



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 152 OF 2010

PETER MAINA NJERIAPPELLANT

VERSUS

REPUBLIC PROSECUTOR

***(Appeal from the Judgment of the Chief Magistrate's Court at Nyahururu Hon. T. Matheka -
Principal Magistrate delivered on the 10th March, 2010 in CMCR Case No. 11 of 2009)***

JUDGMENT

The appellant **PETER MAINA NJERI** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Nyahururu Law Courts. The appellant had been arraigned before the trial court on 16/7/2009 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that:

“On the 8th day of July 2009 in Nyandarua District within Central Province did cause his penis to penetrate the vagina of J W M a girl aged 15 years”

The appellant also faced an alternative charge of **INDECENT ACT CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges and his trial commenced in 12/8/2009. The prosecution led by **INSPECTOR MAKAPILA** called a total of eight (8) witnesses in support of their case.

PW1 J W M was the complainant in this case. She told the court that she was 15 years old and was a student in Form 1 at [particulars withheld] Girls School. On 8/7/2009 the complainant was going back to school from the half-term break. She arrived in school at 4.00pm. At the gate she met a young man whom she did not know. The man was ‘**smelly**’. He greeted her. Apparently at this point after the greeting the complainant claims that she lost consciousness. She awoke to find herself in a certain house. She had pain in her private parts and also had a headache. Appellant told her to leave.

The complainant then boarded a motor cycle and went to Nyahururu town. She then boarded a matatu to Nairobi from where she called her mother. Her mother alerted an aunt who lived in Eastleigh. A good samaritan who had found the complainant crying in Mlolongo and who had lent her his mobile phone, remained with her and eventually handed her over to her aunt.

The complainant's mother then travelled to Nairobi. They took her to Nairobi Women's Hospital where she was examined and found to have been defiled. The appellant was then arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to make an unsworn defence in which he denied having defiled the complainant. The appellant called one witness in support of his defence. On 10/3/2010 the learned trial magistrate delivered her judgment. She convicted the appellant of the charge of defilement and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved by both this conviction and sentence the appellant filed this appeal. **MR. MARAGIA** learned counsel acted for the appellant during the hearing of the appeal. **MS RUGUT** learned Stated Counsel opposed the appeal. She urged this court to confirm both the conviction and sentence rendered by the lower court.

This being a first appeal the court is obliged to reconsider and evaluate the prosecution evidence afresh. In the case of **MWANGI Vs REPUBLIC [2004] 2 KLR 28** it was held

"1. An appellant on a first appeal is entitled to expect the evidence to a whole to be submitted to a fresh and exhaustive examination and to have the appellate court own decision on the evidence.

2.The first appellate court must itself weigh the conflicting evidence and draw its own conclusions".

The first question is whether the complainant was defiled as she alleges. The complainant said she awoke to find herself in a house with the appellant having no memory of what had occurred. She however said she had pain in her private parts and also had a stomachache and a headache.

Upon being traced in Nairobi the complainant was taken to Nairobi Women Hospital for examination. The report from said hospital dated 11/7/2009 was produced as an exhibit. **P. Exb 1.**

PW7 HARRISON NJOROGE a clinical officer attached to Nyahururu District Hospital told the court that he too examined the complainant. He noted bruises on the opening of her cervix and the hymen was broken. He concluded that she had been defiled. **PW7** filled and signed the P3 report which he produced in court as an exhibit. **P. Exb 2.** The absence of the hymen is conclusive proof that penetration occurred. I therefore find as a fact that the complainant was indeed defiled.

The complainant told the court that she met the appellant at the gate to her school and he smelt funny. He greeted her by hand after which she apparently lost consciousness and only woke up to find herself in the appellant's house having already been defiled. My close analysis of the testimony of the complainant leads me to question her veracity or truthfulness. If as she claims the appellant lost her senses at the school gates, then the appellant would have had to move her from that location to his house. The only way would have been to carry her. The time was 4.00pm – it was broad daylight. The sight of the appellant carrying a school girl in full uniform to his house would not have gone unnoticed. Someone would have seen and stopped him.

The complainant claim that after leaving the house of appellant she was still in a disoriented zombie like state. Yet apparently she had the presence of mind to board a motor cycle to Nayhururu town then board a matatu to Nairobi. I do not for one minute believe that the complainant did all these seemingly deliberate actions whilst out of her senses. Her account is not borne out by the evidence of the other prosecution witnesses.

PW4 PETER GICHARU KARIUKI told the court that on the same say he came from grazing his cattle and he met the complainant and appellant seated together holding hands. They were obviously having a *tete a tete*. **PW4** as an elder and a father warned the two about bad behavior and went on his way. He later informed the complainant's parents.

Therefore contrary to the complainants insinuation that she had been drugged by the appellant and rendered unconscious **PW4** found the two seated together holding hands like lovers. He even spoke to

them to chastise them and he stated that the complainant was not unconscious, at the time.

PW5 DANIEL KAIRUIRI NJOLI a boda boda rider stated that on 10/7/2009 he was called to pick a passenger. He went and picked the complainant and took her to Mairo Inya Centre. Under cross-examination **PW5** says that the complainant spoke to him and told him she had been sent away from school due to fees. Upon arrival at Mairo Inya the complainant paid him his dues and **PW5** left. Thus the evidence of **PW5** is that the complainant willingly boarded his motor-cycle. She was neither drugged, disoriented nor unconscious at the time.

This was not the behavior of a person who had been drugged and was out of her senses. The complainant was noted by the witnesses to have been lucid and behaved normally.

Finally on this point I take note of the testimony of the appellant himself in defence. He stated that the complainant met him willingly, that she had made several approaches seeking friendship with him and had even sent one **'Martin'** to tell appellant that she liked him. The said **MARTIN GITHINJI** testified as **DW1**. He confirmed that the complainant used to send him to **'greet'** the appellant on her behalf. Under cross-examination **DW1** states at page 16 line 8

"J W M (complainant) would tell me that she loved the accused very much"

Thus the complainant's claim that the appellant was unknown to her is proved to be an outright lie. The appellant was a person she had been pursuing seeking friendship with him. Most probably the complainant realized that her actions would have severe consequences from her parents due to her failure to report back to school and instead opting to spend the night with appellant in his house. She decided to fabricate the **'cock and bull'** story of having been drugged. She decided to run away to Nairobi to escape the wrath of her parents. My own assessment is that the complainant has been shown to be a bold faced liar who had no qualms in disowning the appellant to save her own skin. The complainant has been shown to have been an untruthful witness under oath. Where a witness is found to have been insincere or untruthful in parts of her evidence then her entire evidence is placed in doubt. A witness cannot be found truthful in certain aspects but untruthful in others. The veracity of her entire evidence is placed in doubt. As a court I would be hesitant to accept her claim that it was the appellant who defiled her.

Having so said I take note that in his defence the appellant conceded that the complainant spent the night in his house. He states that they met during the daytime and went for a walk (that is most probably the time when **PW4** spotted them). It became dark and they went to his house. I do not accept the appellant's defence that nothing happened between them during the night. There were 2 young people in love. It is very unlikely that they spent the night in a room together on the same bed and slept like brother and sister. I have no doubt that sexual intercourse did occur between the two.

In order to make this sexual contact the crime of defilement it must be shown that the complainant was a minor at the time. Age is a crucial and critical ingredient for the defence of defilement. The fact that the complainant may be shown to have been a willing participant or may have even initiated the sexual intercourse is irrelevant. A minor in law is deemed not to have the capacity to give informed content to sexual intercourse.

In this case the particulars in the charge sheet give the complainant's age as 15 years. In her testimony the complainant gave her age as 15 years. The question of age is a fact requiring concrete and tangible proof. Age is a fact in issue in Sexual Offences thus the age of the victim must be proved beyond reasonable doubt. A mere declaration by the complainant that she is 15 years will not suffice. No document was produced in court to prove the age and/or date of birth of the complainant. No birth certificate Vaccination Card, Baptism Certificate, school enrollment form or age- assessment was produced in court. The complainant was a form one student. I have no doubt that at least one of the abovementioned documents could have been easily procured and produced in court.

The complainant's mother **A G M** testified as **PW3** in this case. Nowhere in her testimony did she mention the date when her child was born nor did she state her age. The court cannot presume the age of

the complainant. The prosecution must adduce evidence to prove that her age was 15 years.

The Medical Report from Nairobi Women's Hospital gave the complainant's date of birth as 1993. However, this document was not produced by the maker. As such the appellant had no opportunity to cross-examine the maker with regard to the question of age. The P3 form gave the age of complainant as 15 years. However, **PW7** who produced it did not state how he came to assess that age. More likely the witness just wrote down what the complainant herself told him.

Therefore notwithstanding the fact that the occurrence of sexual intercourse of sexual intercourse has been proved, the failure by the prosecution to adduce any evidence at all to conclusively prove the age of the complainant is fatal to their case. On this basis the charge must fail. I therefore allow this appeal. I quash the appellant's conviction and set aside the 20 year term of imprisonment imposed by the trial court. The appellant is to set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 17th day of August, 2016.

Mr. Odhiambo holding brief for Mr. Maragia

Mr. Chirchir for State

Maureen Odera

Judge