REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 57 OF 2015

ABDALLA HASSAN MWAKUMANYA.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence imposed against the appellant

by Hon C. N. NJAGI (R.M) in a judgment delivered on 10th October, 2014

vide Criminal Case No. 1387 of 2013 at Kwale.)

JUDGMENT

1. The Appellant, ABDALLA HASSAN MWAKUMANYA was charged with the offence of defilement contrary to section 8 (c) as read with Section 8(4) of the Sexual Offences Act, No. 3 of 2006 in the main court. The facts were that;

> **"On 24th day of November, 2013 at Likoni Township in Mombasa County in the Coast Region, the appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of MS, a girl aged 17 years.**

2. In the alternative charge, the appellant was charged with indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, whereby he was alleged to have unlawfully and intentionally committed an indecent act to MS by touching her vagina.

3. The appellant pleaded not guilty to the charge on 4th February, 2013 before the trial court and the case then proceeded for trial whereby he was convicted, and sentenced to serve fifteen (15) years imprisonment for the offence of defilement of a child under Section 8(1) of the Sexual Offences Act No. 3 of 2004. In the main count.

4. The appellant was aggrieved and dissatisfied by both the conviction and sentence in the judgment by the trial court which was delivered on 10th October, 2014. He appealed against the said conviction and sentence putting forth, three (3) (amended) grounds of appeal namely (verbatim);

> **(a) THAT, the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering the fact that the age of the complainant was NOT proved beyond any reasonable doubt hence the conviction and sentence were unsafe.**
>
> **(b) THAT, the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution did not prove its case to the required standard by law for Section 36(1) of the Sexual Offences Act No. 3 of 2004 was not adhered to.**
>
> **(c) THAT, the learned trial magistrate erred in law and fact by arriving to his conclusion in failing to consider my reasonable defence statement which had created doubt to the prosecution's case.**

5. The Appellant filed written submission and on 15th February, 2016, when the parties appeared before me for hearing, he opted to rely on the said submissions whereas the prosecution gave oral arguments in opposition to his appeal.

6. In his submissions, the appellant consolidated and argued the three grounds together to the effect that the prosecution failed to prove beyond any reasonable doubt against the appellant the offence of defilement. According to the appellant, the two critical ingredients required

to be proved in the offence of defilement were not proved to the required standard to warrant a conviction. And for a sentence to be delivered in cases of defilement, the issue of age must be conclusively proved.

7. He also faulted the medical evidence contained in the P3 form. He relied on the decision in **KAINGU Alias KASOMO CR APPEAL NO 504 OF 2011(MALINDI) (UR), CRIMINAL APPEAL NO. 206 OF 1993 (NYERI) HIGH COURT (UR) ARNOLD KILILO CRIMINAL APPEAL NO. 57 OF 2011 (UR)** and concluded that failure of the prosecution to prove the age, conduct a DNA test and confirmation of STI was fatal to the prosecution's case so that it was unsafe to rely on such evidence.

8. The prosecution, through M/S Ocholla, counsel for the state, opposed the appeal and pointed out that the complainant's age was proved by the production of an age assessment report as Exhibit P2 which indicated that she was 17 years old. As for the issue of penetration, M/S Ocholla submitted that the same was proved by the production of a P3 form (Exhibit P1) which confirmed that her hymen was missing and she was four (4) months pregnant at the time. She also argued that the identity of the appellant was confirmed by the evidence of the two having been seen in a relationship from January, 2013 to November, 2013 and the fact that they were neighbours.

9. M/s Ocholla took issue with the issue raised by the appellant that the provisions of Section 36(1) of the Sexual Offences Act were not complied with and stated that the prosecution was able to prove their case against the appellant without subjecting him to any medical examination.

10. On the issue of the appellant's defence not being considered, M/s Ocholla submitted that the appellant was evasive in his defence in that he directed himself to the events that led to his arrest instead of focusing on the merits of the charge against him.

11. She summed up by stating that the sentence of fifteen(15) years imprisonment which was meted against the appellant was lawful as this is what is provided for under Section 8(4) of the Sexual Offences Act.

12. This is the first appeal, hence the duty of this court to re-evaluate and reconsider the evidence that was tendered before the court and arrive at its own conclusion. And in doing this, it should not be lost to the court that it never saw nor heard the witnesses, therefore given an allowance for that. This was enunciated in the case of **OKENO VERSUS REPUBLIC (1972) E.A 32** and subsequently restated in other decisions such as **KIILU & ANOTHER (2005) 1KLR 174,** where court of appeal stated;

> **"(2) 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 own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.**
>
> **(3) It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, 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."**

13. To do this, I have to outline a brief summary of the evidence that was adduced before the trial court.

Briefly, the prosecutor's evidence was that the complainant (PW1) MS stated that, she was a form 2 student aged 17 years old and that she started a relationship with the Appellant in January, 2013. She went on to state that on 24th November, 2013, she visited the appellant's home at Likoni where she stayed for about three (3) days and they made love. That she told her parents and uncle about it and this when they decided to take the appellant to the Sub-chief who handed him over to the police at Kwale because she was still under age and had been missing from home for three days.

14. The complainant's parents, who included her mother MM called her uncle RMM (PW2) and informed him about her disappearance from home for 3 days. He went to their home and interrogated her but she refused to talk. He then took her to Tiribe police post where she divulged where she had been for the three(3) days she was missing from her home. He was referred to the area community policing officer, one Juma Salim Shame and he assisted by taking them to the home of the appellant, Abdalla; who they arrested on 1st December, 2013.

15. The complainant was taken to Kwale sub-county Hospital where she was examined by PW4, Cornelius Machage on 2nd December, 2013 on allegations that she had been defiled by a person known to her.

On examination, PW4 took samples from the complainant which were taken to the laboratory and she was found to be about 4 months pregnant. It was also revealed that she had pus cells in her urine, which is an indication of STI. The medical report was prepared and signed on 2nd December, 2013; with indication that the complainant's genitalia was normal but her hymen was missing. PW4 produced the P3 form and laboratory request form serial No. 40947 as exhibit P1 and P3 respectively.

16. The appellant was re-arrested by PW5 No. 54485 Senior Sergeant Joseph Kimani of Kwale Police station who investigated the matter by recording statements from witnesses and issuing the complainant with a P3 form which was filled at Kwale Hospital where she was taken for examination. PW5 also got an age assessment of the complainant conducted and he produced the report as exhibit P2. He then proceeded to charge the appellant with the offences he was facing before the trial court.

17. The appellant, ABDALLA HASSAN MWAKUMANYA, was placed in defence and he opted to give an unsworn statement in defence. He called no witness. He told court that on 31st November, 2013, he was at his home when the community policing chairman followed and told him that he was being called by the sub chief. That he was told to go there the following day on 1st December, 2013, whereby the girl was taken for treatment and examined while he was told to go home.

18. The appellant said that on 2nd December, 2013 he was arrested. He told court that they were neighbours and that the two families owed each other a debt, hence hatred between them. And that because of this, they told him that they will ensure he is arrested. He asked the court for forgiveness as he was the head of his family.

19. In his judgment, the trial magistrate, in determining whether the prosecution had proved their case against the appellant beyond reasonable doubt, outlined the ingredient that are required to be proved in the offence of defilement as per the provisions of Section 8(1) of the Sexual Offences Act, which were;

> **"For determination is:**
>
> **1. Was there a penetration act done on the minor?**
>
> **2. Was the age of the minor proved?**
>
> **3. Who is the defiler?**

These are the same issues the appellant claims in his appeal, were not proved by the prosecution against him.

In summary of the case, the trial magistrate concluded that the prosecution had "proved their case against the accused person beyond all reasonable doubt."

20. I have considered the grounds of appeal, evidence that was tendered before the trial court, submissions by both counsels, and the authorities cited by the appellant and the law with regard to the offence of defilement as per the provisions of Section 8(1) of the Sexual Offences Act.

21. The first issue to be raised by the appellant is whether the complainant's age was proved beyond reasonable doubt.

In the case of **KAINGU ALIAS KASOMO CRIMINAL CASE NO. 504 OF 2011,** the Judge of the Court of Appeal held that;

> **"In its wisdom parliament chose to categorise the gravity of the offence on the basis of the age of the victim and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond any reasonable doubt. That must be so because, dire consequences flow from proof of the offence under Section 8(1) of the Sexual Offences Act. In the case….. "**

22. According to the particulars of the charge, the complainant was said to be 17 years. PW1, the complainant herself told court in her evidence that she was 17 years old in 2013 which is the year the offence is alleged to have been committed. None of her parents testified to confirm her age and neither was a birth certificate or school document or clinic or baptismal card produced to confirm that she was 17 years old then. An age assessment report was produced by PW5, the Investigating Officer, as exhibit P2. The said report bears the letter head and stamp of the Medical Superintendent, Kwale District Hospital to confirm the complainant was examined and found to be 17 years. And while the age assessment report also gave the age of the complainant as at 2nd December, 2013 to be 17 years, it was produced as an Exhibit by the wrong person. It ought to have been produced by its maker so as to confirm if he was qualified to conduct an age assessment. PW5, as a police officer would not have been in a position to respond to medical questions relating to how age assessment is conducted medically.

23. The other issue is whether penetration as an ingredient of defilement was proved in this case. According to the complainant (PW1) in the evidence, she went to the appellant's house where she stayed for 3 days and alleges she was not ready to have sex, but wanted to get married. She said they made love.

24. In her judgment, the trial magistrate said she "slept with him". She also said "they had sex". As noted by Justice P. Nyamweya in the case of **FURAHA NGUMBAU KAGENGE VERSUS REPUBLIC, CRIMINAL APPEAL NO. 141 OF 2016, MOMBASA (CR);**

> **"…..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….."**

25. She cited the case of **JULIUS KIOKO KIVUVA VERSUS REPUBLIC (2015) eKLR** where the specificity required in the proof of penetration was held to enunciated as follows;

> **"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 in a relationship since January, 2013.**

The relationship was exposed in November, 2013, when she allegedly went to his place and stayed there for 3 days. The laboratory tests that revealed she was four (4) months pregnant were conducted on 2nd December, 2013, meaning that she should have conceived in August, 2013. But there was no evidence that there was sexual activity between them before the 24th November, 2013. And so, who impregnated the complainant if at all?

26. Which then takes me to the next issue of whether the provision of Section 36(1) of the Sexual Offences Act was complied with. The

section provides as follows;

> **"Notwithstanding the provisions of Section 26 of this Act, or any other law, where a person is charged with committing an offence under this Act, the court may direct that on appropriate sample or samples may be taken from the accused person at such a place and subject, to such conditions as the court may direct for the purpose of forensic and other scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

27. The issue of the complainant being pregnant was introduced by PW4, who testified that he conducted laboratory tests which confirmed tht the complainant was four (4) months pregnant. The complainant in her evidence denied this and said that she was never treated. And even if she was pregnant, it would not have been possible to require a DNA test to be conducted because at the time of trial, the child would not have been born and yet such test (paternity) is only viable once the child is born and tested.

28. In conclusion, I find and hold that the prosecution failed to discharge the burden of proof beyond reasonable doubt with the glaring gaps in their evidence against the appellant.

Consequently, the appeal is meritorious and therefore allowed. I proceed to quash the conviction and set aside the sentence of fifteen (15) years imprisonment that was imposed upon the appellant, and substitute the same with an acquittal.

It is so ordered.

JUDGMENT, DELIVERED, SIGNED and dated this 12th day of November, 2018.

D. CHEPKWONY.

JUDGE

In the presence of:

M/S Ocholla counsel for the state

Appellant in person : Present

Court Assistant; Beja