was a child, EML (hereinafter called the victim) aged 16 years. The alleged offence was alleged to have been committed on diverse dates between 27th July 2010 and 16th August 2010 in Njoro, Nakuru County.

2. The appeal is against both the conviction and sentence upon grounds that are summarised as insufficiency and weight of the prosecution evidence to sustain the conviction, shifting the burden of proof to the appellant and grave excessive sentence. This court has been urged to quash and set aside both the conviction and the sentence, and in the alternative to vary and/or reduce the sentence.

3. This is the first appellate court. It is my duty to re-examine the entire evidence adduced before the trial court and to satisfy myself that the evidence supports the findings. It is however not my duty to look for evidence that may support the trial courts finding – **Pandya –vs- Republic 1957) EA 336, Republic –vs- George Anyango Anyang & Another (2016) e KLR, Okeno –vs- Republic (1972) EA 32.**

4. **The Court of Appeal in Eliud Waweru –vs- Republic (2019) e KLR** rendered that a court is

> *"---required to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant…"*

5. The prosecution evidence was urged though six witnesses while the appellant tendered sworn statements of defence and called one witness.

To urge his appeal, the appellant filed and relied on written submissions by his advocate Ms. Amulabu instructed by M/S Geoffrey Otieno & Co Advocates, who framed issues for determination as

1. *Whether the trial court complied with provisions of the Evidence Act, and particularly Section 124.*
2. *Whether the elements of defilement were proved.*
3. *Whether prosecution proved its case beyond reasonable doubt*
4. *Whether the appellant has shown remorse.*

6. I have carefully combed through the entire evidence tendered before the trial court.

The victim was certified to have been aged 16 years old by production of her birth certificate. – PExt 1, and a primary school pupil at

[particulars withheld], primary school

It was her evidence that on the material day the 27th July 2016, together with a girl classmate named L, (not a witness) decided not to go to school, but to Nakuru town to look for a job, and later that evening, the victim went to the said L home, stayed there upto 17th August 2010 (20 days) and never went back to her home.

7. She testified that on one Sunday, on an undisclosed date, the girls went to the appellant's house about 7.30 pm, with another girl named MN. She continued that the appellant made tea for them and M left her behind after which the appellant requested her to sleep with him, but because she was experiencing her menses, she declined but he insisted and locked her inside, went out to work and came back in the evening. She further testified that her friend M came to the house (following day) gave her food and then her parents came with police officers. This was one month after she left their home and arrested the appellant.

8. She was taken to hospital the following day and issued with a P3 form.

On cross examination, the victim reiterated that she left her parents' home on 27th July 2010 and then introduced another girl, T into her escapades, and others namely W, and T in whose homes she stated to have stayed for two weeks. She testified to have also been defiled on other dates she could not remember.

9. The clinical officer Jacob Chelimo testified as PW2. He examined the victim on 17th August 2010.

His observations as stated in the P3 form -

- *PExt 1 - were*
- *Clothes not stained, no injuries to head, limbs or chest,*
- *Lost virginity, no injuries, had numerous pus cells.*

The appellant was also examined and no injuries were noted.

10. On cross examination, the clinician stated that it was not possible to determine when the victim had lost her virginity (broken hymen), and that he did not detect any signs that she had experienced her menses. He further observed that the hymen was not freshly broken.

11. The father of the victim – PW3 - confirmed that the victim had left her home later and found her in the appellant's house upon which he was arrested and charged with the offence.

12. PW3 stated that his daughter (victim) was a class 8 pupil at [particulars withheld] Primary school while the victim gave a different school.

When the victim was recalled for cross examination by the appellant, the victim gave contradictory evidence that when the appellant defiled her on the unidentified date in his house, she did not bleed yet she testified to have been experiencing her menses. She testified to different dates of the arrest as well as the houses she went for the period she was on a "touring mission" that last lead her to the appellant's house. Further at this point in time, the victim informed the court that she had a child aged nine months old, and not a child of the appellant, but one Geoffrey Macharia, who she testified to have been her boyfriend since she was in standard seven, and had agreed to have sex with since 2009.

13. In his sworn statement of defence, the appellant denied having defiled the victim and attributed his arrest to a debt he owed the victim's father. This was however not elaborated.

14. There is no dispute or doubt that the victim had been defiled, and at 17 years old, she already had a child of nine months old, but not with the appellant. Relating the evidence to the issues as framed above, it is apparent that the victim had been fully exposed and experienced in sexual matters with several men, one whom she admitted having had a child with.

15. The victim's behaviour, prior to the incident, and by her escapades, testify to her having presented herself as a mature girl, having boyfriends and engaged in sexual activities several times, even begetting a child.

In the circumstances, it cannot be said with clarity, that the charges facing the appellant were not driven by ill will, malice or some sort of vendetta, by the victim's father.

While in the Appellant's house, and being left therein and even entertaining her girlfriends therein, she presented herself as willing and ready to get married to the appellant. She made no attempt to escape.

16. The Court of Appeal in **Eliud Waweru-Wambui –vs- Republic (2019) e KLR** in similar circumstances rendered that

> "*The mere fact that the complainant made the appellant her boyfriend had sex by consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girls ready to get married---*

it is clear therefore that the charges facing the appellant were driven by ill-will and vendetta for nonpayment…"

17. I alluded to contradictory evidence by the victim earlier on in this evidence. In her evidence in chief, and cross examination it is not possible to come to a conclusion that the victim as trustworthy and straightforward person. Starting from her escape from home on the 27th July 2010 there is no cogent evidence as to who or how many women and men, she met and whose home she slept in and stayed before the alleged defilement she stated on the 27th July 2010 and on the 16th August 2012 long after the alleged offence and arraignment of the appellant in court.

18. The proviso to **Section 124 of the Evidence Act** can only be applicable when the court receiving the victim's evidence is persuaded that the victim's evidence is truthful and credible.

The above sediments were ably expressed in the case **David Ochieng Aketch –vs- Republic (2015) e KLR** that

> *"… to comply with Section 124 of the Evidence Act, the trial court is supposed to be satisfied that the only evidence is that of the alleged victim. The court is further required to record the reasons in the proceedings and to be satisfied that the victim is telling the truth."*

19. In the circumstances, I find that the trial magistrate fell short of stating the reasons upon which he was persuaded that the victim was telling the truth amidst blaring inconsistencies and contradictions in her evidence.

In its totality, I echo the Court of Appeals holding in **Ndungu Kimanyi –vs- Republic (1979) e KLR** that

> *"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straightforward person, or raise suspicion about his trustworthiness, or do (or say) something which indicates that he is of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."*

20. The above is quoted in the case **Eliud Waweru Wambui** (Supra), and it summarises my findings that the trial court relied on the victim's and prosecutions evidence that was totally doubtful, unreliable and not straightforward. Reliance by the trial court on the proviso to **Section 124 Evidence Act** was misplaced.

I am not persuaded to reject the appeal by the Respondent's oral submissions as, in their totality support the trial magistrate's findings on the application of the provision to **Section 124 Evidence Act.** I come to a conclusion that the prosecution failed miserably in its duty to prove the case beyond reasonable doubt.

21. Accordingly I allow the appeal, quash the conviction and set aside the sentence.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Delivered, Signed and Dated at Nakuru this 14th Day of November 2019

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J.N. MULWA

JUDGE