REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CRIMINAL APPEAL NUMBER 49 OF 2015

(From original conviction and sentence in Machakos Chief

Magistrate's Court Criminal Case No. 1060 of 2013,

L Simiyu, SRM on 18th March, March, 2015)

DAVID KISILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **David Kisilu**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No 1060 of 2013 the offence of defilement contrary to section 8(1)(4) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant on the 18th day of August, 2013 at [particulars withheld] Sublocation in Mwala District within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of M M, a girl aged 16 years.

2. The appellant was convicted of the offence of the said offence and sentences to serve 15 years in prison. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1. That, the Learned Trial Honourable Magistrate erred in both law and fact in convicting the appellant on count one and three whereas there was absolutely no evidence capable of supporting the conviction.**
>
> **2. That, the entire case for the prosecution was not proved to the required standards needed in law.**
>
> **3. That the provisions of section 169(1) CPC was not adhered to in relation to his alibi defence statement.**
>
> **4. That the trial magistrate shifted the burden of proof upon him by stating that he did not call any church member to prove the claim.**

3. Accordingly to the appellant, there was no evidence adduced by the prosecution to prove that he penetrated the vagina of the complaint by means of her penis hence the prosecution failed to discharge its burden. It was the appellant's case that the medical evidence adduced in court disproved or dislodged the complainant's allegations that she was defiled on 18th August 2013 and 22nd August, 2013. It was submitted that the medical examination on 8th September, 2013 did not reveal penetration or attempted defilement hence the charge in respect of counts 1 and 3 was not proved. In support of his submission the appellant relied on **Ndungu Kimanyi vs. R [1979] KLR 283** and **Woolminton vs. The DPP [1935] AC 462**.

4. It was further submitted that the dismissal of the appellant's alibi defence amounted to the shifting of the burden to the appellant by holding that the appellant did not avail any witnesses who saw him going to church or the person with whom he attended the church. It was his case that under section 169(1) of the ***Criminal Procedure Code***, there was a duty cast on the trial magistrate to state cogent reasons or points of determination why the defence was unbelievable and in this respect he relied on **Eliud Kamau Njuguna vs. R Mombasa Cr. App. No. 82 of 2010** and **Joseph Musyoki Machakos HCCRA No. 26 of 2007**.

5. The appeal was conceded to by the Respondent for inconsistencies and insufficient evidence in the prosecution's case.

6. It was the Respondent's position that based on the evidence adduced before the Trial Court, there was no corroboration of the evidence on the issue of defilement. It was noted that in her first testimony, the complainant stated that the appellant only attempted to defile her and on later on did she state that she was defiled Further PW2 who it was alleged rescued the complainant did not support that evidence. In addition the medical evidence did not support the fact of penetration.

7. It was further submitted that the judgement did not comply with section 169(2) of the ***Criminal Procedure Code*** in that the judgement did not specify the offence of which and the section of the ***Penal Code*** under which the appellant was convicted.

8. The complainant herein initially testified on 28th April, 2014. On that day she testified that on 18th August, 2013 she was going to school at 6.00 am when she met the appellant who interrogated her and asked her to meet her in the evening after which she hurriedly away and went to school. On 22nd August, 2013, she again met the appellant at 6.00 pm when she was returning from school when the appellant asked her to his lover but she declined. Although the appellant tried to grab her she slipped and hurried away. She then reported the incident to her father and the police. There was a further incident, two days after 22nd August, 2013 when the appellant asked her for sex and she declined and though the appellant grabbed her and threw her down she screamed and her father, upon hearing her scream called her name loudly and the appellant ran off. Though by that time the appellant had already violently pulled off her biker and tried to push his penis into her vagina, her inner pant was still on and her father went to the scene and took her home.

9. It was her further evidence that though the appellant attempted to defile her twice, he only defiled her once.

10. At this point in the proceeding, the complainant was stood down and the Court adjourned the matter to another date when fresh evidence would be adduced for the purposes of what the court termed as "purpose of consistency".

11. On 20th June, 2014 when the hearing resumed, the prosecutor applied for the hearing de novo an application which the Court acceded to though the appellant protested.

12. In her evidence on that day, the complainant testified that on 18th August, 2013 she could not recall exactly what happened. However on 28th August, 2013 she found the appellant on the path at about 6.00 pm and the appellant enticed her to give her Kshs 50 and pulled her aside. At this point she shouted and her father who was returning home from work intervened and the appellant fled before the father arrived at the scene leaving her with the said Kshs 50. She however did not understand why he appellant had given her the said money. On 22nd August, 2013 she met the appellant on the road in the evening and the appellant requested to have sex with her after which the appellant took her away from the path for about 5 metres away after which she went back home. According to the complainant's evidence, the first time she had sex with the appellant was on 18th August, 2013 in the morning as she went to school while the second time was on 22nd August, 2013. On the first occasion she met the appellant on the road in the morning and the appellant gave her *Ugali* and told her to meet him in the evening after they had had sex.

13. It was the complainant's evidence that she had sex with the appellant on three different occasions and that the appellant inserted his penis into her vagina.

14. The second prosecution witness was the complainant's father. According to him on 18th August, 2013 he found the appellant and the complainant on a path in the bush and after calling the complainant he took her home where the complainant informed him that she had made love with the appellant many times previously after which he called the appellant and warned him. On another occasion he found the accused and the appellant on a path where the appellant was giving the complainant *githeri*. He grabbed the *githeri* and returned it to the appellant and ordered the complainant to go to school.

15. According to the evidence of the clinical officer who produced the P3 form, there were no tears or stains on the clothing and that the complaint was that of attempted defilement on 18th August, 013 and 22nd August, 2013. However there were no injuries on the neck, abdomen, thorax or limbs and no treatment was given. The external genitalia was normal and there were no tears, bleeding or discharge. In his opinion there was no sign of penetration as history was shallow. Further there was no indication whether or not hymen was intact.

16. In his judgement the learned trial magistrate found that there was evidence that there was sexual contact with a minor girl aged 16 years. According to him, the accused did not avail any witness who saw him going to church or any person with whom he attended the church. Accordingly his alibi was dismissed. Accordingly, the appellant was found guilty as charged on counts one and three.

17. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

18. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive**

examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

19. Section 8 of the ***Sexual Offences Act*** provides as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(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.

(5) 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; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (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.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

20. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. In this case the appellant was charged with the offence of defilement on 18th August, 2013, 22nd August, 2013 at 0630 hours and on 22nd August, 2013 at 1800 hours. He of course also faced the alternative counts of committing indecent acts with a minor contrary to section 11 of the ***Sexual Offences Act***. The Court however found that there was no case to answer with respect to count 2.

22. It is clear that the evidence adduced by the complainant on the first hearing is not helpful in so far as the conviction is concerned. In her evidence on the resumed hearing, the complainant was clear that she could not remember what happened on 18th August, 2013. However on 28th August, 2013 after the appellant pulled her from the path she shouted and her father intervened and the appellant fled before the father reached the scene. On 22nd August, 2013 she met the appellant on the path and the appellant took her away from the path, had sex with her and she went back home thereafter. She however contradicted her earlier testimony by stating that she in fact had sex with the appellant on 18th August, 2013 and on two other occasions. Pw2, the father, on the other hand recalled that he found the complainant and the appellant in a bush on 18th August, 2013, called the complainant's name and the complainant came out but did not give him detailed particulars apart from the fact that she had been violently grabbed by the appellant. She however said that she had had sex with the appellant many other times previously.

23. It is therefore clear that not only were there contradictions in the evidence of the complainant herself but also between the evidence of the complainant and PW2 as to whether there was in fact penetration and when that penetration occurred. Whereas these contradictions could have been clarified by the medical evidence, that evidence was not helpful in so far as the issue of penetration was concerned.

24. In **Omar Nache Uche vs. Republic [2015] eKLR** the Court observed as follows:

"If the complainant contradicted her uncle and mother on the events of 24th January 2013 how sure are we that whatever she testified as having transpired on 19th January 2013 is true" Can we rely on her to tell the truth" The court of Appeal in

the case of *Ndungu Kimanyi VR [1979*] KLR 283 held:

"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 a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

25. In this case it is clear that there were material contradictions in the prosecution evidence. The Trial Magistrate did not attempt to reconcile the same before convicting the appellant. Section 169 of the ***Criminal Procedure Code*** provides that:

169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

26. In this case the Trial Magistrate simply indicated that the age of the minor had been proved to be 16 years old and that the medical evidence was not denied or challenged. He did not go further to make express finding with respect to the penetration and the reasons for that finding. He simply reiterated that the complainant gave a concise account of what happened on three occasions when the accused had sex with her by inserting his penis into her vagina. According to the Trial Magistrate he had no reason to disbelieve the complainant. However, the Trial Magistrate seemed to have forgotten that he had found that the appellant had no case to answer in respect of one of three occasions. In other words while there is no prescribed style for writing judgements, the judgement did not comply with section 169 of the ***Criminal Procedure Code***.

27. It is my view that had he so complied, the learned trial magistrate would no doubt have realised that there were material contradictions, inconsistencies and gaps in the prosecution case that could not make the appellant's conviction safe. The appellant's defence or any gaps therein, in my view could not justify the failure to prove the prosecution case was required by law. In **Woolmington vs. The DPP [1935] AC 462.**

"If there is any reasonable doubt created by the evidence brought forward by the prosecution, then, the case of the prosecution is not proved and the prisoner is entitled to an acquittal."

28. In conclusion the conviction of the appellant was clearly unsafe and the Learned State Counsel properly did not support the same.

29. It is therefore my view that considering the totality of the evidence adduced by the prosecution, the conviction of the appellant cannot stand. There were just too many inconsistencies in the prosecution evidence and inconclusive evidence to leave the conviction undisturbed.

30. I accordingly, find that the appellant's conviction was unsafe and for that reason I allow the appeal, set aside the conviction and quash the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

31. Right of appeal 14 days.

32. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 12th day of June 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for Respondent

CA Geoffrey