



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
(CORAM; CHERERE-J)
CRIMINAL APPEAL NO. 01 OF 2016

BETWEEN

PAUL SIMIYU NAMANGASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 796 OF 2012

in the Principal Magistrate's court at Webuye by Hon C.N.Oruo (RM) on 21.12.15)

JUDGMENT

The trial

1. The Appellant **PAUL SIMIYU NAMANGASA** has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of *the Act*. The particulars of the main count are that

On diverse dates between 9th December 2011 and June 2012 at [particulars withheld] village Misikhu location within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of RN a girl aged 15 years

The prosecution's case

2. The prosecution called 4 witnesses in support of the charges. PW1 R.N, the complainant stated that she was born on 28.3.97 as shown on her certificate of birth PEXH. 1 and that she was 15 years in 2012. She recalled that sometimes in 2012, she lived with the appellant as husband and wife for a period of about 5 months within which time she became pregnant. It was her evidence that all was well until the appellant assaulted her when she asked him if he had another wife and she returned to her parent's home from where she was blessed with a baby on 7.9.12 of which the appellant paid the hospital bills. It was her evidence that she reported the matter to the police and appellant was arrested. PW2 R W , complainant's mother stated that complainant went missing from home sometimes in December 2011 and was found in June, 2012, 6 months later, pregnant and living with the appellant. PW3 Antony Eric Otieno, produced complainant's P3 form, PEXH. 2 on behalf of his colleague Peter Wanyama who had moved to Nairobi

and it showed that she had no hymen and was 36 weeks pregnant. PW4 Sgt Consolata Lugonzo, the investigating officer stated that on 31.8.12, complainant reported that she had lived with the appellant as husband and wife since 9.12.11 and returned home pregnant after the appellant assaulted her after she asked him about his other wife. She stated that after complainant was blessed with a baby, DNA tests of complainant, the baby and the appellant were taken which showed that appellant was the father of the child. She produced the DNA report as PEXH. 5.

The Defence Case

3. When the appellant was put on his defence, he stated that he had no evidence to offer. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years imprisonment.

The Appeal

4. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 4th January, 2015. From the 9 grounds of appeal and oral submissions by the appellant's counsel Mr. Makokha, I have deduced the following issues:-

- 1. That section 200(3) of the Criminal Procedure Code was not complied with*
- 2. That the proceedings of 30.10.15 do not show the language of court and that appellant was not warned of the seriousness of the offence*
- 3. That there was no medical evidence to confirm the charges*
- 4. That the complainant, by impression, made the appellant believe that she was an adult*
- 5. That appellant was entitled to a lesser sentence since he was providing for complainant's baby*
- 6. That DNA was unprocedurally produced by a police officer*

5. The appellant placed reliance on the following authorities:-

- a. Bungoma Criminal Appeal No 124 of 2011 Timothy Wanjala Wembale versus Republic
- b. P K K Versus Republic [2015] eKLR
- b. Criminal Appeal Nos. 21 and 23 of 2004 Antony Njeru Kathiari & Anor Versus Republic

6. Mr. Oimbo learned Counsel for the state opposed the appeal and submitted that the P3 form was lawfully produced by PW3 on behalf of his colleague after the court as satisfied that all legal requirements had been met. He also submitted that there was no evidence that the complainant deceived the appellant that she was over 18 years old. It was further his evidence that there was no necessity of compliance with Section 200(3) of the CPC since Hon. Oruo wrote judgment on a case that was fully heard by Hon. Abuya. He finally submitted that the court must have considered the law before allowing the police officer to produce the DNA report.

Analysis and Determination

7. This being the first appellate court, I have to start by reminding myself that I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. (See **Okeno v Republic [1972] EA 32**).

8. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a) **Language of court**

9. The proceedings of 30.10.15 show that after section 211 CPC was explained to the appellant, he replied:-

“I will keep quiet, let the court decide”.

10. From the answer given by the appellant, I have no doubt that the court must have explained the section to him as required as a result of which he opted to tender no evidence. Otherwise what would he have been responding to?

b) **Was the appellant entitled to a lesser sentence since he was providing for complainant’s baby**

11. Providing for a child born out of a defilement union is not a mitigating factor since, sentences under ***the Act*** are governed by the age of the complainant. (See **Stephen Nguli Mulili V Republic 2014 eKLR**).

c) **Did medical evidence confirm the charges?**

12. To prove that the complainant and the appellant had engaged in a sexual union, the state relied on the P3 form PEXH. 2 and a report as PEXH. 5. The P3 form was filled by Peter Wanyama and the DNA report was made by A.W.Nderitu and both did not testify.

13. Section 33 of the Evidence Act provides:

***“statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible*”**

***(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty*”**

14. Section 77 of the Evidence Act provides:

(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

15. To my mind, in the context of this case, Section 33 and 77 of the Evidence Act contemplate a situation where the officer giving evidence knows the clinical officer, doctor or analyst who prepared the report. In effect the witness should be conversant with the maker’s handwriting and signature. It does not contemplate a situation where the officer giving evidence is a total stranger to the clinical officer, doctor or analyst who prepared the report. In my humble view, to allow any officer who is a stranger to the clinical officer, doctor or analyst who did not prepare the reports to give evidence on behalf of another

clinical officer, doctor or analyst would amount to hearsay. For that reason, I find and hold that the admission of P3 form produced by PW3 Antony Eric Otieno as PEXH. 2 and the DNA report produced as PEXH. 5 by PW4 Sgt Consolata Lugonzo and putting reliance on them and coming to conclusion that defilement was proved was an error in law and the trial court ought to have rejected them.

d) **Did the complainant deceive the appellant that she was an adult?**

16. Complainant told court that in 2012, she lived with the appellant as husband and wife for a period of about 5 months within which time she became pregnant. Her mother, PW2 R W, told court that complainant went missing from home in December 2011 and was found in June 2012, 6 months later, pregnant and living with the appellant. PW4 Sgt Consolata Lugonzo, the investigating officer stated that the first time that the complainant regarding complainant's disappearance from home and defilement was on 31.8.12 which was about 9 months from the time complainant is alleged to have gone missing.

17. Complainant's mother's evidence that she searched for complainant and found her staying with the appellant cannot be true in view of complainant's evidence that she returned to her parent's home after the appellant assaulted her when she asked him if he had another wife.

18. Even after the complainant returned home in June 2012, no action was taken against the appellant and the matter was reported to the police in August 2012 which was two months after her return.

19. Complainant's mother did not explain why she did not report the disappearance of the complainant to the relevant authorities or why she took no action immediately complainant returned home. This court therefore makes a presumption that complainant's mother knew where the complainant was and whom she was with and holds that her evidence that complainant had disappeared from home was made up.

20. Section 11 of the SOA provides:-

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

21. From the foregoing, I find that had the trial court carefully considered the conduct of the complainant and her mother, it might have arrived at the conclusion that the appellant was deceived and reasonably believed that complainant was over the age of eighteen years.

22. From the totality of the evidence on record, this court is of the humble view that the report to the police 9 months from the date the offence is alleged to have been committed was actuated by malice and not by a honest aspiration to do justice and ought to have been rejected.

e) **Was section 200(3) of the Criminal Procedure Code was not complied with?**

23. I have taken the liberty to consider if the conviction and sentence would have stood had the prosecution case been proved. In this regard, I have considered the application of Section 200 (3) of the CPC.

24. Justice Dulu in the case of **Anthony Musee Matinge V Republic [2012] eKLR** stated as follows:-

"The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section 200 of the Criminal Procedure Code (CPC). The relevant part of which provides:-

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

25. Counsel for the state Mr. Oimbo submitted that compliance with section 200(3) CPC was not necessary since Hon. Oruo wrote judgment on the case that was fully heard by Hon. Abuya. Counsel for the appellant Mr. Makokha urged the court to declare the case a mistrial and order a retrial.

26. With due respect, Section 200(3) of the CPC is couched in mandatory terms and it was indeed critical considering that the succeeding magistrate who wrote the judgment in the present case did not himself see and hear any of the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of any of the witnesses in this case and the trial was therefore unsatisfactory.

27. Mr. Makokha, learned counsel for the appellant urged the court to declare that the case was a mistrial and order a retrial in line with the provisions of Section 200 (4) of the CPC which provides that:-

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial"

28. The grounds for allowing a retrial under the above section are enumerated in the case of *Muiruri v Republic [1983] eKLR* and reiterated in numerous authorities. Khamoni J in *Laban Kimondo Karanja & 2 others v Republic [2006] eKLR* discussing grounds for ordering a retrial, reviewed several court of appeal decisions on the subject and concluded as follows:-

"At the end,the principles an appellate court should apply in determining whether to order a retrial are as follows:-

i. A retrial may be ordered only when the original trial, was illegal or defective.

ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person.

iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result"

29. It is the duty of the court to ensure that fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and under no circumstances can a person's right to fair trial be jeopardized. From the analysis of the evidence on record, I am not persuaded that a retrial can be conducted without causing injustice considering that there was no overwhelming evidence that the appellant defiled the complainant.

30. Had there been overwhelming evidence against the appellant, this court would no doubt have ordered a retrial considering that a charge of defilement is not one to be taken lightly and even though appellant has served 3 years imprisonment, the term is not adequate for an offence that attracts a 20 year term of imprisonment.

31. *Having considered the evidence in its totality, the appeal succeeds.* Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk : Ribba & Diannah

Appellant

For the State: Mr Oimbo