REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 72 OF 2016

FESTUS KAKAI NDINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Sexual Offence Case No. 3 of 2006

vide Kitui CM's Court Sexual Offence Case No. 20 of 2015)

J U D G E M E N T

1. **Festus Kakai Ndinda**, the appellant herein, was charged with the offence of defilement contrary to **Section 8(1) (3) of Sexual Offence Act No. 3 of 2006 vide Kitui CM's Court Sexual Offence Case No. 20 of 2015**.

2. The particulars of the offence were that on 18th August 2014 at unknown time at [Particulars Withheld] village, Kathungi in Katulani within Kitui County the appellant intentionally caused his penis to penetrate the vagina of (name withheld) a child aged 15 ½ years.

3. The proceedings from the trial court indicates that the appellant initially pleaded guilty but later changed his mind and pleaded not guilty after the facts were read over to him. Trial proceeded and after 5 witnesses were heard and he was found guilty by the trial court and convicted. He was then sentenced to serve 15 years in prison.

4. He felt aggrieved by both the conviction and sentence and preferred this appeal raising five grounds but before I look at the grounds I will consider a brief summary of the prosecution's case presented at the trial.

5. The appellant as I have observed was charged with the offence of defiling a girl aged 15 ½ years old. From a brief summary of the case presented to the trial court. The appellant appeared to have had an illicit love affair with an underage girl for some time before the mother, **BM (PW1)** discovered it when she incidentally ran into them in the act at a bush near Kalundu River at [Particulars Withheld] village. That incident was in the month of March 2014 on a date the mother could not recall.

6. The appellant reportedly took to his heels after being caught in the act leaving behind the bewildered girl. The mother perhaps using her maternal instincts did what a mother would ordinarily do in such circumstances. She gave her daughter a thorough beating and the matter could have ended there because the mother for unknown reasons never took further action against the culprit.

In January 2015, she discovered that her daughter was pregnant and that is when she took action by escorting her now pregnant daughter to Itoleka Police Station. The victim was referred to Kitui County Hospital where she was discovered to be 7 months pregnant.

7. The appellant was then arrested and arraigned. At the trial, the medical evidence to wit P3 was tendered by **Dr. Mutuku (PW3)** as **Ex. 3**. The P3 indicated that the victim was 15 years old and 7 months pregnant. The age assessment report dated 20th February 2015 tendered as P. Ex 4 indicated that the girl was 15 ½.

8. The complainant testified at the trial court on 26th October, 2015 and told the trial court that she was then 16 years old and that she was 15 years old when she voluntarily had sex with the appellant. She recalled that she had sex with him on 18th August 2014 after the appellant promised her that he would marry her if she got pregnant. She also testified that she discovered she was pregnant in September 2014. She denied being caught by her mother (**PW1**) having sex with the appellant.

9. The investigating Officer (**PW4**) testified that a report was made at Itoleka Police Station on 17/2/2015 by the complainant's mother and that the complainant reported to have been defiled on 18.08.2014.

He escorted the girl to Kitui District Hospital where the pregnancy was confirmed to be 7 months old and the girls age confirmed to be 15 ½ years old. He tendered the birth certificate as **P Ex5** indicating that the complainant was born on 15th August, 1999.

10. When he was placed on his defence, the appellant denied the offence insisting that he did not know why he was arrested. He faulted the evidence tendered in regard to the age of the complainant insisting that the evidence on the PRC form was inconsistent with the other evidence tendered and faulted the doctor for stating that the age of the victim had been assessed. He also faulted the investigating officer for not subjecting him to medical examination as well to confirm that he had committed the offence.

11. The trial court evaluated the evidence and found that the ingredients of the offence of defilement had been established and that though the victim consented to sex, she had no legal capacity to do so. The appellant's defence was found not convincing and hence the conviction.

12. The appellant as I have observed above was aggrieved and raised 5 grounds in his petition of appeal and even though he added additional grounds in his written submissions he did so without leave of this court and so this court will consider the following grounds raised in the initial petition of appeal which are:

i. That the charges of defilement section 8 (1) as read with section 3 of the Sexual Offences Act No 3 of 2006 were never proved beyond reasonable doubt

ii. That the trial magistrate erred me in law and facts by relying on evidence that lacked the proper legal meaning of first report

iii. That the trial magistrate erred me in law and facts by bashing his judgment while understanding there wasn't any DNA done

iv. That the trial magistrate erred me in law and facts by failing to take into note that the said investigating officer did not visit the scene of crime

13. In his written submissions the appellant has embarked on new additional grounds which I have found to have been raised incompetently without leave of this court. The same to that extent will not be considered.

14. The appellant fault's the prosecution's case contending that DNA test was not conducted to prove that he had committed the offence and that he was the father of the minor. He faults the evidence tendered by the complainant's mother wondering why she did not take action immediately. She discovered there was an affair between them when she found him and the complainant having sex near a river.

15. The appellant also takes issue with the age of the victim contending that the age of the victim was not established because of the inconsistent evidence tendered in regard to age.

16. He submits that the prosecution failed to prove its case to the required standard contending the evidence of **PW4** and **PW5** relied on were hearsay evidence. He submits that the ingredients of the offence were not proved to the required standard.

17. The State through the Office of the Director of Public Prosecution has opposed this appeal through its written submissions dated 30th August 2021.

18. The Respondent submits that it proved all the elements of defilement beyond reasonable doubt. It points out the evidence of **Dr. Patrick Mutuku (PW3)** proved that penetration had taken place as he found the hymen of the complainant broken upon examination and also found her pregnant. The state submits that the fact that the complainant was pregnant in itself showed that she had been defiled.

19. On age, the Respondent submits that the age assessment report as **P Ex4** showed that the complainant was 15 years 6 months and that the birth certificate (**P Ex 5**) showed that at the material time the complainant was exactly 15 years old.

20. The State further submits that the evidence tendered indicated that the appellant and the victim were involved in a sexual relationship since 2013 and that the last time they had such an encounter was on 18th August 2014 and that in the month of September 2014, the victim discovered she was pregnant.

21. The State further submits that there was no necessity for a DNA test because the complainant was clear about who the father of her child was and that the appellant had promised marry her. The respondent submits that defilement or rape is not necessarily proved by DNA but evidence and has relied on the decision of ***Fappyton Mutuku Ngui versus Republic [2014] eKLR***.

22. The State faults the appellant for engaging in a sexual relationship with a minor submitting that he was the adult in the relationship and should have known better.

23. The Respondent on the issue of defence raised during trial, contends that the trial court duly considered the defence and found no merit in it. The state submits that the appellant's defence at the trial was too weak as compared with its case which it contends was credible, consistent and corroborative.

24. On sentence, the respondent contends that the mother of the victim clearly testified that the complainant was 15 years at the month of August 2014. It points out the birth certificate Serial No. **313753** tendered as **P Ex 1** showed that the victim was born on 15.08.1999 which meant that on 18.08.2014, that is the date of the offence, she was 15 years old. It clarifies that the age assessment report produced as **Ex. 4** indicating that the minor was 15 ½ years old was not accurate. It submits that given the age of the victim the sentence of 20 years' imprisonment was justified.

25. This court has considered this appeal and the submissions made by the appellant and the comprehensive submissions made by Christine Nthiga the learned prosecuting counsel appearing for the Office of the Director of Public Prosecution for the Respondent.

The duty of this court as the 1st Appellate Court was clearly stated in the case of ***Okeno versus Republic [972] EA*** where the ***Court of Appeal for Eastern Africa*** stated;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.''

26. The appellant was charged and convicted of defilement ***Section 8(1) (3)*** provides: -

''(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.''

27. This appeal has raised 3 issues namely: -

i. Whether the prosecution's case was proved beyond doubt.

ii. Whether the defence was considered

iii. Whether the sentence imposed was excessive.

28. On the first question for determination this court has already given the brief summary of the background of the case presented at the trial. It is clear from the cited section upon which the appellant was charged and convicted that the prosecution having the burden of proof should establish and prove the following ingredients: -

i. Penetration

ii. Identification of the offender

iii. Age of the victim

29. On the question of penetration, ***Section 2 of the Sexual Offence Act*** defines penetration to be;

''Partial or complete insertion of the genital organs of a person into genital organ of another person.''

30. The prosecution's case at trial rested on the evidence of the complainant (**PW2**) and **PW3**- the doctor who examined her and filled the P3 and the age assessment.

31. The defence contention in this appeal rest on the failure by the prosecution to conduct DNA analysis to establish who the father of the minor was.

This court has considered the circumstances obtaining in this case and finds that the appellant's concern should have been addressed and put to rest if the prosecution was diligent enough. I say this because though the victim was 7 months pregnant when the appellant was first arraigned, during the course of trial the complainant gave birth before the prosecution closed its case on 12th May 2016. The investigating officer should perhaps exercise due diligence by carrying out DNA test to put the matter on paternity of the minor born out of defilement to rest.

32. Having said that, I am persuaded by the prosecution's submissions that a sexual offence such as defilement is not proved only by forensic (DNA) evidence. The court held in ***Musa Kipsiele Chepkonga versus Republic [2021] eKLR*** that the absence of DNA test does not mean that rape never took place and that the same can be established though other evidence which necessarily may not just be forensic analysis. ***Section 124 of the Evidence Act*** indeed provide that the evidence of the victim on its own will suffice it the court is satisfied that the victim is telling the truth. Though the trial court could have prompted the prosecution to do the needful by subjecting the child born, as a result of defilement to DNA test, pursuant to ***Section 36 of Sexual Offence Act*** it was quite in order to evaluate the evidence presented before it and determine if the threshold had been established. This is because the provisions of ***Section 36 of Sexual Offence Act*** gives the trial court a discretion to order for DNA test where it finds it appropriate. It is not a mandatory requirement.

33. I have considered the evidence at the trial and find that the prosecution's case against the appellant was weighty. There is no doubt going by the evidence that the appellant and the complainant had been involved in an illicit relationship even earlier than the material date. The complainant's mother **(PW1)** told the trial court that she found the two in the act near a river sometime in March 2014.

The mother could have rescued her daughter had she taken action immediately by reporting the matter to the police, and perhaps if she had done so, her daughter may not have fallen pregnant in August the same year. Perhaps she thought, mistakenly of course, that by giving her daughter a thorough beating she was going to put the illicit affair to an end but she was mistaken.

34. The evidence given by the complainant was vivid. She gave in to the sexual advances from the appellant because he promised to marry her if she fell pregnant. I am persuaded by the Respondent's contention that the appellant being the adult in the illicit affair should have known better. A minor has no capacity to give legal consent to sex. That means that even if the complainant testified that she willingly engaged in the forbidden sexual engagement with the appellant, the same cannot offer the appellant a defence in this sort of offence. If it was rape, or sexual encounter with an adult, it could have offered a reprieve but with defilement consent is not a defence.

35. I have considered the evidence of **PW1**, **PW2** and **PW3** and find that taken in totality, the evidence established and proved all the ingredients necessary to prove defilement. The minor was candid in my view and there is nothing to suggest that the mother **(PW1)** was ill motivated against the appellant, because if she was, as I have said above she could have taken action earlier. It is evident that she only took action after she realized that her daughter was pregnant.

36. The appellant when first presented in court on 19.2.2015 admitted committing the offence though he later changed his plea on 23.2.2015 when the facts were presented. The appellant had every right to changed his mind of course and I am not suggesting that he should have been convicted on that account. What is clear is that the minor was smitten by promise of marriage which appears to have made her throw all caution to the wind and no one can really blame her given her age. The appellant ought to have exercised some responsibility or patience as an adult and wait for the girl to mature up and finish her education. I am not persuaded that the trial court relied on hearsay evidence tendered by **PW4** and **PW5.** The two witnesses who were police officers testified on the actions they took upon receiving the report on defilement. It is misleading to state that the trial court relied on their evidence to render the conviction. The key witnesses were **PW1**, **PW2** and **PW3** all of who gave direct evidence which as observed above sufficiently proved that the appellant committed the offence. This court is satisfied that the prosecution's case was sufficiently proved to the required standard.

37. On the question of defence, it is evident that the appellant gave unsworn statement of defence and gave wide berth to the allegations made against him. Instead he concentrated on the fact that the Investigating Officer did not visit the scene of crime which was fallacy of what use would a visit to the scene be when the act complained of had taken place months ago and in a secret place. The appellant also stated that the doctor who examined the complainant did not find any injury on the genitalia of the victim.

But as evidence suggested the appellant had been involved in sexual encounters with the minor on a number of occasions before she got pregnant.

38. The appellant has also raised the issue of age of the victim which is the next issue of determination in this appeal.

39. It is apparent from the charge sheet and both the **P3 (Ex 3**) and age assessment report **(Ex 4)** that the age of the victim indicated is 15 ½ years. The birth certificate **(P Ex 5)** shows that the complainant was born on 15.08.1999 which means that the complainant was aged exactly 15 years at the material time (August 2014). It is likely that the age assessment report dated 20.2.2015 and tendered as Ex 4 is correct because when the victim was taken for age assessment in February 2015, her age was approximately 15 ½ years. The error by the prosecution not to capture the correct age of the minor was a minor error. It did not prejudice the appellant in any way and the same is one of those errors curable under ***Section 382 of the Criminal Procedure Code***. The assumption of the age of 15 ½ to 15 years did not occasion any miscarriage of justice to the appellant. The trial court gave appropriate sentence as provided under Section 8 (3) of the Sexual Offence Act. This court finds that the sentence meted out to that extent was not excessive but lawful and proper. The hands of the trial court were tied by the cited provisions of the law. I am only persuaded to take into account the fact that the trial court seems not to have taken into account the time the appellant spent in custody awaiting trial. The proceedings show that the appellant was arraigned on 19.2.2015 and convicted and sentenced on 28.10.2016. This means that he spent 1 year and eight months in custody.

Provisions of ***Section 333 (2) Criminal Procedure Code*** provides that the period should be taken into account.

In the premises and for the aforestated reasons, this court finds no merit in this appeal. The conviction and sentence are upheld but the period of 1 year and ten months spent in custody shall be subtracted from the 20 years' prison term which means that the appellant shall now spend ***18 years, 2 months*** to commence from **28th October 2016** when he was sentenced.

DATED, SIGNED AND DELIVERED AT KITUI THIS 10TH DAY OF MARCH, 2022.

HON. JUSTICE R. K. LIMO

JUDGE