REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.86 OF 2016

PETER MWANGI...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From the original conviction and sentence in criminal case No. 571 of 2016 of the Senior Resident Magistrate's Court at Githongo by Hon. C. Kemei – Resident Magistrate)

JUDGMENT

PETER MWANGI, the appellant, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 16th May 2016 at [particulars withheld], Imenti Central District of Meru County intentionally and unlawfully caused his penis to penetrate the vagina of **I.K** a child aged 13 years.

The appellant was found guilty of the offence and sentenced to twenty years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by convicting without any medical evidence linking him to the offence.

2. That the learned trial magistrate erred in law and in fact by convicting without sufficient evidence.

3. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

On the material day, the complainant had visited a couple who were her friends. Later that evening the three went to visit the appellant. After a while, the couple left and promised to return for her. They did not. she therefore spent the night in the house of the appellant. While they were sleeping, she woke up and found the appellant defiling her. Her parents and the landlady went for her the following morning and the appellant was arrested.

In his defence the appellant contended that though the complainant slept in his house, he did not defile her.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

It is now settled law that medical examination of a culprit though may be of assistance is not mandatory. This was decided by the court of appeal in the case of **JOHN OTIENO MUMBO vs. REPUBLIC [2011] eKLR** where the court said:

> ***Complaint was also raised about failure to medically examine the appellant in order to confirm his involvement in the commission of the offence. Indeed medical examination of an accused person is vital in proceedings where offences such as the one appellant faced in the lower court and is still facing an appeal are involved, but where such a procedural step has not been undertaken, it is not to be taken as being fatal to the entire prosecution's case, because if it had been undertaken then the resultant medical evidence would have been additional to any other evidence adduced and relied upon by the prosecution as either incriminating or exonerating the appellant in relation to the commission of the crime. In the absence of such evidence, the court has no alternative but to go by the evidence on the record.***

In the instant case the appellant was medically examined. Nothing positive was noted. It was erroneous for the examining doctor to say in his opinion the appellant was involved in the defilement without any basis for saying so. In the circumstances of this case, the findings by the doctor on both the complainant and the appellant ought to have raised a red flag.

The evidence on record was that the appellant was arrested before bathing. If indeed he was involved in sexual liaison, evidence on his penis would have been evident. Lack of observation of any traces of dry vaginal or seminal fluid on the penile shaft, may have meant either there was no penetration or he used a condom. There was no evidence however that he used a condom. At a later stage I will revert to the issue of medical evidence when I will be analyzing the complainant's evidence.

In her evidence the complainant testified as follows:

On 15th May 2015 she left her home and went to visit C N, her friend. She found her friend at their home and she proceeded to [particulars withheld] with her and her husband. They went to a hotel where they took some meal. While at the hotel, when she told C that she wanted to leave, the latter told her not to worry for she was going to pay for a motor cycle for her. C's husband called Mwangi(appellant) on the Phone and the three of them left for his home.

When they reached the appellant's home, her friend and her husband left her there promising to go for her later. They told her to stay for she had no identity card and police on patrol could arrest her. By 2 a.m they had not returned. Meanwhile the appellant was joined by some two men who were chewing miraa. She left them chewing miraa and slept on the appellant's bed. While asleep, she heard her clothes being lowered. The appellant had already inserted his penis into her genitalia. When she informed him that she was going to report, he apologized. She went back to sleep and was woken up the following morning by the land lady. She looked for the keys and opened the door. The appellant was arrested and she was taken to hospital.

Several issues emerge from the evidence on record:

One, the role of C and her husband is very suspect. One wonders why the investigating officer did not deem it fit to investigate the duo and if an offence is established they be arrested and charged.

Two, the reading of the evidence in totality, gives an impression that the complainant was conscious of what her friends were planning. Her contention that she was left in the appellant's house, by being duped is not convincing. However, being a minor she lacked the requisite capacity to give consent. This brings us to the defence of the appellant that he did not know that she was a minor. Could he have been duped also? Though this issue was brought out during cross examination, the learned trial magistrate ought to have made a finding on the same. She ought to have recorded her observation of the complainant's stature (especially where the age assessment put her in the age bracket of 12 to 15 years) and whether any reasonable person would consider her a child or an adult by appearance. This is because such a defence is envisaged under section 8 (5) of the Sexual Offences act in the following terms:

> ***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.***

Unfortunately this was not done.

Three, did the appellant walk into a trap? The complainant's mother J G testified that Caroline informed her that her daughter (the complainant) had been locked in the appellant's house. She did not testify under what circumstances she volunteered this information to her. Having the evidence of the complainant in mind on the role C played, one is left wondering what she was up to. Failure to call her or her husband left very pertinent questions unanswered.

Four, whether indeed there was defilement. The evidence of the complainant on this issue was very casual. She never talked of any pain. It is trite knowledge that sexual liaison with a child is very painful. According to her evidence, when she woke up, the appellant had already inserted his penis into her genitalia. This ought to have been a harrowing ordeal for her.

The medical evidence does not support penetration. Except for the broken hymen, no physical injuries were observed on her. The other finding was a whitish discharge. The doctor did not testify whether the hymen was freshly broken or the perforation was old. The complainant testified that she was taken to hospital on the same day. If it was fresh, the doctor ought to have observed the same. The doctor did not indicate whether the dry discharge on both the labia minora and majora was from the complainant or from the culprit. I find that it was unsafe to make a finding of penetration into the genitalia of the complainant.

The upshot of the foregoing analysis of the evidence is that the appeal succeeds. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at **MERU** this **27th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE