REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 47 OF 2015

EVANS ODUOR……..…….APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief magistrate's Court at Makadara Criminal Case No. 3255 of 2010 delivered by Hon. E.K. Nyutu, P.M. on 19th march, 2015).

JUDGMENT

Background

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the main charge were that on diverse dates between 2006 and 27th July, 2009 in Embakasi within Nairobi Area Province intentionally and unlawfully caused his penis to penetrate the vagina of E.M. a child aged 15 years. The particulars of the alternate charge were that on diverse dates between 2006 and 27th July 2009 in Embakasi Division within Nairobi Area Province, intentionally touched the buttocks/breast of E.M. a child aged 15 years with his penis.

The Appellant was found guilty on the main count and was sentenced to 20 years imprisonment. He was dissatisfied with conviction and he preferred this appeal. His grounds of appeal were summarily that the prosecution had not proved the case to the required standard as required by law and further that there was a misapprehension of the law by the trial magistrate in allowing the admission of the government analyst report on the child's paternity whereas the blood used was never linked to him. He was further dissatisfied that the learned trial magistrate relied on the evidence of Doctor Kamau, a police doctor yet he never extracted his blood sample but merely recommended that a DNA test be conducted.. He further contended that he was not accorded a fair trial due to a failure by the court to comply with Section 200(3) of the Criminal Procedure Code.

Submissions

The Appellant filed written submissions which basically expounded on the grounds of appeal. In brief, he submitted that he doubted the results of the DNA examination as he was not subjected to the extraction of his blood sample. He contended that the blood samples examined were taken to the Government

Chemists by a Police Officer by the name Regina whose source could not be ascertained. In that regard, he could not be held responsible as having sired the complainant's issue. More importantly was that it was not Doctor Kamau a Police Surgeon who extracted the blood sample. He submitted that the learned trial magistrate namely Hon. E. K. Nyutu failed to comply with Section 200(3) of the Criminal Procedure Code when she took over the conduct of the trial from Hon. T. Mweya on 21st March, 2013. That meant that he was not accorded a fair hearing against the provisions of the Constitution. Finally, he submitted that on the whole, the case was not proved beyond a reasonable doubt.

The Respondent, represented by learned State Counsel, Ms. Wario, canvassed the appeal by way of oral submissions. She submitted that all the ingredients of the offence of defilement, namely; age of the complainant, identity of the accused and penetration were proved beyond reasonable doubt. She also stated that the fact that the names of the witnesses were not given in the charge sheet was not prejudicial to the Appellant as it was a curable defect, a ground the Appellant had not raised in his memorandum of appeal.

Evidence

The prosecution's case was that on 27th July, 2009 the Appellant who was the complainant's tutor asked her to wait after class to enable him answer her question. This was after the other pupils had left. He had rented a room within the plot where the complainant (PW1) lived. Apparently, the plot was owned by PW1's parents. He asked her to stay behind so that he could explain the answer to a question she had asked. The Appellant then went to his room that was adjacent to the class and asked the complainant to join. While PW1 was in his room, he undressed her, touched her breasts and proceeded to have sex with her. This was not the first time that the Appellant had made her do that having previously, on diverse dates starting in 2000, carried out the same ploy. He even at some point told E.M. that the sex would improve her performance in all the subjects and further that they needed to carry out experiments to prove the things she was learning. This was all meant to keep the affair secret.

The mother to the complainant, PW2, who was suspicious that her daughter was pregnant since she was not asking for sanitary pads decided to get her tested on 27th September, 2009. After testing at Alice Nursing Home they were informed that she was 3 months pregnant. The parents took E.M. to her grandmother where on further interrogation she informed them the child belonged to the Appellant. She was later taken to Nairobi Women Hospital where a report was prepared by the Dr. Muhombe, now deceased, and produced by Dr. Muriithi Japheth, on 1st December 2009. The report confirmed that she was about 20 weeks pregnant, negative for hepatitis, HIV and urinalysis cells. He also stated that there was sexual assault on a minor as set out in the medical report.

She was on the same day examined by a police surgeon, Dr. Zephania Kamau for alleged defilement. He found that she was 30 weeks pregnant which he equated to 8 months and given her pregnancy there was no need for a vaginal examination. He advised that a DNA analysis be carried out once the child was born. He did fill and produce a P3 form with the details.

The investigating officer, PW6, No.66146 CPL. Regina Kitalia was attached at Embakasi Police Station when on 28th August, 2010, a suspect was brought from Villa Police Station under suspicion of defiling a minor. She summoned the complainant's mother who informed her that a child had been born as a result of the defilement. She interrogated the suspect who informed her that he had been released on police bail pending the birth of the child. She thereafter recorded the statements of E.M. and PW2 before escorting the suspect to Nairobi Area surgery where the blood samples of the Appellant, the complainant and the child were collected for purposes of DNA sampling to establish the baby's paternity. She forwarded the samples to the Government Chemist for purposes of the sampling.

On 30th August, 2010, PW5, John Kimani Mungai received the samples from PW6 and was assigned the duty of establishing the child's paternity. He created a DNA profile of the samples and found that there was a 99.997% chance that the Appellant was the child's biological father. PW6 on receiving the report on the DNA analysis charged the accused with defilement.'

After the close of prosecution's case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He chose to give an unsworn defence and called no witness. He stated that sometime in the month of August, 2000, on a Sunday, he was at his place of work when some four men approached him and informed him that he was required to go to Kwa Njenga Police Post. On arrival, he found Rahab Wamaitha (PW2) who had reported that her daughter had been defiled. The police told PW2 to go to bring the child but she did not return. On the following day, he was arraigned in court. He stated that he was never subjected to any medical examination and that there was no blood sample taken from him by any doctor. He maintained his innocence.

On considering the respective submissions and the evidence I narrow down the issues for determination as follows;

1. **Whether section 200 of the Criminal Procedure Code was complied with**
2. **Whether the chain of custody of the DNA evidence was properly followed.**
3. **Whether the charge was proven beyond reasonable doubt.**

Determination.

This court is tasked, being a court of first appeal, with evaluating and examining the evidence before it afresh. See the case of **Kariuki Karanja v Republic(1986)e KLR.**

On whether Section 200 of the Criminal Procedure Code was not complied with, the Appellant particularly took issue with subsection (3) which provides as under;

> ***" (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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

The court has looked at the proceedings and it is evident on the face of it that the Appellant, on 21st March 2013, was explained to by Hon. E. K. Nyutu (P.M), the particulars of Section 200 in a language he understood. He replied: "**May the matter proceed from where it had reached."** He chose by his own accord to proceed with the matter from where it had reached. His response was a clear indication that he had understood the implications of the provision otherwise he would not have responded in a manner that accorded with it. He did not exercise his right to recall the witnesses. This ground of appeal thus lacks merit.

The next issue regards the chain of custody of the evidence in respect of the DNA examination. This is particularly with regard to the Appellant's assertion that he did not provide blood to anyone and as such he does not understand where the sample used to analyse the child's paternity was obtained from. This court has looked at the record and decided to reconstruct the chain of custody regarding the blood in question. The investigating officer, PW6, received the suspect at Embakasi Police Station on 28th August, 2010. On 30th August, 2010 she escorted the Appellant, the complainant and the new-born baby to Nairobi Area Surgery where PW4 carried out an examination and extracted the blood from each of them. She then proceeded to the Government Chemist, with the Appellant in tow, where she requested a DNA profile to determine the child's paternity. This test was carried out by PW5, John Kimani Mungai and a report dated 14th June, 2011 produced which stated with certainty the likelihood of the Appellant being the child's mother at 99.997%. The Appellant was categorical that his blood was never extracted. He asserted this during his unsworn statement that formed the crux of his defence. This court has evaluated the defence and found that the defendant's claim is an attempt to avoid and evade responsibility in the matter. It is evident from the evidence of PW2 that earlier on the Appellant had actually objected to the DNA evidence being collected/. The court also notes that the Appellant was granted police bail pending the birth of the child. This was because the police, according to PW6 were waiting for the child to be born to enable the drawing of a blood sample for DNA analysis. After the child was born the blood sample was taken as per the process outlined above.

The final issue that this court must determine is whether the offence was proved beyond reasonable doubt. To prove a charge of defilement one must prove the age of the victim, identity of the perpetrator and penetration. The first ingredient, age, was proven by the production of the complainant's Birth Certificate number 892320. It clearly showed that the complainant was born in 1995 and as such was 15 years old at the time of the incident. This age falls within the provisions of Section 8(3) of the Sexual Offences Act.

On identification complainant testified that she was defiled by someone known to her, being her former tuition teacher. PW2 she knew the Appellant for 7 years prior to the offence and it was also clear that he had rented the tuition and residential rooms from the complainant's father. The court is convinced that the Appellant was indeed known to the complainant and as such she identified him through recognition.

As regards penetration, I need not belabour on the same as I have already found that the DNA process was undertaken in a satisfactory manner. The result of the same is that the child born by the complainant was sired by the Appellant. That is sufficient proof of penetration.

The ingredients being so proven this court is satisfied that the prosecution proved the case beyond a reasonable doubt. The Appellant’s defence failed to dislodge it.

On sentence, Section 8(3) of the Sexual Offences Act is couched in mandatory terms and this court cannot disturb the 20 years imprisonment handed to the Appellant.

In the end, I find that the appeal lacks merit and the same is hereby dismissed.

DATED AND DELIVERED THIS 10TH DAY OF MAY, 2016.

GRACE NGENYE-MACHARIA

JUDGE

In the presence of:

M/s Wario for the Respondent