REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 16 OF 2018

J O T.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior

Principal Magistrate's Court at Maseno (Hon. R.S. Kipng'eno SRM)

dated the 15th February 2017 in Maseno SRMCRC No. 189 of 2017)

JUDGMENT

1. J O T was convicted for the offence of **Defilement** Contrary to **Section 8(1)(4**) of the **Sexual Offences Act.** He was then sentenced to serve 15 years imprisonment.

2. In his appeal, he faulted the trial court for failing to appreciate that the identification in this case was by a single visual witness, under difficult conditions.

3. The alleged incident is said to have taken place at night, in a dark room. Therefore, the Appellant submitted that in the absence of corroboration, he ought not to have been convicted.

4. The Appellant also reasoned that the Complainant was unlikely to have been given time to put on some light after she had already been grabbed by her assailant, whilst she was asleep.

5. In any event, the Appellant believes that the testimony of the Defence witnesses provided a complete answer to the case, as he was not at the scene of crime. Whilst the Complainant said that the Appellant sneaked back to the house, in the dead of the night, and defiled her after he had unlocked the door from outside, the Appellant pointed out that at all material times he was attending a funeral gathering, 30 kilometres away.

6. In the light of the distance between the scene of crime and the place where the funeral was, the Appellant submitted that it was not possible for him to have sneaked back to his house un-noticed by those he was with at the funeral.

7. According to the Appellant, the whole case against him was a mystery, whose source he was unaware of. He was even more surprised considering that the Complainant's guardian was not told of the alleged defilement soon after it had happened.

8. The other issue raised by the Appellant is that the evidence of the Complainant should not be accorded any weight when it is considered that she did not report the incident until she was 6 months pregnant.

9. Furthermore, the Appellant submitted that if the Complainant was defiled on 23rd April, 2013, she could not have been only 30 weeks pregnant on account of the alleged defilement.

10. Finally, the Appellant complained that the prosecution failed to make available the DNA results of the Complainant's child, which could have proved that he had no nexus with the Complainant's pregnancy.

11. In answer to the appeal, the Respondent pointed out that this was a case of recognition, as the Complainant was a daughter of the

Appellant's brother.

12. The Respondent also submitted that all the ingredients of the offence of defilement had been proved by the prosecution.

13. Miss Barasa, learned State Counsel, submitted that the Appellant cannot have been framed as the Complainant was sent by her grandfather to prepare food for the Appellant. That implied that there was no bad blood between the Complainant and the Appellant; which could have been the basis for the alleged *"framing."*

14. Being the first appellate court, I have re-evaluated all the evidence on record, and have drawn my own conclusions.

15. PW1, L was the Complainant. She testified that she was born in April 1998.

16. She said that the Appellant was her uncle.

17. On the material day, **PW1** was given instructions by her grandfather, to go and prepare food for the Appellant.

18. According to **PW1**, the wife of the Appellant had gone to attend a funeral, hence the reason why she was given the task to prepare food for her uncle.

19. After **PW1** had put the food on the table, the Appellant told her that she (PW1) would stay in the house on that night, as the Appellant was going to attend a funeral.

20. PW1 requested the Appellant to allow her to go and call her friend, but the Appellant offered to call the Complainant's friend.

21. Within 5 minutes, the Appellant came back and told **PW1** that her friend had refused.

22. Whilst the Appellant was outside the house, he had locked the door from outside, therefore, the Complainant could not leave the house.

23. When the Complainant became tired, she went to sleep in the children's room.

24. Later that night, someone entered the children's room, and uncovered the Complainant.

25. PW1 lit a light, and she recognized the intruder, who is the Appellant.

26. He held a knife as he removed the Complainant's panty and skirt. He then defiled her.

27. PW1 told the parents of the Appellant about the incident, but they refused to take her to the hospital.

28. As a consequence of the defilement, the Complainant became pregnant.

29. PW2, PC ANTONY MUSEMBI, was the arresting officer.

30. During cross-examination he said that the Appellant had told him that he wanted to solve the issue of the Complainant's defilement at home.

31. After **PW2** testified, the Appellant made an application that the child who was allegedly the product of the defilement, should undergo DNA testing. On 29th January 2015 the trial court ordered that samples be taken from the Appellant, the Complainant and the child, and that the said blood samples be subjected to DNA testing.

32. PW3, N T E, is an uncle of the Complainant. He was also her guardian, as her father was deceased.

33. When **PW3** noticed that the Complainant was pregnant, he asked her to reveal the identity of the man who was responsible for the pregnancy.

34. According to **PW3**, the Complainant informed him that it was the Appellant who was responsible.

35. When the witness asked the Appellant about the issue, the Appellant became so angry that **PW3** decided to report the incident to the police.

36. PW3 and the Appellant are brothers.

37. During cross-examination, **PW3** stated that DNA could be done.

38. PW4, MAINA AGGREY AMBETSA, is a Clinical Officer, based at the **EMUSIRE HEALTH CENTRE.**

39. After he had conducted a medical examination on the Complainant, **PW4** filled in Part 3 of the P3 Form.

40. The record of the proceedings shows that **PW4** had testified that the Complainant's pregnancy was 30 weeks.

41. However, the P3 Form actually indicates that the pregnancy was 33 weeks old.

42. PW4 also requested that a DNA test be conducted after the child was born.

43. On 18th May 2015, the learned trial magistrate reiterated the order directing that blood samples be taken from the Complainant, the Appellant and the child. The samples were to be used for DNA testing.

44. PW5,CPI MONICA AOKO, was the Investigating Officer who took over that role after **CPI LYDIA MIGWI** was transferred to Ruiru.

45. As CPI Migwi was attending court in Thika, on the date when she was expected to testify PW5 produced the written statement of CPI Migwi.

46. When the Appellant was put to his defence, he said that on the material night, he attended a funeral, and that he never returned home.

47. DW2, J O, said that he was at the funeral together with the Appellant. He said that they only returned home after the burial on 24th April 2013.

48. DW3, R S T, corroborated the testimonies of both **DW2** and the Appellant.

49. From the Baptismal Card, it is clear that the Complainant was born in 1998. Clearly, therefore, as at April 2013 the Complainant was 15 to 16 years old.

50. She testified that she was 16 years old.

51. The Appellant, who is her uncle, did not dispute that evidence.

52. And I note that he was not an uncle who lived far away from the Complainant's home. He actually lived within the same homestead as the Complainant. Therefore, the court expects that if he were disputing the Complainant's age, the Appellant would have had a good basis from which to commence.

53. In the light of the Baptismal Card, the court holds that the age of the Complainant was proved.

54. I also note that the Appellant did not challenge the Complainant's evidence about the fact that when the intruder had uncovered her, by removing the blanket, she lit the light.

55. By suggesting, at this stage, that the light which was put on may have been a match-stick, the Appellant was speculating. The court refuses to drawn into the realm of speculation.

56. I note that the Complainant had made it clear that it was after she had lit the light, and had seen the intruder, that he removed a knife. In effect, the threat came about after the Complainant had already recognized the intruder.

57. The Complainant did not give particulars of the length of time it took for the intruder to defile her, when the light was on. However, I think that that was not at all necessary, because recognition did not require the light to remain on for any considerable length of time.

58. The Complainant had seen the Appellant earlier on that same evening. She had prepared food for him, and placed it on the table. She then talked to the Appellant, about leaving his house.

59. When he refused to let her leave, the Appellant went away, saying that he would call the Complainant's friend. The Appellant returned to the house after about 5 minutes, and he talked to the Complainant.

60. I have restated all these facts because they help us to appreciate the fact that it was very easy for the Complainant to recognize the Appellant when he later returned to his house, which he had locked from outside.

61. The Appellant did state, in his defence, that when he went to the funeral, he had left his brother's son and 2 of his sisters to watch over the house.

62. I find that line of defence to be an afterthought, when it is borne in mind that the Appellant never cross-examined the Complainant about it.

63. Furthermore, if the Appellant already had 3 people watching over his house whilst he was attending a funeral, he would not have needed to lock the Complainant inside his house.

64. The Appellant's wife was away attending a funeral. It was for that reason that the Appellant's father instructed the Complainant to make food for the Appellant.

65. The Appellant did not cross-examine the Complainant about those facts. Therefore, I find that it was most improbable that the Appellant's 2 sisters were actually present, considering that when the Complainant was reluctant to prepare supper for the Appellant, the Appellant's father told her that if she did not do as instructed, she would not sleep in his house.

66. In any event, the Complainant testified that she was all alone in the Appellant's house. If the Appellant disputed that evidence, he would have raised the issue during cross-examination; but he did not do so.

67. In this unfortunate incident, the Complainant informed her grandfather about the actions of her uncle. The Complainant also told her grandmother. However, the said grandparents took no action, and also refused to take the Complainant to hospital.

68. Perhaps if the defilement did not result in the Complainant becoming pregnant, the incident would not have come to light.

69. When the Appellant's brother saw the signs of the Complainant's pregnancy, he inquired from her and she told him that it was the Appellant who had defiled her.

70. Although the medical examination was done many months after the incident, the pregnancy can be described as the ultimate corroboration of the sexual liaison about which the Complainant had testified.

71. Having come to the conclusion that the Complainant was 16 years old and that she was defiled by the Appellant, it follows that the evidence which suggests that the Appellant was not at the scene of crime at the material time, was rejected.

72. The learned trial magistrate, who had the advantage of observing the demeanour of both the Complainant and the Appellant, when they testified, believed that the Complainant told the truth. I have no reason to doubt the said assessment of the trial court, concerning the fact that the Complainant was a witness of truth.

73. The Appellant had sought DNA testing, with a view to having evidence which would, hopefully, have shown that the child begotten by the Complainant was not his.

74. The Complainant accepted to undergo the DNA testing.

75. The trial court ordered that blood samples be taken from the child, the Complainant and the Appellant.

76. Regrettably, there is no evidence as to whether or not the blood samples were ever taken.

77. Neither the Appellant nor the prosecution provided the court with information about the intended DNA testing.

78. In the circumstances, it cannot be said that there was some evidence which was obtained, but which was then kept away from the court.

79. If DNA testing had been done and the results were available, and if the said results were kept away from the trial court, it may have been possible, (depending on reasons provided), to make a presumption that the evidence could have been prejudicial to the prosecution.

80. As we have no idea whether or not the DNA testing was ever conducted, the court has no legal basis for making any presumption.

81. In the final analysis, I find that the trial court did correctly hold that all the ingredients of the offence of defilement were proved against the Appellant. Therefore, there is no merit in the appeal.

82. I dismiss the appeal, and uphold both the conviction and the sentence.

DATED, SIGNED and **DELIVERED** at **KISUMU this 11th day of October 2018**

FRED A. OCHIENG

JUDGE