REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 59 OF 2020

REPUBLIC.....APPELLANT

VERSUS

ERICK MUTHURI KITHINJI.....RESPONDENT

(Being an appeal from the original conviction and sentence by

Hon. M.A Odhiambo RM in Meru S.O No. 20 of 2017 on 29/07/2020)

JUDGMENT

1. **Erick Muthuri Kithinji ('the respondent')** 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**. It was alleged that between 28th and 31 December 2016 at [particulars withheld] area in Imenti District within Meru County, he intentionally caused his penis to penetrate the vagina of **HKK ("the complainant")** a child aged 17 years old.

2. He also faced 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** in which it was alleged that on the same day and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of HKK, a child aged 17 years.

3. He denied the charges where-after the prosecution paraded 4 witnesses in support of its case and when put on his defense the respondent gave sworn evidence without calling any other witnesses. He was subsequently acquitted in accordance with section 215 of the CPC upon finding by the court that, on among others, the complainant had behaved and represented as an adult and therefore that the respondents defence that he reasonably believed that the complainant was not a child was believable.

4. Dissatisfied with the respondent's acquittal, the prosecution/appellant lodged this appeal setting out 7 grounds of appeal as follows;

a. The trial court erred in law and fact by failing to consider that all the ingredients of the offence of defilement contrary to section 8(1) of the Sexual Offences Act were duly met and proved.

b. The trial court erred in law and fact by acquitting the respondent without considering the weight of the evidence adduced vis a vis the weight of the evidence by the defence.

c. The trial court erred in law and fact by misapplying the law in the circumstances thereby arriving at a decision that was unjust and unfair.

d. The trial court erred in law and fact by failing to appreciate the evidence tendered by the prosecution met the required standard, that is beyond reasonable doubt.

e. The trial court erred in law and fact by finding that the respondent's defence had merit despite his failure to take any steps to ascertain the age of the victim as envisioned in section 8(6) of the Sexual Offenses Act.

f. The trial court erred in law and fact by finding that the respondent's defence had merit despite his failure to adduce any evidence to support his assertions.

g. The judgement of the trial court was against the weight of the evidence.

5. The evidence before the trial court was that, in June 2016 at around 11.00 am, the complainant, PW1, then aged 17 years, together with PG, were going to visit their grandmother at [particular as withheld] and the respondent gave them a lift to the destination. When they got there, he asked for her number. On 28/9/2016 at 10.30 a.m, they were calling, texting and chatting with each other, when the respondent called her so that they could meet at Ngonyi. They met and she got into his car and they drove to Chaure. When they got to Chaure, he alighted to run his errands while she remained in the car. The respondent then called her to go to a certain house, where they watched a movie, began to romance then had sex. It was still during the day, so they watched a movie, romanced, had sex and left the place at 2.00 p.m. On 31/12/2016 at around 10.30 p.m, she was attending a kesha in church, when the respondent called her. She got out of church and went to him. They came to Meru town, got into a lodging, had sex and slept till 3.00 a.m. The respondent then dropped her somewhere near her home. When she missed her October and November periods, she informed the respondent. On 2/3/2017, the deputy principal noticed that she was pregnant and she was brought to Meru, where a pregnancy test was done. After the test turned out positive, her father was summoned to the school. The case was then reported to Meru police station and the P3 and the PRC forms, which are all dated 23/3/2017, were filled. She concluded that the respondent was unknown to her when they first met.

6. During cross examination, she stated that in 2014, she was aged 16 years, although she did not produce her birth certificate. She further confirmed that she had a mobile phone at that time, which was registered in her mother's name. She also confirmed that they used to communicate and chat on phone daily with the respondent. She stated that she told the respondent that she was aged 16 years. She went on to confirm that she had previously had sex with someone else before the respondent. She stated that they stopped chatting in 2017 and that she had never been to the respondent's house. She stated that they went to Chaure in September 2016 and that the respondent did not force her to have sex with him. She realized that she was two month's pregnant two months later, and the principal realized she was pregnant in March. In denying having any bad blood with the respondent, she stated that she delivered in June 2017 and has been solely taking care of the child. She went on to state that her father would only allow her to withdraw the case if, the respondent started taking care of the child. She confirmed that she did not tell the court how old the pregnancy was. She also confirmed that she attended hospital 3 months after defilement. She confirmed that the respondent was still her friend and she did not want to see him imprisoned. She also confirmed that she knew what she was doing at the time and was open to being assisted by the respondent in raising the child.

7. In re- examination, she stated that when the respondent picked her at Gikumene, she was not in school uniform. She stated that the respondent told her he was married and she got furious. She once again confirmed that she had sex with someone else prior to meeting the respondent.

8. **PW2 IKK,** the complainant's father, stated that on 3/2/2017, he received a call from a teacher at **[particulars withdrawn]**. When he got to the school, he was informed of the intended pregnancy test on PW1 and he consented. On 6/2/2017, after the test was done, he was informed by madam J through the phone that the results were positive. He together with PW1's mother asked the complainant who was responsible for the pregnancy and she said it is the respondent. He then made a report at Meru police station but the respondent could not be arrested because he fled. After one month, he called Sergeant Mulwa to inform him that the respondent was back and he was then arrested. He confirmed that the respondent was known to him as they lived close by. He stated that the complainant was born in January 2000, although her birth certificate indicated that she was born in 2002.

9. During cross examination, he stated that he had four children and the complainant, who was born in 2000 was the 2nd born. He did not know when the P3 and PRC forms were filled, despite having reported the case the same month. He confirmed that PW1 had a mobile phone registered in her mother's name. He denied knowing whether PW1 had sex with other men before the respondent. Although he did not know the name of the respondent, he confirmed that he lived about 2 KMs from his house and that PW1 and

her sister knew the respondent. He was informed about the pregnancy by madam J although he did not know whether she was a witness. He confirmed that there was a time they wanted to withdraw the case, but he was told he could not do so. He asked the respondent for Ksh. 50,000 in order to withdraw the case, but when the respondent brought the money, he declined to receive it. He was present when the P3 form was filled but he did not know how far the pregnancy was.

10. **PW3 Dr. Mukene Muthuri**, from Meru Teaching and Referral Hospital, produced the P3 form filled on 23/3/2017 and PRC form of the complainant, on behalf of his colleague Dr. Munyoki. The complainant, aged 17 years was examined 3 months after the defilement. On examination, the clothes were normal, the physical examination was normal, there were no physical injuries, the hymen was broken, there were no injuries and/or bruises on the labia minora and majora and there was no discharge or blood found in the vagina. A pregnancy test was done and it turned out positive. He stated that the patient was not treated but was placed on Antenatal care. He stated that the complainant had unprotected consensual sexual relationship with a person known to her.

11. When cross- examined on the age of the complainant, he stated that he could not confirm the same since he only relied on what was indicated on the P3 and PRC forms.

12. During re-examination, he stated the PRC form was filled at the first instance the complainant attended the hospital.

13. **PW4 Senior Sergent Dominic Mulwa,** the investigating officer herein was on duty on 3/3/2017 at Meru Police Station. As he was going through the OB, he came across a report of the complainant aged 17 years and a form 4 student at **[particulars withheld]**. It was alleged that she had been impregnated by the respondent, a taxi driver. The complainant visited the station in the company of her father and he interviewed her. After she narrated how she had met the respondent, started communicating with him through the phone and even met and had sex on two occasions, she later learnt that she was pregnant. He advised her to go to the hospital where she was issued with a P3 form. He also requested for her birth certificate which was availed. After investigations, he arrested and charged the respondent with the offence in question. He produced the complainant's birth certificate as Pexh 3.

14. During cross examination, he stated that it was the complainant's father who reported the incident on 2/3/2017, whereas the P3 form was filled on 23/3/2017. He also stated that the complainant was 5 month's pregnant when the incident was reported. He stated that the complainant had a mobile phone number although he did not know in whose name it was registered. He also confirmed that the complainant was not in school uniform when she was picked by the respondent. He stated that he did not know the distance from the complainant's house to that of the respondent but it was not far. The respondent had gone into hiding but he was arrested three months later on 5/6/2017. He did not know whether PW1's father had asked for Kshs 50,000 to settle the case.

15. In re-examination, he stated that the respondent lastly met the complainant on 31/12/2016.

16. In his defence, the respondent told the court that he was a taxi driver. He stated that the complainant was known to him. In June 2016, he narrated that he was at Gakoromone when he saw two girls standing by the roadside. They asked for a ride to Ngonyi and since he was also heading there, he agreed. Although they did not speak, they asked him to give them his phone number. The complainant who had a phone said she just wanted his number. He took the complainant to Ngonyi, then she texted him 3 weeks later, after which they began to chat. She told him that she had cleared school and was taking computer classes in Meru town. She further told him that she was an adult. She was drinking alcohol, she had a mobile phone and they could go to town during week days. When he asked her why she was all the time switching her phone off, she said that it was because of her previous boyfriends. He could pick her in town, they spend the night and drop her back to Meru town. He confirmed that he had known the complainant's father since he was young, but he did not know PW1. In January 2017, the complainant called to inform him that she was pregnant. She asked him for Ksh. 2,000 to procure an abortion but he told her that if he was the father, he would support the child. However, PW2 started to demand for Ksh. 200,000 and that he should marry her. He said he only had Ksh. 50,000 and they entered into an agreement in an advocate's office. He produced that agreement as Dexh 1, where he agreed to pay PW2 Ksh. 50,000 and take care of the child. PW2 and other witnesses executed the agreement and he was given the money. PW2 was still asking PW1 to extort money from him. He denied having fled as suggested by the police and maintained that he was always at home. He stated that PW1 had other men and she even went to live with another man in Chuka. He asked the court to look at the SMS extract, which he did not produce as exhibit.

17. During cross examination, he confirmed that he knew where PW1 lived as it was about 500 meters from his home. He stated that he was not related to PW2 and he had lived there since birth. He stated that he first met PW1 in June 2014, when she told him that she wanted to contact him to take her grandmother to the hospital, but she never got in touch in regard to that subject. They

continued chatting until 2016. He found messages on her phone which confirmed that she had other men. He got angry when she told him that she was living with other men. He confirmed that he had a relationship with the complainant, but had never met her parents. PW2 demanded money from him and the payment was made in 2017. Although the complainant conceived, he did not know whether he was the child's father, but he was willing to support the child. He stated that PW1 would tell him that the reason her phone was off was because she was at her friend's home.

18. In re-examination, he confirmed that there was no children case between them and that the complainant as per the agreement, which was in relation to their case, was PW2.

19. The appeal was directed to be heard by way of written submissions and only the appellant filed on 26/7/2021. In those submission the appeal collapses into the question whether the case was proved beyond reasonable and if the respondent discharged his burden in proving that he was deceived into believing that the complainant was an adult and not a child.

20. The appellant's submissions were to the effect that the respondent was engaged in a sexual relationship with the complainant, who was aged 17 years. The said relationship was revealed while the complainant was at school and after her teachers suspected that she was pregnant, the test conducted affirmed their suspicion. It submitted that indeed the respondent admitted that he was the father of the child and was willing to take care of it. It maintained that it had proved all the ingredients of the offence of defilement beyond reasonable doubt. The bone of contention was the use and application of Section 8(5) and 8(6) of the Sexual Offences Act. It contended that the respondent had not made any efforts to ascertain the age of the minor at any point throughout their sexual relationship. It submitted that no action by the victim can be said to be deceptive and no evidence was adduced by the defence. It concluded that the trial court had misapplied the defence of defilement as espoused in section 8(5) as read with section 8(6) of the Sexual offences Act in acquitting the respondent, and prayed that the appeal be allowed. The prosecution relied on **G.O.A v R (2018) eKLR, Barton Ongago Kenyatta v R (2020) eKLR, Luka Waithaka Ndegwa v R (2017) eKLR and Janet Jepchirchir v R (2021) eKLR** in support of its case that a child has no capacity to consent to sexual intercourse and that an accused has a duty to ascertain the age of the child before assuming that the child is an adult.

21. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See ***David Njuguna Wairimu v R (2010) eKLR.***

22. It is not in doubt that age and penetration were proved beyond reasonable doubt based on the concession by the respondent that he infact had sexual intercourse with the complainant on two occasions. On the identity of the perpetrator, although the respondent admitted to have been having a sexual relationship with the complainant, evidence was led that she was sleeping with other men prior, during and after meeting the respondent. It could not be established with certainty who was responsible for the pregnancy or how old it was. The investigating officer testified that the alleged defilement was reported 3 months later after which the complainant was examined. With such concession, the fact of penetration, age of the complainant and the identity of the defiler cannot be in contention.

23. The only contested issue is the truth of the defence raised by the respondent under Section 8(5) and (6) of the Sexual Offences Act. That Section provides as follows:-

"(5) It is a defence to a charge under this section if-

(a)it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b)the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

24. The respondent in his defence testified how he had met the complainant, who was not in school uniform. That fact was confirmed by the complainant herself as well as her father, PW2. The complainant testified that she got furious when the respondent

told her that he was married. She further stated that they had on one occasion gone to a lodging, after which the respondent dropped her somewhere near her home at 3.00 a.m. The respondent also stated, **I took the girl to Ngonyi. PW1 then wrote me a message 3 weeks later. She asked for my number she told me that she had cleared school and that she was taking computer classes in Meru town. She told me she was an adult. She was drinking alcohol, she had a mobile phone and we could go to town during weekdays."**

25. In determining the strength of that defence, the trial court did seek guidance from decisions of the superior courts including the decision by the Court of Appeal in Eliud Waweru Wambui vs Republic (2019)eklr for the proposition that a child need not deceive by telling a lie that she is over 18 years of age. The court equally took into account the fact that there was an admission that the child admitted to having another relationship parallel to that with the respondent and that the conduct of PW2 in demanding money from the respondent made his evidence unsafe to be relied upon as a basis of a conviction.

26. In my assessment of the evidence, I do find that any reasonable person would least expect a school going child to have the guts to ask for a telephone number, engage an adult freely on phone and texts at all time and give the excuse of not being able to pick a phone on being near a boyfriend. When one behave such and asserts being in college and not a basic education school, it is only reasonable to believe that she is an adult. On the duty of an accused person to ascertain the age of the child, I find that there were inquiries leading to the statement that the complainant was in a computer college. I find that to have been the only reasonable thing to do. I therefore find merit in the respondent's contention and defence that he reasonably believed that the complainant was over the age of 18 years. The respondent went into some length to elaborate how he was reasonably deceived by the complainant in believing that she was an adult. His testimony that the complainant was drinking alcohol and that she used to go to town with him during weekdays was not impeached during cross examination. In fact, PW2 and the complainant herself admitted that she had a mobile phone and was not in school uniform when the respondent first met her. Even when cross examined, the respondent maintained that he was infuriated when the complainant informed him that she was living with another man. When such conduct on the part of the complainant is viewed in light of the demand by PW2 that the respondent pays Kshs 50,000 as a consideration of the case being dropped and that the respondent marries and takes responsibility of the child to be born, an impression is created that the pursuit was not a genuine administration of criminal justice but to push the respondent into a corner at the risk of being jailed. I consider not to be in the genuine pursuit of criminal justice because the admitted another boyfriend who maintained a relation with the complainant has not been pursued. In addition if the concern was the child to be born, it was only just that the child arrives and paternity tests conducted to establish if the respondent was the father. That however is not the docket of a criminal court. I fear that the impression created here was that the court was being called upon to punish the respondent not for defilement but for failing to satisfy an agreement seeking compensation for defilement. That may as well be subversion or perversion of the criminal justice.

27. I find that trial court properly directed its mind to the respondent's defence and the totality of the circumstances of the case, in arriving at the decision it did. The upshot from the foregoing analysis is that the appeal is devoid of merit and the same is accordingly dismissed.

DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF DECEMBER, 2021

Patrick J.O Otieno

Judge