REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO 6 OF 2018

AY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appear from the original conviction and sentence dated 1/3/2018 in the

chief magistrate's court at Narok in Criminal Case No.4/2016 R. v. AY)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 20 years imprisonment in respect of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.

2. The state has conceded both the conviction and sentence.

3. The appellant has raised nine grounds in his petition of appeal to this court. In grounds 1 and 5 the appellant has faulted the trial court in finding that the prosecution had proved its case beyond reasonable doubt. He has faulted the trial court in failing to take into account the result of the DNA test on the paternity of the complainant's child as the child was alleged to have been the result of defilement in respect of which the appellant was convicted. In this regard the complainant (PW 2) – DSK (her initials) was allowed to give sworn testimony after a successful *voire dire* examination. At the time of testifying, she was aged 15 years. It is important to point out that a *voire dire* examination applies to children of tender years who are aged 14 years and below. The complainant being 15 years old should not have been subjected to a *voire dire* examination.

4. The evidence of the complainant is that she knew the appellant with whom she was in love since 2014. On 29/1/2015, she conceived following sexual intercourse with the appellant. It was her evidence that this was the first time she was having sexual intercourse. She testified that the sexual intercourse was painful and that it took 30 minutes. As a result, the bed sheet was blood stained, which she then washed. She also testified that she did not tell any person concerning that sexual intercourse.

5. Furthermore, she testified that she was examined in school in May 2015 and was found to be pregnant. She delivered on 29/10/2015. After delivery, she never saw the appellant again. It seems she told her mother (PW 3). The mother decided that the matter be kept in abeyance until she delivers. The mother told her that the parents of the appellant were required to take the responsibilities of the upkeep of the child. This they failed to do. The investigating officer forwarded to the Government chemist at Kisumu the following exhibits after preparing the exhibit memo:

1. Blood sample from AY alleged father – marked B

2. Blood sample of the complainant – marked A

3. Blood sample of the child – marked C

6. The report of the Government analyst signed by Mr. R. K. Langat after DNA testing concluded that the appellant was not the biological father of the child. However, the report found the complainant to be the biological mother of the child.

7. Mr. Yenko, counsel for the appellant cited *Eliud Ouma Agwara v. R (2016) eKLR,* in which the court pronounced itself as follows: "*The trial court in its judgement states as follows as regards DNA TEST: - 'the DNA results report is an expert report and in the absence of any other contrary expert report the same cannot be challenged as such I am of the findings that the accused is not the biological father to the*

complainant's child."

Following the DNA report in that case the court allowed the appellant's appeal in that case and set free the appellant. In the course of his judgement after reconsidering the evidence of the DNA expert found that the DNA report is 100 percent correct.

8. This is a first appeal court, and I have reassessed the evidence of the prosecution and that of the defence. The defence evidence was that the appellant knew the parents of the complainant. He further testified that they were forcing him to marry the complainant. It was also his sworn testimony that the father of her child was a teacher. In support of his case, the appellant called S Y (DW2), who was his brother. It was the evidence of DW2 that the appellant and the complainant are relatives and by virtue of that sexual intercourse between them was forbidden by their culture.

9. After reassessing the foregoing evidence, I find that the appellant was not the biological father of the complainant's child. This is clear from the DNA report, which is prosecution exhibit 3. It therefore follows that the appellant did not have any sexual intercourse with the complainant. It also follows that the trial court errored in law in disregarding the DNA expert report, which exonerated the appellant as being the father of the complainant's child. Additionally, the court also erred in law in disbelieving the sworn defence evidence that the biological father of the complainant's child was a teacher. For these reasons, Mr. Omwega properly conceded the appeal.

10. The upshot of the foregoing is that the appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed.

11. The appellant is hereby set free unless otherwise held on other lawful warrants.

Judgement delivered in open court this 14th day of November, 2018 in the presence of Mr. Yenko for the appellant and Mr. Omwega for the respondent.

J. M. Bwonwonga

Judge

14/11/2018