REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 29 OF 2016

GEVIOUS OTIENO ....APPELLANT

VERSUS

REPUBLIC …………………….………..………. RESPONDENT

(From the original conviction and sentence in criminal case No.30 of 2014 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u (Miss)– Chief Magistrate)

JUDGMENT

GEVIOUS OTIENO the appellant, was convicted for the offence of defilement contrary to section 8(1)(3) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 1st January 2014 in Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of **I O A,** a child aged 16 years.

He was sentenced to serve fifteen years imprisonment. He has appealed against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal which I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence and hearsay.

2. That the learned trial magistrate erred in law and in fact by relying on contradictory evidence.

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

The State conceded the appeal through Mr. Owiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant was going to Kayumba market, the appellant who is her neighbour offered to take her there on his motor cycle. On their way to Kayumba, it started raining. The appellant suggested they go to his home for shelter. This is where he defiled her before her father went there and both were arrested.

The appellant contended that he was advising the complainant against going to a disco when his door was

bolted from outside. He denied to have defiled the complainant.

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.**

The charge was erroneously drafted. It ought to have read contrary to **"...section 8(1) as read with section 8(3) ...**"

The appellant understood the charge before pleading to it. He fully participated in the trial. He was not prejudiced in any way and the defect is curable under section 382 of the Criminal Procedure Code.

The age of the complainant was given as 16 years. The appellant ought to have been charged under section 8(1) as read with section 8 (4) of the Sexual Offences Act. I however notice that the learned trial magistrate was alive to this fact while meting out the sentence. The appellant was not prejudiced by this error. This error is curable under section 382 of the Criminal Procedure Code.

For an offence of defilement to be proved, three ingredients must be proved beyond reasonable doubts. In the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** the court enumerated them in the following terms:

> ***The first is whether <u>there was penetration</u> of the complainant's genitalia; the second is <u>whether the complainant is a child</u>; and finally, <u>whether the penetration was by the Appellant</u>.*** *(emphasis mine)*

The age of the complainant was established by the production of a certificate of birth. According to this document, she was born on 17th June 1998. At the time of the alleged offence she was therefore fifteen and a half years.

The evidence of penetration was adduced by the complainant. This was after initially testifying that when she went with the appellant to shelter from the rain, they did nothing until her father knocked at the appellant's door and both were arrested. She however changed her story when the prosecutor pointed to her, the statement she recorded with the police. This is when she said he defiled her. The trial magistrate ought to have handled this evidence with caution bearing in mind what the Court of Appeal said in the case of **NDUNGU KIMANYI Vs. REPUBLIC [1979] KLR 283**(MADAN, MILLER and POTTER JJA held):

> ***The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.***

The prosecution did not seek to reconcile this contradictory evidence by the complainant. The learned trial magistrate did not bother to indicate why she believed the latter version of the complainant and not the former. The proviso to section 124 of the Evidence Act provides:

Provided that where 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 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.

The complainant having created an impression that she was not credible, it was incumbent on the learned trial magistrate to record her reasons why she thought the complainant's second version was to be

believed. The learned trial magistrate relied heavily on circumstantial evidence to convict the appellant.

In the case of **SAWE –V- REP [2003] KLR 354**, the Court of Appeal held as follows:

> ***1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.***
>
> ***2.Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
>
> ***3.The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***
>
> **...**
>
> **...**
>
> **...**
>
> ***7.Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.***

The appellant has argued that the learned trial magistrate relied on circumstantial evidence. There is nothing wrong in relying on circumstantial evidence. It must however fit tightly in the trite parameters that were revisited in the **Sawe** case (supra).

The arguments of the learned trial magistrate of justifying the conviction were not supported by the evidence on record.

> (a)The mere fact that the appellant were found in a locked house at 7 p.m was only a basis for suspicion and not prove of sexual liaison.
>
> (b)Though the learned trial magistrate said the complainant was found with a sexually transmitted, there was no such evidence either orally or on the P3 form. This conclusion was self defeating. There was no evidence that the appellant suffered from any sexually transmitted disease. The question that went unanswered was therefore where the complainant got the infection if any. I am saying so because the evidence other than indicating that she had lower abdominal pain, there was no mention of any sexually transmitted disease.
>
> (c) The medical evidence did not help the prosecution case on penetration. The P3 form talked of a recent perforation of the hymen was indicative of defilement. However, the same did not indicate how recent the perforation was and yet the complainant was taken to hospital the following day. If there was penetration the previous day, there was nothing that would have prevented the examining clinical officer from saying the perforation was fresh and indicate whether it was consistent with the complaint at hand.

From the foregoing analysis, I find that the conviction of the appellant was not safe. I accordingly quash the conviction and set aside the sentence meted by the learned trial magistrate. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA** this **22nd day** of **June, 2017**

KIARIE WAWERU KIARIE

JUDGE