REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 156 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 24 of 2014 of the Chief Magistrate's Court at Naivasha – E. Kimilu, SRM)

JOHN KAMAU GACHUHA..……. APPELLANT

-VERSUS-

REPUBLIC…… RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted for the offence of Defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In that between the 7th September, 2014 and 15th September, 2014 at [particulars withheld] in Naivasha Sub-county, within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of **M.W.M.**, a girl aged 15 years old. He was sentenced to serve 20 years imprisonment.

2. He filed an appeal to this court raising five (5) grounds of appeal subsequently restated and expanded by way of supplementary grounds, filed through the Appellant's advocate on 9th February, 2017.

3. The supplementary grounds are as follows:-

> **"1. THAT the Honourable Senior Resident Magistrate erred in law and fact in placing unquestioning reliance on medical evidence that showed tampering.**
>
> **2. THAT the Honourable Senior Resident Magistrate erred in law and in fact in basing the conviction on contradictory and incredible evidence.**
>
> **3. THAT the Honourable Senior Resident Magistrate erred in law and in fact in failing to find that the Appellant was not properly connected to the alleged offence.**
>
> **4. THAT the evidence produced by the Prosecution was insufficient to support the charges.**
>
> **5. THAT the Honourable Senior Resident Magistrate erred in law and in fact in convicting on a charge sheet that ws improperly amended.**
>
> **6. THAT the Honourable Senior Resident Magistrate erred in law and in fact in failing to analyse the evidence of the prosecution as well as the defence and dismissed the defence off-hand when it had merit"**

4. After several adjournments counsel for the Appellant promised to file written submissions in support of the appeal. He did not do so despite reminders to him on 8th November 2017 and 18th January, 2018 by the Deputy Registrar. The court has therefore to pronounce itself, based on its own perusal of the record of the lower court, and the supplementary grounds of appeal.

5. In any event the first appellate court's duty is as stated in **Pandya -Vs- Republic [1957] EA 336** to wit:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

6. The prosecution case was that **M.W.M.** (**PW2**) was aged 15 years in 2014 had dropped out of school, becoming unruly. Her relatives got her to leave her home in [particulars withheld] to live with her sister **M.N.M.** (**PW3**) at [particulars withheld] as a way of managing her conduct. On 7th September, 2014 she was sent out on an errand by **PW3**. It would appear that by that date **PW2** had befriended the Appellant who lived in the same area. The complainant joined him at his house and commenced a "cohabitation" with him. They had sex on several occasions between 7th and 15th September, 2014.

7. Pursuant to inquiries made by **PW3,** the complainant was traced at the Appellant's house. She was taken to the police station and then to Naivasha District hospital for examination. The Appellant was also arrested. Medical examination revealed that the complainant had engaged in sexual activity leading to a sexually transmitted infection, for which she received treatment. The Appellant was subsequently charged.

8. The Appellant gave an unsworn defence statement. To the effect that in 2013 he disagreed with his wife who left him. That he commenced a relationship with **PW3,** but the relationship also terminated. **PW3** alleged lured him to her home under the guise that her father wanted to speak to him. He was arrested at the home and taken to the police station where he met the complainant. That **PW3** boasted that she would falsely implicate him in the present offence, which he denied committing.

9. There is no dispute that the Appellant, **PW2** and **PW3** were known to each other in the material period. The immunization card, age assessment form and P3 form produced at the trial all indicated that **PW2** was 15 years of age in the material period. Further, from the evidence of **Dorcas Wandaje Osoro** (**PW1**) a clinical officer, the complainant had been defiled. The PRC and P3 forms produced as **Exhibit 1b** and **1a** respectively, document the fresh injuries found on the complainant's genitalia as well as the existence of a sexually transmitted infection (STI).

10. This evidence is confirmation of the testimony by **PW2** that having taken her in allegedly as a wife the Accused had sexual intercourse with her twice in the week the two lived together. It is true that at first, the complainant had been reticent about giving evidence against the Appellant but she subsequently gave reasons for the reticence. She stated:-

> **"When Kamau (Appellant) was brought to me I identified him as person who had married me for one week. We were living only the two of us, I was afraid and I denied first but we had lived with Kamau and had sex twice."**

11. When cross-examined by the Appellant she stated:-

> **"I came to your place on 7th September, 2014 and we stayed for one week. We met at 5.00pm and got to your house at 7.00pm. We slept in your house at** [particulars withheld] **estate. You promised to marry me. I am telling the truth before court. When I come to court first as a witness you had threatened me not to tell court the truth since you will be taken to prison. I was terrified when I came to court and I was stood down. I have spoken the truth even doctor confirmed we had sex with you. I cannot forget you John Kamau Gachuha."**

12. It is not unusual for a young girl emotionally involved with an assailant to be tempted to spare him punishment by denying the assault. **PW2** is no exception. Besides, in her first appearance in court on 3rd October, 2014 she admitted to have gone to the house of the Appellant on 7th September, 2014, only not stating what happened there, beyond stating that she had not *"planned to be married by the Accused"*

13. Her evidence is in my opinion materially corroborated by **PW3** who found her in the Appellant's house on 15th September, 2014 after a search. The Appellant's assertion that **PW3** had an affair with him, and instigated his prosecution to get even when the two broke up was not put to **PW3** during examination. Moreover, this assertion does not explain how **PW3** procured **PW1** and **PW2** to give false evidence against the Appellant.

14. The Appellant's complaint that the medical records were tampered with has no merit. I have reviewed the PRC form and P3 forms. The only notable amendment is to the approximate age of injuries at page 2 of the P3 form. The cancellation and alteration is however countersigned by the medical officer, **PW1**. She gave evidence and produced both forms at the trial but at no point was this matter raised with her by the Appellant. Her findings at page 3 clearly state that the genital lacerations noted on **PW2** were fresh. **PW1's** findings are consistent with the PRC forms completed on 15th September, 2014.

15. The prosecution evidence is both reliable and credible. The trial magistrate properly considered the evidence and defence and her conclusion was that it is the Appellant penetrated the complainant having correctly found that was the only issue for determination.

16. The Appellant was properly identified by the complainant and **PW3** who found the former in his house on 15th September, 2014. The oral testimony by **PW2** and **PW3** is firmly corroborated by the medical evidence and the Appellant's defence was totally displaced.

17. Two amendments were made to the charge sheet, concerning the age of the complainant from 13 to 15 years on 31st October, 2014 and on 10th November, 2014 to the date of offence to state that the same occurred between 7th and 15th September, 2014, previously only stating the former date. The Appellant has complained regarding these amendments in his grounds. Evidently, the trial magistrate did not follow the correct procedure as she did not seek the Appellant's reaction to the amendments or require him to plead afresh to the amended charge particulars. The omissions in my view are nonetheless minor and cannot vitiate an otherwise regular trial. There is no evidence that the omission occasioned prejudice against the Appellant.

18. The Court of Appeal addressed itself to such a failure in the case of **Josphat Karanja Muna -Vs- Republic [2009] eKLR** stating that it would not interfere unless the omission to comply therewith was shown to have caused prejudice:-

> **"On non-compliance with Section 214 of the Criminal Procedure Code, we observed that as far as the Appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant …. That the spirit of Section 214 is to afford an accused person opportunity to recall and cross examine witnesses where the amendments would introduce fresh element**

or ingredient into the offence with which an accused person was charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of the name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of Section 214 of the Criminal Procedure Code resulted into injustice to the Appellant."

19. Further, in **David Irungu Murage & Anthony Kariuki Karuri –Vs- Republic Criminal Appeal No. 184 of 2004** the Court of Appeal had this to say concerning the failure by the trial court to call upon the Appellant to plead to the amended Charges:

"The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under *section 382* of the Criminal Procedure Code."

20. The Court of Appeal in **David Nzongo -Vs- Republic [2014] eKLR** in reiterating its decision in **David Irungu Murage & Another -Vs- Republic, Criminal Appeal No. 184 of 2004 at Nakuru, (unreported)** state that:

"The court has used the test of whether any prejudice was occasioned by the failure to take plea in the case of David Irungu Murage & Another –Vs- Republic Criminal Appeal No. 184 of 2004 where it held that an accused person was not prejudiced when the trial proceeded on the assumption that he had pleaded not guilty."

21. Similarly in this case, the Appellant was not prejudiced by the omission. He clearly understood the charges facing him as his conduct at the trial demonstrates. The charges were not substantially altered by the amendments. Nothing turns on that point. In the result, the court is satisfied that the Appellant was convicted on solid and credible evidence and that his defence was properly dismissed. Equally, his appeal to this court is devoid of merit and is accordingly dismissed.

Delivered and signed at Naivasha, this 16th day of March, 2018.

In the presence of:-

For the DPP

For the Appellant

Appellant

C/C

C. MEOLI

JUDGE