REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA NO. 66 OF 2015

M N T.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

(An Appeal against the conviction and sentence of 15 years imprisonment by Hon. Andayi W.F (SRM) at Kaloleni Law Courts on 11/03/2009)

1. The Appellant was convicted and sentenced to 15 years imprisonment for the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (4) of the sexual offences Act No. 3 of 2006.

2. The particulars of the charge are that on 25th December 2007 at *[particulars withheld]* village in Rabai Location in Kaloleni District within the Coast Province, the Appellant committed an act which caused penetration of his genital organ with the genital organ of xxx a girl aged 16 years.

3. The prosecution evidence in summary is that the complainant was at the time of the alleged offence a pupil at *[particulars withheld]* primary school.

On 25/12/2007 (Christmas day) at 1 p.m, she prepared food and took some to the Appellant on a plate. The complainant said the Appellant is the son of her auntie.

The complainant said the Appellant who was alone in his house held her and gagged her mouth with his shirt. He removed her panties and raped her in the sitting room of his house. She said he is stronger than her and he overpowered her.

The complainant went away after the act and she told her grandmother who checked and confirmed that she had been defiled. The complainant's parents were also told and they took the complainant to hospital 3 days after New Year's Day. A P3 form was filled at Mariakani Hospital and the Appellant was subsequently arrested and charged.

4. The Appellant said on 25/12/2007 he went to work and returned at 4 p.m. he said he met some ladies who were seated and they asked him for palm wine. He gave them Kshs. 100/=. On 8/01/2008, he was arrested while at Shika Adabu stage and taken to Kaloleni police station where he was charged with this offence which he knows nothing about.

5. The trial court convicted him as charged and sentenced him to 15 years imprisonment. The Appellant

has appealed against conviction and sentence on the following amended grounds:-

i. **That the learned trial Magistrate erred in law and facts when convicting and sentencing the Appellant without considering that the burden of proof was not shifted to the Appellant given other grounds that;-**

a. **The plea was equivocal**

b. **There was no medical evidence to support the charge**

c. **Essential witnesses were not called in evidence to scrutiny the prosecution's allegations.**

ii. **That the learned trial Magistrate erred in law and facts by finding the Appellant guilty and by convicting and sentencing him without considering his defence together with the evidence of his witnesses.**

6. The Appellant submitted in writing as follows:-

i. That the prosecution evidence was contradictory on the dates the complainant was taken to hospital. The complainant said the 3rd day after New Year's Day while PW3 said she was taken to hospital on 5/01/2008.

ii. That there was no medical evidence to confirm the defilement and also the age of the complainant. The clinical officer did not give evidence.

iii. That the plea was taken in the absence of the Appellant and therefore the subsequent proceedings are irregular.

iv. Finally the Appellant submitted that his defence was not considered and also the testimonies of the defence witnesses were disregarded.

7. The Respondent conceded the Appeal and submitted as follows:-

i. That the age of the victim and penetration was not proved and the conviction is not safe.

ii. The P3 form was not produced as an exhibit as the Doctor who examined the victim was not called to testify.

8. This is the first appellate Court and I have a duty to re-evaluate the evidence on record while bearing in mind that the trial court had the opportunity to see and hear the witnesses. In the case of ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***

ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

9. My findings are as follows:-

(i) The Respondent conceded that the age of the Complainant was not proved. However, I find that

the Appellant penetrated the Complainant and Section 179 of the CPC is applicable. Sections 179 of the CPC provides as follows:-

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

(ii) The application of Section 179 was given by the Court of Appeal in the case of IRUNGU Vs REPUBLIC [2016] eKLR in which a charge of indecent assault was substituted with one of sexual assault and it was held as follows:-

"We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault. As this Court observed in *James Maina Njogu v. Republic*, *Cr App No. 38 of 2004 (Nyeri)* regarding section 179 of the Criminal procedure Code:

"It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence."

In the same vein, we stated as follows in *Robert Mutungi Muumbi v. Republic*, *Cr App. No. 5 of 2013:*

"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."

10. I find that the evidence on record discloses the offence of sexual assault, which is a cognate and minor offence of the offence of defilement with which the appellant was charged.

11. I accordingly allow the appeal, quash the conviction for the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No 3 of 2006 and set aside the sentence of 15 years. In lieu thereof I substitute a conviction for the offence of sexual assault contrary to section 5 (1) of the Act and impose a sentence of 10 years imprisonment from the date of sentence by the High Court. It is so ordered.

Dated and signed at MOMBASA this 16th day of November 2016 in the presence of the parties.

ASENATH ONGERI

JUDGE.