IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 12 OF 2017

BETWEEN

ZAKAYO OLUKUWE SIKUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from a Judgment of the High Court of Kenya at Kitale (**Muriithi, J**.) dated 8th October, 2014*

in

H.C. Cr. A. No. 30 OF 2014)

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JUDGMENT OF THE COURT

[**1**] This is a second appeal against the judgment of the High Court dismissing the appellant's appeal against conviction for **defilement** of a child and sentence of twenty years imprisonment.

[**2**] The charge was based on **section 8(1)** as read with **section 8(3**) of the **Sexual Offences Act**. The particulars of the offence alleged that on 12th July 2009, the appellant defiled the named complainant, a child aged 14 years. The complainant's evidence at the trial was briefly as hereunder.

On 12th July, 2009 at 7.00 p.m. the complainant went to the village shop of the appellant to purchase sugar. She found the appellant alone in the shop. She asked for sugar but the appellant pulled her to an inner room where he made her to lie on bags of maize, wore a condom and defiled her. She bled from her private parts but the appellant dressed her with Elastoplast. Thereafter the appellant chased her away saying that his wife would find the complainant. The complainant went home and reported to her father ***JK***. In July, 2009, her father discovered that the complainant was pregnant. After questioning her, she named the appellant as the person who had defiled her. He reported to the police and the complainant was taken to hospital for examination and age assessment.

Boniface Wangila, a Community Oral Health Officer assessed the age of the complainant as 14 years being guided by the fact that the complainant's four wisdom teeth had not erupted. The medical examination report prepared by one ***D. K. Shaghani*** was produced at the trial by ***Linus Ligale*** – a clinical officer. The medical report indicated that complainant had a 26 weeks pregnancy at the time of examination. The investigations were conducted by ***PC Lucy Nyaboke***. She was transferred and did not give evidence. Instead, ***Sgt. Juslin Wambire*** who took over the investigations file gave evidence.

[**3**] The appellant made an unsown statement at the trial. He stated that he was falsely accused and that the village elder who was jealous of his success in business influenced the complainant to implicate him but she refused.

[**4**] The trial magistrate made a finding of fact that the complainant was aged 14 years; that penetration was proved by the fact of pregnancy which the appellant had not disputed; that although the date when the alleged offence occurred was not clear from the evidence, the charge sheet was amended to show that it occurred in 2009 and not 2010; and that the appellant was the defiler, whether or not he was responsible for the pregnancy.

[**5**] On its part, the High Court made findings that the act of defilement of the complainant was not disputed; that the only issue was whether

the appellant was the person responsible for the offence; that there was undisputed evidence that the complainant was under the age of 18 years and approximately 14 years of age; that it was unnecessary to order a DNA test since paternity of the complainant's child was not an issue; that although the appellant used a condom such protection is not absolute and that the complainant's evidence was worth of belief.

[**6**] The appellant claims by the memorandum of appeal and the supplementary memorandum of appeal and also in his oral submission, in essence, that the High Court failed to re-evaluate the evidence relating particularly to the name of the complainant, the contradictions in the evidence of the complainant and her father on the requirement for DNA test; that **section 200(3*)*** of the Criminal Procedure Code was not complied with; that the investigation officer did not testify and that the trial magistrate made a finding that the appellant had no case to answer.

[**7**] By the proviso to **section 124** of the Evidence Act, an accused person may be convicted of a sexual offence with a victim solely on the evidence of a child victim if the court is satisfied, for reasons to be recorded, that the child victim told the truth. In this case, there was ample evidence that the complainant was a class six pupil in primary school and that she was under the age of 18 years at the time of the commission of the offence. The fact that the complainant became pregnant and eventually gave birth to a child is itself evidence of penetration. It was evident that at the time of the trial, the complainant had already given birth. Indeed, she came to court with a child.

[**8**] However, as regards the identity of the defiler, the trial magistrate did not adequately evaluate the evidence. Similarly, the High Court did not re-evaluate the evidence before making a finding that the complainant was worthy of belief. The complainant categorically stated that she reported the defilement to her father and gave the name of the appellant on the same night. However, her father stated that the complainant never reported to her about the defilement and never told him that the appellant had defiled her. It is clear from the evidence of the complainant's father that it is only after he suspected that the complainant was pregnant and took her to a traditional birth attendant who confirmed the pregnancy, that he questioned the complainant who believed that the appellant was responsible. It was also his evidence that when he confronted the appellant, the appellant denied responsibility. ***Ms. Karanja***, the learned State Counsel while opposing the appeal submitted that the matter could have been different had the appellant co-operated with the father of the complainant. It is apparent that it is the denial of responsibility by the appellant which led to the complaint being lodged with the police.

[**9**] It is clear that the complainant lied to the court that she reported the defilement by the appellant immediately which fact cast reasonable doubt to her evidence on the identity of the defiler. In view of that lie, her evidence on the identity of the defiler required corroboration. Had DNA been conducted on the appellant and the complainant's child, it is probable that a link would have been established between the appellant and the complainant's child that could have provided sufficient corroboration of the complainant's evidence that it was the appellant who in truth defiled her on the material date. The DNA was not conducted for some unexplained reasons. DNA was important in the circumstances of this case because firstly, the two courts below relied on the fact of birth of the child as the evidence of penetration, and secondly, the complainant claimed that the appellant had put on a condom.

[**10**] Further, the complainant's evidence on the date when defilement took place was unreliable. She testified that she was defiled on 12 th July 2009. According to the evidence of her father when he discovered that she was already pregnant in July 2009, she was already 4 months pregnant by that date. Medical examination showed that she was 26 weeks pregnant by 23rd December 2009 when police sent her for medical examination. In view of the large variance of the dates, the date of defilement was, contrary to the finding of the trial court, material as it went to the credibility of the evidence of the complainant.

[**11**] In addition, there were other unsatisfactory features of the trial. Firstly, ***Hon. MC Chepsiba*** heard the evidence of the complainant and her father. The evidence of the other three witnesses was received by ***Hon. J. M. Nang'ea***. The record of the proceedings supports the submission of the appellant that section 200(3) of the Criminal Procedure Code was not complied with. Thus, the rights of the appellant were not explained but also he was not given an opportunity to elect whether or not the complainant and his father, who were material witnesses should be recalled or further cross-examined. Secondly, although it was lawful to receive the evidence of the complainant in camera, it was not lawful for the trial court to deny the appellant a public trial after the complainant had testified. The record particularly shows that the evidence of ***Linus Ligale*** and ***Sgt. Justin Wabwire*** was taken "*in camera*" and further that the judgment was delivered "*in camera*".

In the same vein, the High Court made a finding that defilement was not "*disputed*" thereby shifting the burden of proof to the appellant to prove that defilement did not in fact take place. This was a misdirection. The High Court should have instead considered the evidence and made a finding whether or not the prosecution had proved defilement beyond reasonable doubt.

[**12**] For the foregoing reasons, we find that the High Court did not properly re-evaluate and reconsider the evidence including the manner in which the trial was conducted. Had it performed its duty, it would have come to the conclusion that the offence was not proved through a fair trial, beyond reasonable doubt.

In the premises, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held for a different offence.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR