REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL 234 OF 2011

STEPHEN MAKUTO ……..…….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act No.3 of 2006 Laws of Kenya. The particulars of the offence were that *the appellant on diverse dates between January 2008 and July 2009 at [particulars withheld] Kakamega Central district within Western Province intentionally and unlawfully inserted his genital organ namely penis into the genital organs namely vagina of **SNN** a girl aged 12 years*. The appellant also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 2006 laws of Kenya. The particulars of the offence are that *the appellant on diverse dates between January 2008 and July 2009 at Siyenga village, Nambacha sub-location, Bunyala central location, in Kakamega Central district within Western Province intentionally and unlawfully contacted his genital organ namely penis into the genital organs namely vagina of **SNN** a girl aged 12 years.*

The appellant was found guilty of the alternative charge and sentenced to serve ten (10) years' imprisonment. His grounds of appeal are that:-

1. He pleaded not guilty to the charge.

2. He was not supplied with witness statements to enable him prepare his defence.

3. The provisions of Section 36(1) of the Sexual Offences Act No.3 of 2006 were not complied with.

4. The newly born baby had no medical or scientific proof to show that it was that of the appellant.

5. The trial court did not scrutinize and evaluate the entire evidence

6. His alibi defence was not considered.

Mr. Weskesa, counsel for the appellant, proceeded by way of written submissions. I have gone through the written submissions and the same are only explaining the above grounds of appeal. There is nothing new to comment about in the written submissions. Mr. Oroni, state counsel, entirely relied on the proceedings of the lower court.

The prosecution case was that the appellant was married to the complainant's sister. The complainant was living with them while attending school. On several occasions the appellant defiled the complainant. The

complainant informed her sister who did not take any action. The complainant became pregnant and delivered a baby out of the defilement.

PW1, SN was the complainant. She testified that she was 12 years old and was attending {particulars withheld} Sometimes in January 2009, at about 1.00 p.m. she was at the appellant's house playing with other children when the appellant pulled her hand and took her in a room in the house. The appellant pressed her on the wall and raped her. She tried to scream but the appellant threatened to slit her throat. The appellant removed her underpants and lifted her skirt and raped her. The incident took about 30 minutes or so. She later informed her sister **GM** about the incident but her sister kept quiet. Later in May 2009 the appellant took her to the same room and raped her again for about one hour. Her sister was not around and when she came back PW1 informed her about the second incident and once again she kept quiet. In July 2009 the appellant raped her in the same house and she informed her sister who did not take any action. In both the May and July incidents the appellant threatened to cut her throat in the event that she screamed. PW1 did not recognize that she was pregnant until when her aunt **JN (PW2)** examined her and told her that she was pregnant. It is PW1's further evidence that she had known the appellant since 2003 when her parents died and that she had never had sexual intercourse with any other person. The appellant was arrested in September and charged with the offence.

PW2,JNW, testified that on the 28th August 2009 she heard that the complainant was not attending school because she was pregnant. The complainant is a daughter of her brother in-law. PW2 called for the complainant and took her to a traditional birth attendant who confirmed that the complainant was pregnant. PW1 told them that it was the appellant who had made her pregnant. Later a doctor confirmed that she was pregnant.

NICHOLAS WANJALA was **PW3**. He got information on 28th August 2009 that the complainant was not attending school as she was pregnant. He called for the complainant and found that indeed she was pregnant. PW3 reported the matter to the village elder. The complainant told them that it was the appellant who had defiled her. PW3 informed the Headmaster of the school where the complainant was learning. On 8th September 2009 PW3 reported the matter at Navakholo Police station. The complainant was taken to Navakholo sub-district hospital and a P3 was filled. According to PW3 the complainant was born in January 1997 and she was baptized on 3rd May 1998. Her father died in 2002 and the mother died in 2004.

PW4, VICTOR OBANDA WERE, is a clinical officer based at Navakholo sub-district hospital. He produced the P3 form that had been filled by his colleague **ROBINSON CHACAHA**. The P3 form was filled on 10th September 2009 and indicated that the complainant was pregnant. PW4, further testified that the complainant continued to attend clinic and gave birth on 25th of March 2010 at the Kakamega Provincial Hospital. The newly born child was given the name **LN**, a baby boy.

The appellant was put on his defence and gave unsworn evidence. He testified that he is 26 years old and on 6th September 2009 he went to do his daily casual jobs. He has a wife and three children and the complainant is his sister in-law. On the 6th of September 2009 he was summoned by the Navakholo police officers and on 7th September 2009 the police arrested him. He was told that he had impregnated the complainant. He denied committing the offence. The appellant further testified that he hated the complainant's uncles. He went to hospital 7 times with the police officer but he was not tested.

The trial court evaluated the evidence and acquitted the appellant on the main count of defilement. The trial magistrate was of the view that the time taken to report the matter led to the offence of defilement not being established. The only evidence on defilement according to the trial court was the child but no DNA tests were conducted. The court held that the failure to produce the DNA analysis made it to acquit the appellant on the first count. On the second count the court concluded that the appellant had an indecent act with the complainant. The court evaluated the complainant's evidence and went on to summarize the evidence as to how the appellant removed his clothes and inserted his genital organ into the complainant's genital organ. According to the complainant the incident occurred three times when the complainant's sister was away.

Turning to the grounds of appeal and submissions by counsel for the appellant it is contended that **Section 36** of the Sexual Offences Act was not complied with as there was no medical evidence produced. According to Section 36 the court is allowed to call for medical evidence including DNA tests in order to ascertain whether the appellant committed the offence. According to the submissions by counsel for the appellant the medical evidence could have established as to whether the appellant committed the offence since there was no other eye witness to corroborate the evidence of the complainant. The newly born child had no medical or scientific tests conducted to prove that it was fathered by the appellant. I have gone through the judgment of the trial court and I am satisfied that the court took into account the lack of the DNA test. The court cited the case of **THUMI V REPUBLIC [1984] KLR660** whereby it was held that medical evidence is not necessary to convict on a charge of indecent assault. The wording of **Section 36** of the Sexual Offences Act does not make mandatory that medical evidence has to be adduced. The proceedings before the trial court shows that PW4, Victor Obande Were, a clinical officer testified and produced a P3 form. I do find that the lack of any further medical evidence as provided for under **Section 36** of the Sexual Offences Act did not in any way prejudice the appellant's defence. Indeed the trial court acquitted the appellant on the first count of defilement due to the absence of the DNA test.

The appellant further contends that the trial court did not scrutinize and evaluate the entire evidence. The court sumarised the evidence of each witness as well as that of the appellant. The court noted that the investigating and arresting officers did not testify and registered its disappointment. The court went on to evaluate the evidence on record and the way the complainant testified. I do find that the trial court properly evaluated and scrutinized the evidence adduced by both the prosecution and the defence and there is no reason for me to hold contrary opinion.

The appellant's other ground of appeal is that there was no corroboration of the evidence of the complainant. The trial magistrate in her judgment noted that there was no eye witness but she was satisfied that the evidence of the complainant was sufficient and had proved the case. In her judgment the magistrate noted that she had observed the complainant, a 12 year old girl, who gave a vivid and graphic detail of what transpired. The court noted that the complainant appeared to be honest and haboured no ill will against the appellant. Section 124 of the Evidence Act states that in a criminal case involving sexual offence where the evidence is that of the victim of the offence, the court can convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth. The trial magistrate was convinced that the complainant was telling the truth and did note that she was the only eye witness. I am satisfied that the trial court evaluated the evidence and was satisfied with its truthfulness.

A baptismal card was produced which established the age of the complainant. According to the card the complainant was born on the 8.1.1997 and was baptized on the 3.5.1998 at the Kakamega Yearly Meeting of Friends Church. I am satisfied that the complainant's age was ascertained by the baptismal card. Further PW2 and PW3 testified as to the age of the child which evidence is in line with the baptismal card.

The appellant finally contends that his alibi defence was not considered. The record shows that the appellant testified that the complainant is his sister in-law. He gave evidence as to how he was arrested and taken to Navakholo police station. He denied committing the offence. According to the complainant the crime occurred in three occasions in the appellant's house. The appellant was living with the complainant. There is no evidence that the appellant was not present in his house when the incident occurred. There is no alibi defence that was advanced to the trial court. The court evaluated the defence evidence and concluded that it did not disprove the complainant's allegations. I do find that that ground of appeal does not help the appellant and the same is disallowed.

In the end I do find that the appeal lacks merit and the same is hereby disallowed.

Delivered, dated and signed at Kakamega this 9th day of May 2013

SAID J. CHITEMBWE

J U D G E