REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 97 OF 2014

PETER KIIRU MATHI.....APPPELANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from conviction and sentence in Mukurweini Senior Principal Magistrates' Court Criminal Case No. 410 of 2014 (Hon W. Kagendo, Senior Principal Magistrate) delivered on 13th October, 2014***)**

JUDGMENT

The appellant was charged with the offence of rape contrary to **section 7** of the **Sexual Offences Act No 3 of 2006**. The particulars were that on the 30th day of August 2014 at [Particulars Withheld] in Mukurweini sub County within Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J W W a person with mental disabilities. In the alternative, he was charged with an offence of indecent act with an adult contrary to **section 11 (A)** of the Sexual Offences Act and here the particulars were that on the 30th day of August 2014 at [Particulars Withheld] in Mukurweini sub County within the Nyeri County, the appellant intentionally touched the vagina of J W W with his penis against her will.

The trial court found the appellant guilty of the principal count and was sentenced to serve 20 years in prison. He appealed against both the conviction and sentence and in his petition filed in court on 24th of October 2014 he set forth the following grounds against the decision of the trial court:

1. The learned trial magistrate erred both in law and in fact in sentencing the appellant to 20 years' imprisonment yet the evidence available did not support the sentence;

2. The sentence of 20 years' imprisonment was in any event harsh and excessive considering that the appellant was of advanced age and ailing;

3. The learned trial magistrate did not consider the appellant's mitigation in meting out the sentence against him;

4. The learned trial magistrate erred both in law and in fact in convicting the appellant yet the available evidence did not link him to the offence charged;

5. The learned magistrate erred both in law and in fact in convicting the appellant contrary to the findings of the medical evidence produced in court; in other words, the conviction was against the weight of evidence;

6. The learned trial magistrate erred both in law and in fact in disregarding the appellant's defence and thereby infringed **section 169** one of the **Criminal Procedure Code, cap 75**.

The appellant filed supplementary grounds of appeal alongside his written submissions which he filed in court on 23rd July, 2015; however, these grounds appear to me to be no different from those in the original petition.

Although the complainant was stated to be mentally handicapped, the learned trial magistrate examined her and established that she may not have been that fluent but the complainant was audible enough and that her utterances made sense. She also established, after that examination, that the complainant appreciated the meaning and importance of an oath and thus she was competent to testify on oath.

Her evidence was that she knew the appellant and that on a late evening, he put her on his bed and removed her pants; he pulled down his trousers and did 'bad manners' to her. She demonstrated what the 'bad manners', entailed by touching her private parts in which the appellant is alleged to have put his 'thing'; the 'thing', according to her evidence, was between the appellant's thighs. Once he was done and while the complainant was seated on a stool, the complainant's grandmother together with the appellant's wife and some other people stormed the appellant's house. The appellant's wife had hitherto been locked outside the house by the appellant.

Though the complainant testified in her evidence in chief that her grandmother did not check her out, she stated during her cross-examination that she indeed examined her but did not find anything unusual. She testified further that her grandmother even declined to take her to hospital and that she was only taken there by other people. The two of them were later on summoned to the chief's camp.

The complainant's grandmother, **N M (PW2)** testified that the appellant usually worked for her. On 30th August, 2014 at about 6.00 PM he passed by her house and asked her to tell the children to pick cattle fodder, apparently from his home. She told him to take Z and K along for this task but she later learned that apart from these two children, the appellant had also left with the complainant. The latter did not, however, come back with them when they returned home.

Anxious of the complainant's whereabouts, the complainant's grandmother together with her co-wife, W wa M moved from one home to the other looking for her; they eventually ended up at the appellant's compound where they found his wife outside, crying. Apparently, the appellant had locked her outside but when she informed him that it was the complainant's grandmother who wanted to see him, he opened the door and came out. The complainant's grandmother then called out the complainant's name; she responded and came outside the house. She then accompanied her grandmother, her grandmother's co-wife, her son W and her daughter in law, K back home.

The witness further testified that she checked out the complainant that evening and established that her petticoat was wet. She was summoned to the chief's camp the following morning and when she got there she was asked to bring the complainant. Before she could bring her, one K came along with the complainant. She then accompanied the complainant to Mukurweini hospital where she was examined. They later went to Mukurweini police station where the complaint against the appellant was booked. She identified a medical card showing that the complainant was treated on 2nd September, 2014.

One of the people who was in the company of **N M (PW2)** as they searched for the complainant was **Alice Wahura Warui (PW4).** She testified that they found the gate to the appellant's compound locked; his wife had been locked outside. They forced their way in and forced the door to his house open. There was water in a basin with traces of blood; the beddings were also blood stained. The complainant was seated on a stool and her pants were torn and blood stained as well. She checked the complainant's genitals and established that there was some discharge of blood.

Dr Paul Kimathi (PW3) relied on the medical treatment notes to complete the complainant's P3 form. It was his evidence that according to these notes, the complainant had a history of mental retardation. Besides the mental handicap, the doctor established that there were no other injuries save for the broken

hymen. He also testified that the complainant was aged 20 at the time of the alleged offence. Though she is alleged to have been raped on 30th August, 2014, she was examined on 3rd September, 2014.

Administration police constable **FWW (PW5)** testified that the alleged offence was reported by **N M (PW2)** at Gikondi Administration police post on 2nd September, 2014; she was accompanied by the complainant. The officer escorted the complainant to hospital. The investigations were, however, undertaken by **corporal Chibungu Sanga (PW6)** who was then based at Mukurweini police station. His evidence was that the complainant was escorted to Mukurweini police station by **FWW (PW5)** and her grandmother on 3rd September, 2014. All the officer did was to record the statements of witnesses; he did not take any other step in the investigations and his testimony simply reiterated what he recorded from the witnesses.

The appellant denied the allegations against him and in his unsworn statement he claimed that the prosecution charge was a frame-up. According to him, the complainant never visited his house on the material date. It was also his case that the charge against him had been instigated by **N M (PW2)** who was apparently angered because he had rebuffed her sexual advances.

The appellant's wife, **Nancy Wambui Kiiru (DW1)** testified as his witness and admitted that indeed the complainant was at their home on 30th August, 2014 to collect fodder for the animals. The complainant's grandmother found her there and it was the appellant who opened for her. However, she denied that anything happened to the complainant.

Section 7 of the **Sexual Offences Act** under which the appellant was convicted states as follows: -

> ***Section 7.***
>
> ***A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.***

In the absence of any other evidence to the contrary, the medical evidence that the complainant's hymen was broken should be accepted as conclusive proof that the complainant was engaged in some sexual activity. A sexual activity in itself is, however, not enough to establish an offence under this provision; it must be further demonstrated, beyond doubt, that the activity was either between family members or that the victim was a child or person with mental disabilities. The complainant is alleged to have been of this latter category of persons. According to **Dr Paul Kimathi (PW3),** the complainant was aged 20 and had a history of mental retardation.

"Mental retardation" is not defined in the Act and therefore the question that arises is whether that state of one's mental health is equivalent to what the act refers to as "mental disabilities". Perhaps because of its centrality to proof of an offence under **section 7** or any other provision in the Act where it is necessary, this latter concept has not been left to speculation but has been defined in section 2 of the Act; according to that provision, a person with mental disabilities is:

> ***A person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was***
>
> ***(a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;***
>
> ***(b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;***
>
> ***(c) unable to resist the commission of any such act;***

or (d) unable to communicate his or her unwillingness to participate in any such act.

My reading of this section of the law is that the question whether one is incapacited by a mental disability to such an extent as to fall into the category of persons with mental disabilities contemplated in **section 7** of the Act is a question of evidence. The burden is on the prosecution to demonstrate that at the time the victim of the sexual assault is alleged to have been assaulted, she or he suffered a mental handicap of such nature that limited her or his appreciation of the nature and the consequences of the sexual activity; or that though he or she was able to appreciate the nature and the consequences of the activity in issue, she or he was incapable of making an informed decision based on what she or he knew; or, the victim could not resist the act; or, finally, the victim could not communicate his or her objection to engage in the impugned activity.

It follows that it was not enough to simply state, as **Dr Paul Kimathi** stated, that the complainant suffered from a mental retardation. It had to be proved that what was regarded as mental retardation was a mental disability that incapacited the complainant to act in all or any of the ways prescribed in **section 2** of the Act; without proof of that link, there was no evidence that the complainant was "a person with mental disabilities" as understood in **section 7** of the **Sexual Offences Act** as read with **section 2** of the same Act.

It must be recalled that the learned magistrate herself went into great lengths in examining the complainant before she took her evidence; at the conclusion of her examination, the learned magistrate established that the complainant was not only coherent but that she also understood the nature and the import of giving evidence on oath. With this sort of finding, it was necessary for the prosecution to prove that while the complainant was capable of appreciating certain actions, her mental retardation was of such nature that tipped her over to within incapacities of persons with mental disabilities as prescribed in **section 2** of the Act.

From the available evidence, there is every possibility that the appellant had sexual intercourse with the complainant but in the absence of proof that the complainant was a person with mental disabilities, there is no evidence that an offence under **section 7** of the Act was committed. Accordingly, I find the appellant's conviction unsafe; I hereby allow his appeal, quash the conviction and set aside the sentence. He's therefore set free unless he is lawfully held.

Signed, dated and delivered in open court this 24th March, 2017

Ngaah Jairus

JUDGE