



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 39 OF 2015**

**GERISHON GICHERA MUREMI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Principal Magistrate's Court (M. Kivuti) at Baricho, Criminal*

*Case No. 656 of 2014 delivered on 19<sup>th</sup> August, 2015)*

**JUDGMENT**

1. The appellant herein **Gerishon Gichira Muremi** was charged before Baricho Principal Magistrate's Court with the offence of defilement contrary to **Section 8 (1) (4)** of the **Sexual Offences Act No. 3 of 2006** vide **Criminal Case No. 656 of 2014**. The particulars of the offence are that on 27<sup>th</sup> January, 2014 at [particulars withheld] Village in Kirinyaga County, intentionally caused his penis to penetrate the vagina of F.W.M. a child aged 17 years.
2. The appellant was charged with a second count of Abduction contrary to **Section 142 of the Penal Code** in that on the 27<sup>th</sup> January, 2014 at [particulars withheld] Village in Kirinyaga West District within Kirinyaga County with intention to have carnal knowledge of F. W. M. took and detained her against her will.
3. After a full trial the Appellant was found guilty of the offence of defilement, was convicted and sentenced to serve fifteen years imprisonment. He was acquitted on the offence of abduction. The appellant was dissatisfied with both the conviction and sentence and filed this appeal.
4. The appellant raised the following grounds:
  - (i) *I pleaded not guilty.*
  - (ii) *That the learned trial magistrate erred in both law and facts failing to note that the case was not proven beyond reasonable doubt.*
  - (iii) *That the learned trial magistrate erred in both law and facts by failing to consider the fact that P.W. 1 denied any knowledge of the accused person in that she could not identify the accused on the dock as the person who had allegedly defiled her but said it was another person called Chomba.*

*(iv) That the learned trial magistrate erred in both law and facts by failing to note that the accused had been charged by the same complainants and witnesses with four different charges in two different courts therefore there was an existing grudge between the accused and the complainant.*

*(v) That the learned trial magistrate erred in both law and facts by failing to consider the appellants defense which clearly illustrated the issue of there having been a grudge between the complainant's family and the accused.*

*(vi) That the learned trial magistrate erred in both law and facts by failing to consider my mitigation in which he outlaid his predicaments clearly.*

5. The State opposed the appeal. The Appellant through his advocate M. M. Muriuki and Company Advocates filed written submissions which were highlighted orally in Court. The State through Mr. Sitati, State Counsel, filed a response to the submission and made oral submissions in Court in reply to oppose the appeal.

6. The facts of the case are that the complainant herein F. W. M. who is a girl aged seventeen (17) years who was by then a form one student at [particulars withheld] Secondary School went to the home of the accused Gerishon Gichira on 27<sup>th</sup> January, 2014. The complainant then went to Kagio in company of the appellant. The appellant bought her a soda then took her to Makena club where he booked a room. The two entered the room and engaged in sex. She stayed in the room for one week with the Appellant within which time the Appellant would leave the room and go home to Kiandai and return to the room. While living in the room they heard that Police were looking for them and so they decided to leave the room on 5<sup>th</sup> February, 2014. They went to various places like Murang'a, Ruiru, Ngurubani and Nairobi. The complainant F. W. M. returned home at Kagio on 4<sup>th</sup> June, 2014. The appellant was arrested at Kagio town on 8<sup>th</sup> June, 2014. The complainant F. W. M. was also arrested from Kagio town and the two were escorted to Mutino Police Post and eventually to Baricho Police Station. F. W. M. was escorted to Baricho Health Centre where she was treated as per treatment notes and was later issued with a P. 3 form, exhibits P 2 and 3 respectively. She F. W. M. had told the appellant that she is 17 years old. She engaged in sex with the appellant as they moved from town to town as they lived as husband and wife.

7. The appellant gave a statutory statement in his defence. His case is that they are enemies with the mother of F. W. M. arising from matters related to land as she had requested his mother to sell to her a piece of land and he objected. That it is the mother of F. W. M. who reported at Mutino Police Post that he had an affair with her daughter. The daughter stated she had a boyfriend called Amos Chomba.

8. At the hearing of this appeal, counsel for the Appellant dealt with three issues namely:

1. Penetration

2. Age

To these two was added a 3<sup>rd</sup> ground by the State namely:

The perpetrator.

I will address these three issues in this appeal.

9. The Appellant submits that the key ingredients were not achieved and so it resulted in unsafe conviction. In considering whether there was proof beyond any reasonable doubts, this being a first appeal, the Court has a duty to analyse the evidence adduced and come up with its own independent findings while bearing in mind that it did not have the advantage to see and hear the witnesses when they testified. In **Okeno -V- R (1972) E.A.** it was held that 'a first appellate Court must consider the evidence presented before the trial court and make its own findings and draw its own conclusions and only then can

it decide whether the magistrate's findings should be supported and in so doing it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness'.

10. On the issue of penetration the evidence was adduced by P.W.1 F. W. M. who testified that she is seventeen (17) years old as she was born on 26<sup>th</sup> October, 1996 as per birth certificate (exhibit -1-). On 27<sup>th</sup> January, 2014 she was going to school but diverted and went to the home of the mother of accused. She changed her school uniform and thereafter went to Kagio in company of the Appellant. Thereafter they went to Makena club where the Appellant booked a room. While there they engaged in sex. P.W. 1 testified that between 27<sup>th</sup> January, 2014 and 3<sup>rd</sup> June, 2015 they moved to various towns engaging in sex while living as husband and wife. Her testimony at that stage was not shaken in cross-examination. The complainant is a seventeen year old. She stated that she engaged in sex with the appellant for the time she was with the Appellant. There can be no doubt that she meant that they were engaging in penetrative sex.

11. P.W. 1 was recalled after the appellant was given statements of witnesses. In cross-examination P.W.1 stated that the Appellant is his neighbour. That they did not have a relationship. She said she had recorded a statement and mentioned Chomba who was not in court. In re-examination P.W. 1 said she had a relation with Amos Chomba. She said in her statement she had recorded Chomba. P.W. 1 admitted that she had a relation with one Amos Chomba. In her testimony she said she had recorded Chomba. P.W. 1 did not tell the Court why she implicated Chomba in her statement to the Police but in court implicated the Appellant. The parents of the complainant P.W. 2 and P.W. 3 testified that the Appellant is also known as Chomba. P.W. 2 stated that the Appellant is a neighbour at home and is called Chomba. P.W. 3 on his part told the Court that the Appellant is also known as Gerishon Murimi Chomba. There is material contradiction in the evidence of the complainant and that of P.W. 2 and P.W.3.

12. The complainant testified that the Chomba who she had a relationship with was not in court. She had referred to him in her statement as Amos Chomba. The P.W. 2 and P.W. 3 stated that it is Gerishon Gichera Muremi alias Chomba. This evidence by the complainant and P.W. 2 and P.W. 3 has raised some issues. From the record the mother of the complainant is the one who reported the matter. The issue which arises is whether there could have been a mistaken identity by the P.W. 3 who testified that her daughter was spotted severally in Kagio in company of accused Gerishon Chomba, page -9- line -2-. The name Chomba featured after P.W. 1 was recalled and the appellant had been supplied with statements of witnesses. It is then that the complainant admitted that she had mentioned Chomba. It is only the complainant who could have resolved the issue. There are two scenarios here. One is that there is a material contradiction in the evidence of the mother and father, and that of the complainant. If we believe the parents that Gerishon Gichira Murimi is also called Chomba (Page 18 line -2-) and (Page 18 line 25), then the complainant was not telling the truth. If on the other hand we take it that she was telling the truth that she had a relationship with Chomba who she said was not in court, (Page 17), then the person she was talking about was not the Appellant. The evidence of the complainant is shaky. The evidence raises doubts as to whether the Appellant is the person she was talking about. The evidence of P.W. 2 is that the complainant told her she was living with Appellant. However, from her testimony, P.W. 2 said she visited the home of Appellant on 21<sup>st</sup> January, 2014 in company of assistant chief, school principal and school committee as the complainant was missing. The Appellant who they met at home said he did not know the whereabouts of the complainant. This despite the fact that the complainant had said she was with Appellant all this time. P.W. 2 further said the complainant left her uniform at the home of the mother of accused on 27<sup>th</sup> January, 2014. This evidence is not corroborated as none of those mentioned were called as witnesses. In cross-examination P.W.2 said she had met appellant with her daughter but he denied he had a relationship with the complainant. P.W. 3 said he discovered that the Appellant had an affair with his daughter. He further stated that her daughter was spotted severally with Appellant in Kagio town. There was no witness called to corroborate this testimony. It is hearsay.

13. There is nothing in his evidence to show that the complainant ever told P.W. 3 that she was with the Appellant. When P.W. 2 testified after being recalled, her evidence was hearsay as she mentioned wife of Appellant and his brother who were not called as witnesses. After analyzing this evidence, I am of the view that there were contradictions in the evidence of the complainant and P.W. 2 and P.W. 3 on the

identity of the perpetrator. The complainant excluded the appellant as the one she was talking about when she said Chomba who she had mentioned in her statement to the Police with whom she had a relationship was not in court. This inevitably raised doubts in the prosecution case. There are also doubts as to whether the complainant is the one who told her parents the person she had eloped with. They seem to have relied on hearsay evidence. When doubts are raised in the prosecution case, the benefits of such doubts must be given to the appellant.

14. The trial magistrate based her finding on the evidence of the complainant and that the clinical officer P.W. 4 who said she gave a medical history of having been defiled by a person well known to her. She failed to consider the evidence that the complainant had said she had relationship with one Chomba who she had mentioned in her statement to the Police and was not in court. Due to failure to analyse the evidence, she arrived at a wrong conclusion. Evidence by P.W. 4 was not sufficient to corroborate the evidence of the complainant on identity of Appellant by stating that it was a well known person. In any case P.W. 4 admits that he had no knowledge as to who could have defiled the complainant, page 17. The Appellant submits that the complainant had multiple partners. The complainant by her testimony showed that she was in a relationship with another man. She was not credible and her testimony raised doubts. Her testimony required material evidence to corroborate it.

15. I must also look at the circumstances of this case. The complainant posed as a grown up. In acquitting the Appellant on the charge of abduction, the trial magistrate found that there was no proof that the Appellant had taken the complainant against her consent. She moved to many places and in her own words, having sex and living as husband and wife. This is conduct which shows that she had posed as a grown up and not a child. The complainant even informed her mother that she wanted to get married. The complainant was a borderline case as she was over seventeen years on 27<sup>th</sup> January, 2014. She kept disappearing from home. She may have misled the perpetrator that she was over eighteen. In her testimony she never stated that she told the Appellant her age. It is only in cross-examination that she stated that she told the Appellant she was seventeen years. I am persuaded to adopt the reasoning by Justice Chitembwe in **Martin Charo -V- Republic Criminal Appeal No. 32 of 2015 H.C. Malindi** where he found that;

***Section 8 (5) qualifies the provisions of Section 8 (1) to 8 (4) which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of eighteen (18) years. However, where the same child under eighteen years who is protected by law opts to go into men's houses to have sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant does not normally complain but is made to be the complainant because she is under eighteen years. My view is that such behavior is that of an adult and not of a child.***

16. The complainant behaved like an adult and no wonder the trial court found that she was not abducted. She is not a credible witness in view of what I have stated above. Her age was not conclusively proved. The birth certificate which was produced in court for F. W. who was born on 23<sup>rd</sup> October, 1996 shows she is the daughter of P. M. G. The name of the mother is given as H W N. However in court the person who testified as the mother of the complainant gave her name as F W. No explanation was given for this disparity. As submitted by the Appellant, the name on the birth certificate is different from that of the person who gave evidence in Court as the mother. It raises doubts as to whether the birth certificate is that of the complainant. In view of the anomaly doubts are raised as to the age of the complainant. The age of the complainant was not proved beyond any reasonable doubts. In the case of **Dominic Kibet Wareng -V- Republic Cr. Appeal No. 155 of 2011** where one of the grounds of the appeal was that the age of appellant was not proved, the court held; "the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof". In **Hilary Nyongesa -V- Republic Cr. Appeal No. 123/2009, Muilu J.**, (As she then was) stated:

***"Age is such a critical aspect in sexual offences that it has to be conclusively proved.....And this becomes more important because punishment (sentence) under Sexual Offences Act is determined by the age of the victim."***

17. The prosecution failed to conclusively prove the age of the complainant as the birth certificate relied on was not satisfactorily proved to be that of the complainant. The complainant testified that she was born on 26<sup>th</sup> October, 1996 which is not the date on the birth certificate. The prosecution did not discharge the burden to prove the age of the complainant. This coupled with what I have found above that the complainant posed as an adult raises doubts on the age of the complainant. This is fatal to the prosecution case.

18. Finally the defence raised the issue of medical evidence. The appellant as pointed above was charged that he defiled the complainant on 27<sup>th</sup> January, 2014 at [Particulars Withheld]Village. As submitted, the evidence of the complainant required corroboration as the trial magistrate did not give reasons for believing the complainant. This as provided under **Section 124 of the Evidence Act:**

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15) where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution, in proceedings against any person for an offence, the accused shall not be liable to be convicted unless it is corroborated by other material evidence in support thereof implicating him provided that in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim of the offence and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”***

19. There was no corroboration to the testimony of the complainant. The evidence of P.W. 2 and P.W. 3 did not afford corroboration to the complainant’s evidence but contradicted it on a very material particulars. There was no proof that the complainant was defiled on 27<sup>th</sup> January, 2014. The prosecution called P.W. 4 John Ngatia Githaiga who testified that he is a clinical officer at Baricho Health Centre. He testified that he examined the complainant for an alleged offence which happened on 27<sup>th</sup> January, 2014 and 8<sup>th</sup> June, 2014. At the time of examination, the approximate age of injuries was about two days. There was normal external genitalia but the hymen was absent indicating penetration. There was blood discharge from her vagina. He produce P. 3 form as exhibit 1 and treatment notes exhibit 2. The P.3 form shows that the complainant was sent to the hospital on 9<sup>th</sup> June, 2014. On that day the hymen was missing. This was proof of penetration. From the record P.W. 2 testified that the complainant returned home for one week and thereafter she disappeared from home. P.W. 1 testified that she returned home on 3<sup>rd</sup> June, 2014 and she left home again on 4<sup>th</sup> June, 2014 and went to Kagio. On 8<sup>th</sup> June, 2014 she was arrested. The complainant testified that appellant took her to Makena club. There is no corroboration to her evidence by any witness from Makena club.

20. The prosecution has not proved that she was with accused in that club that day. In any case, the particulars do not state the offence was committed in this club or even at Kagio. The complainant did not adduce evidence that she was defiled at Kiandai village. P.W. 4 did not adduce evidence to show when the hymen was broken. It was the only positive finding as the genitalia was normal. If this was two days old, the prosecution as submitted has failed to prove that any defilement occurred on 27<sup>th</sup> January, 2014 at Kiandai village. The prosecution had a duty to prove the charge and the particulars beyond any reasonable doubts. The medical evidence is not cogent. Looking at the evidence of clinical officer, on 9<sup>th</sup> June, 2014 the age of injury was two days meaning the offence was committed on 7<sup>th</sup> June, 2014. He did not adduce evidence that the complainant had engaged in sexual intercourse before that date. P.W. 4 did not indicate when the hymen was lost, whether two days before examination or five months before examination. I find that medical evidence has failed to prove that penetration occurred on the date indicated on the particulars of the charge. The complainant admitted that she had a boyfriend by name Amos Chomba. There is a possibility based on her testimony that she had multiple boyfriends.

21. The prosecution did not discharge the burden to prove that the Appellant was responsible for the penetration. The complainant did not allege that two days prior to the examination, she had sexual intercourse with the Appellant. Though the Appellant submits that a D.N.A. test ought to have been done, I find that failure to examine the alleged perpetrator would not have been fatal. The prosecution is required to prove penetration. This the prosecution did proof penetration but failed to relate it to the

offence charged and the particulars. I have considered the case of **Lazarus Ocharo Kieya -V- Republic CR. A. 252/2011 H.C. Kisii** where the court found that:

***“The clinical officer’s evidence of broken hymen is not corroborative of the complainant’s testimony because it is not indicated whether the hymen was freshly broken or an old tear and it does not therefore of itself independently implicate the appellant in terms of section 124 of the Evidence Act.”***

The same situation appears here. Medical evidence has failed to corroborate the evidence of the complainant. The evidence of the complainant is not corroborated as required under **Section 124 Evidence Act Supra**. I have stated the credibility of the complainant was in question and her evidence required corroboration with material evidence for the court to safely rely on it. I have also considered the case of **Elias Kiamati Njeru -V- D.P. H.C. Embu Cr. Appeal 1/2015** where it was held that where the evidence of the complainant was not corroborated the prosecution evidence was not sufficient to support the charge.

22. I am of the view that the conviction of the Appellant was against the weight of the evidence. It was not safe to convict the Appellant with the evidence on record. For the reasons I have given, I find that the appeal has merits. I allow the appeal and order that the conviction and sentence are set aside. The Appellant be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Kerugoya this 16<sup>th</sup> day of May, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open court, appellant present, Mr. Muriuki for him, Mr. Omayo

state counsel for State, court assistant Naomi Murage this 16<sup>th</sup> May, 2017.

**L. W. GITARI**

**JUDGE**