REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 141 OF 2016

FURAHA NGUMBAO KADENGE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

***(*An appeal against the original conviction and sentence of Hon. L. K. Sindani RM delivered on 1st November 2016 in Criminal Case No. 150 of 2016 in the Principal Magistrate's Court at Kaloleni)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement , contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 1st April 2016 and 30th June 2016 in Kilifi County within Coast Region, he intentionally and unlawfully committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely the vagina of H M K a child aged 17 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded not guilty to the charge in the trial court on 8th August 2016 and was convicted after a full trial. He is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal dated 14th November 2016 and Supplementary Grounds of Appeal dated 29th August 2018 that he filed in Court are as follows:

a) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering that the charge of defilement was not established or proved.

b) That the trial magistrate erred by arriving at his conclusion without considering that the age of the complainant was not conclusively proved, hence the conviction and sentence was unsafe.

c) That the learned trial magistrate erred in law and fact by not considering that the date in which the complainant alleges to have been defiled was not precise but an estimate of dates between 1st April 2016 and 30th June 2016, which does not relate to the 23 weeks of the pregnancy the complainant alleges to have been by the time of the alleged defilement.

d) That the trial magistrate erred in law and in fact by determining the suit based on the observation of the witnesses demeanor and not the evidence presented before her.

e) That the trial magistrate erred in law and in fact by failing to have DNA test done to determine if the appellant was responsible for the pregnancy to corroborate the evidence of defilement.

f) That the learned trial magistrate erred in law and fact in failing to consider the defence of the Appellant.

g) That the trial magistrate erred in law and in fact by finding the Appellant guilty of committing the offence of defilement and sentencing him to 15 years imprisonment.

4. The appeal proceeded for hearing on 3rd September 2018, and Ms Othiang, the counsel for the Appellant, relied on written submissions dated 30th August 2018 which she highlighted during the hearing; while Ms. Mutua, the Prosecution counsel, made oral submissions.

5. The Appellant in his submissions argued that the offence of defilement was not proved beyond reasonable doubt for two main reasons. Firstly, the charge stated that the defilement occurred between 1st April 2016 and 30th June 2016 , while PW4 in his evidence testified that the complainant was 23 weeks pregnant at the time of her examination, which meant that it highly improbable that it was the Appellant defiled the complainant on the said dates. Further that the complainant testified that she conceived in April 2016, and that if that were the case, then her pregnancy would have been 16 weeks at the time of her examination. Therefore that the complainant was defiled by someone else other than the Appellant.

6. The second reason proferred by the Appellant was that the requirement of penetration was also not established, as the trial Court and PW4 relied on the complainant's pregnancy as proof of penetration. In addition that the trial Court erred in denying the Appellants request for a DNA test, and that it was incumbent for such a DNA test to have been conducted by the Prosecution to establish if the Appellant was the father of the complainant's child and therefore the perpetrator of the offence. Reliance was in this regard placed on section 36(1) of the Sexual Offences Act and the decision in **Abeid Athuman Cimbugwa vs Republic (2017) e KLR.**

7. Ms. Mutua on her part opposed the appeal, and submitted that the charge was proved as the age of the complainant was established to be 17 years by her birth certificate that was produced as an exhibit. Further, that the ingredient of penetration was proved by the evidence of PW1 and the P3 form that was produced as an exhibit. That PW1 also proved the identity of the Appellant and that the evidence of PW4 confirmed that the complainant's pregnancy was 23 weeks old.

8. The prosecution counsel further submitted that the trial magistrate relied on the totality of all the evidence to find that the Appellant had committed the offence, and only relied on the demeanour of the complainant to rely on her evidence as a single identifying witness under section 124 of the Evidence Act. On the DNA test request by the Appellant, the Prosecution submitted that the trial rejected the same as it was made during the defence stage, and that the provisions of section 36(1) of the Sexual Offences Act are not mandatory. Lastly on the defence proferred by the Appellant, it was contended that he denied knowing the complainant and did not give his account of the events when the offence occurred.

9. Having heard the arguments by the parties, my duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

10. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. The complainant (H. M.K.) was PW1, and she testified that she met the Appellant who she knew and was a neighbour, on a date she could not remember between 1st April 2016 and 30th June 2016, and went with him to his home where they had sex. Further, that they had sex twice during that period. Further, that in April she told him she was pregnant, and that her brother later told her to take leave from school and they went to Kizurini Police station to report the matter. PW1 testified that she then went to Mariakani sub-county hospital where a P3 form was filled.

11. J M (PW2) and K K J (PW3) who are the complainant's father and brother respectively, testified as to the report they got of the complainant's pregnancy, and that upon inquiry PW1 told them that the Appellant was responsible, whereupon they reported the matter to the village elder and the police.

12. Mwangilo Chigulu, a clinical officer at Mariakani Hospital testified that he examined PW1 on 17th August 2016 and that her hymen was found to be broken, and she had pregnancy of 23 weeks and 3 days. He produced the P3 Form as the Prosecution's Exhibit 1, the Treatment Notes as the Prosecution's Exhibit 2, and the Ultra Sound Notes as the Prosecution's Exhibit 3.

13. PC Rukia Guyo was the last prosecution witness (PW5), and she testified that the complainant was brought to Kaloleni Police Station on 5th August 2016 by her brother and father, and a report of her defilement was made. Further, that she interrogated the complainant and gave her a p3 Form and sent her to Mariakani Hospital for it to be filled. PW5 also testified that the Appellant then took plea in Court. She produced a birth certificate as the Prosecution's Exhibit 3, which showed that the complainant was 17 years old.

14. The Appellant was put on his defence and he gave unsworn testimony as DW1 and did not call any witnesses. He denied the allegations made against him and did not call any witnesses. He also requested that a DNA test be performed when the child is born to establish if he was responsible.

The Determination

15. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there is one issue for determination in this appeal. This is whether the Appellant was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence.

16. Defilement is defined in section 8(1) of the Sexual Offences Act as follows:

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

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

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

17. The relevant evidence adduced in the trial Court as to defilement was that of the complainant, who was PW1, and who testified that she had sex with the Appellant on two occasions between 1st April 2016 and 31st June 2016 as a result of which she became pregnant. I find this testimony insufficient to sustain a conviction of the Appellant for two reasons.

18. Firstly, no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not. Evidence of having sex does not necessarily entail penetration and is not conclusive proof of penetration. Sex is defined in **Black's Law Dictionary , Ninth Edition** at pages 1498-1499 as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse.

19. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt. This Court in **Julius Kioko Kivuva v Republic [2015] eKLR** held as follows as regards specificity required in the proof of penetration:

> **"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal".**

20. PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex.

21. Secondly, the evidence by PW4 that PW1's hymen was broken at the time of her medical examination on 17th August 2016, and that she was 23 weeks and 3 days pregnant was corroboration of penetration, however it did not identify the person responsible and was therefore not corroboration as to penetration by the Appellant. In addition, a deduction of 23 weeks and 3 days from 17th August 2016 would result in a finding that PW1 conceived around 14th March 2016, which is before the dates she alleges she was defiled by the Appellant.

22. On the requirement of a DNA test, I however agree with the trial Court's finding that it would not have been helpful at the time of the proceedings, as the child was not yet born, and such a test is only be able to establish paternity once the child was born and is also tested.

23. I therefore find that there were gaps in the evidence adduced by the prosecution, and it was not sufficient to establish the offence of defilement as against the Appellant beyond reasonable doubt .

24. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) (3) of the Sexual Offences Act. I also set aside the sentence of fifteen years imprisonment imposed upon the Appellant for this conviction, and order that he is set at liberty forthwith unless otherwise lawfully held.

25. It is so ordered.

DATED AND SIGNED THIS 2ND DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 16TH DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE