REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 165 OF 2012

SAMMY MWANGI MUNYIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 8 of 2012 (Hon. W.A. Juma, Chief Magistrate) on 14th September, 2012)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006** in that on the night of 6th and 7th January 2012 at [Particulars Withheld] village in Kieni West district within central province, he intentionally and unlawfully did an act of penetration by inserting his penis into the vagina of a girl namely J M R aged 14.

In the 2nd count, the appellant was charged with the offence of indecent act with a child contrary to **section 5(1)(b)** of the same Act and the particulars here were that on the night of 6th and 7th of January 2012 at [Particulars Withheld] village in Kieni West district within central province, the appellant intentionally and unlawfully did an indecent act to J M R by touching her private parts.

The appellant was sentenced to twenty years imprisonment on the 1st count. What was described in the charge as the 2nd count should, strictly speaking, have been an alternative count to the main count of defilement; however, having been convicted on the main count, there is nothing much that turned on this discrepancy and I am well advised not to pursue it any further.

The appellant appealed against the conviction and sentence and raised the following grounds of appeal:

1. The learned magistrate erred in law and in fact in convicting the appellant on contradictory evidence by the prosecution witnesses;

2. The learned trial magistrate erred in law and in fact by failing to consider that the complainant's evidence exonerated the appellant from blame;

3. The learned magistrate erred in law and in fact in failing to find that the appellant was never medically examined; and,

4. The learned magistrate erred in law and in fact by failing to hold that none of the prosecution

witnesses was an eyewitness.

As usual, it is necessary to consider and evaluate the evidence at the trial afresh; at the end of this exercise this court has to come to its own conclusions on matters of fact irrespective of the conclusions that the trial court may have come to but bearing in mind that it is the latter court that had the advantage of seeing and hearing the witnesses.

The state made a rather false start in the prosecution of its case; the complainant, its first witness, testified that on 6th January, 2012, her father and a police officer, took her to the police station where she was forced to record a statement on which she appended her signature. The state immediately applied to have her declared a hostile witness; the trial court acceded to the application and treated the complainant as such. The evidence that followed was not whether the complainant was defiled as alleged but whether or not her statement was voluntary and whether the contents thereof could be attributed to her.

When the statement was put to her, the complainant admitted that police officer recorded the statement based on what she told him. She signed the statement after it was read over to her. She denied, however, that she ever met the appellant and went with him to Bagamoyo bar and neither did she record that the appellant was her boyfriend. She also denied that she ever recorded that she had sexual intercourse with the appellant in a lodging.

The complainant also denied that she went to **Imam Mohammed (PW3)** and informed him that the appellant beseeched her that if her case was ever taken by the police she should not tell the truth. She denied that the Imam took her to her mother and narrated what happened to her or that thereafter her brother rang their father and informed him. Lastly, the complainant denied having been taken to Nairutia police station by her father and the Imam.

The complainant's father (PW2) testified that his daughter was 14 years old; on 6th January, 2012 at around 1 PM he was on his way home when his wife told him that the complainant had been missing since morning, apparently of that day. They both searched for her but they couldn't find her on that day. The following day, he was informed that his daughter had been cited at the Imam's place. This Imam later accompanied the complainant to his (witness's) home where he met his wife and together they went along with the girl to her father's stall where he traded in khat. They took the complainant to the police and later, on 8th January, 2012 the complainant was taken to hospital.

Later in his evidence in chief, the witness testified that, in fact, the complainant had been living with the appellant for some time apparently after the latter enticed her away from home.

The Imam (PW3) testified that she met the complainant on 6th of January 2012 at around 11 AM. She told him that she had slept at Benta, at the appellant's place, after she quarreled with her parents the previous evening. He took her home to her mother; they then went to the complainant's father's stall who took the complainant to the police station. The Imam denied that the complainant told him that the appellant defiled her.

The doctor who examined the complainant worked at the provincial general hospital, at Nyeri at the material time; he testified that the complainant was treated on 7th of January, 2012 though her P3 form was filled on 11th of January, the same year. According to his findings, the complainant had a perforated hymen. She had a bloodstained pre-vaginal discharge. A vaginal swab showed yeast cells but no spermatozoa. The degree of injury was classified as "harm".

The investigations officer testified that the complainant's complaint was reported on 7th January, 2012 and on the same date he accompanied the complainant to Marina health centre for examination; he took the complainant to Nyeri provincial general hospital for the same purpose the following day. He arrested the appellant on 6th February, 2012.

The appellant denied having committed the offence in his sworn testimony when he was put on his

defence. He admitted, however, having seen the complainant on 6th January, 2012 as she alighted from a motor vehicle; she was a person he knew before and indeed she even borrowed money from him on that particular day. He spent the night at a lodging and proceeded to college the following day. He was arrested and charged when he came back home after a month.

This was all the evidence that the trial court was confronted with.

The tag attached to the complainant because of her "hostile evidence" is that of a person "*who is not merely disappointing or unfavourable to the party calling him, but is also in the opinion of the court, unwilling to tell the truth at the instance of that party;*" see **Stephen, Digest of the Law of Evidence (12th edn, 1936) pp 169-170**. Such a witness may prove hostile through his adverse testimony or through his refusal to answer questions; in the instant case, the former is alleged to have been the case- the prosecution interpreted the complainant's testimony to have been adverse and so sought for and was granted leave to cross-examine her. In such circumstances the purpose for the cross-examination of such a witness is to discredit him and impeach his testimony; the net result is that his evidence is of little worth to person calling him, in this case, the prosecution. This is the common law position and it was well illustrated in **R versus White (1922) 17 Cr Appeal Rep 60**. In that case, several witnesses called by the prosecution had previously made statements to the police indicating that the accused had participated in a riot. At the trial this witnesses gave evidence in which they said that the accused did not participate in the riot. The previous documents were admitted, and the judge told the jury that they could choose between the witnesses evidence at the trial and the statements to the police. The jury apparently acted on the latter for it returned a verdict of guilty; but the conviction was quashed because:

> ***Quite obviously it is one thing to say that, in view of an earlier statement, the witness is not to be trusted: it is another thing to say that his present testimony is to be disbelieved and his earlier statement, which he now repudiates, is to be substituted for it. (Per Lord Hewart CJ at page 64).***

In **R versus Golder, Jones and Porrit (1960) 3 ALL ER 457 at 459**, the Court of Criminal Appeal stated:

> ***When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial the jury should not merely be directed that the evidence given at the trial should be regarded as an unreliable; they should also be directed that the previous statements sworn or unsworn do not constitute evidence upon which they can act.***

Closer home, the Court of Appeal for East Africa sitting at Kampala in **Batala versus Uganda (1974) E.A 402** had this to say on the evidence of a witness that has been declared hostile:

> ***The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is an unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight. The rule of practice is based on logic, because if a person is found to be untruthful, there is no reason to suppose that he was any more truthful before he was caught out than after: indeed it is the very evidence that he has given that has shown his unreliability***. (see page 405).

The court cited with approval its earlier decision in **Alowo versus Republic (1972) E.A page 324**; in that case, the trial judge had held that the proper procedure with regard to the evidence of a hostile witness should be to keep the evidence in reserve instead of rejecting it. That when a conclusion on other evidence is reached and this conclusion is found to be in tandem with the evidence of the hostile witness that evidence should be regarded as strengthening the conclusion. The court overruled him and held as follows:

> ***"With respect, that is not and cannot be the law. The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible. Secondly, the***

earlier statement is not evidence at the trial and cannot therefore be relied on."

There is no doubt therefore, that as far as the law is concerned, the complainant's evidence was unreliable and could not form the basis for the appellant's conviction. As was stated by the Court of Appeal in **Maghenda versus Republic (1986) KLR 255**, its relevance was only necessary to the extent that it favoured the appellant but even then, the court was not bound to act upon it.

The learned magistrate appears to have done the contrary; it is apparent from her judgement that despite declaring the complainant a hostile witness, she still relied on her evidence to convict the appellant. In particular, the learned magistrate found as a fact that the complaint of defilement against the appellant was initiated by the complainant herself and indeed the Imam and the complainant's father would not have known of the sexual assault were it not for the complainant giving them this information. The learned magistrate went further to state that the complainant's story was corroborated by the evidence of the doctor; she also accepted the complainant's evidence that the scene of crime was where the appellant had rented a house for her. She ultimately came to the conclusion that there was overwhelming evidence against the appellant.

With due respect to the learned magistrate, she misdirected herself both on the facts and the law. According to the Imam, the complainant asked him to take her to her parents after she quarreled with them and spent the night at Benta. He was categorical that, the complainant never told him that the appellant had defiled her. And even if she had, the Imam's evidence would not amount to anything more than hearsay after the trial court declared the complainant a hostile witness. The moment she acquired this status, what the complainant said before or during the trial was less useful to the prosecution case and in any event, could not be a basis for holding the appellant culpable.

Again, for the same reason, the doctor's evidence, could not be said to corroborate evidence which in effect did not exist. As the decisions I have cited demonstrate, the complainant's evidence was undoubtedly unreliable and if that evidence was of that character, it could not be said to be corroborated by any other evidence.

It must also be noted that the complainant was in a unique position; she was more than any other ordinary prosecution witness to the extent that she was allegedly the victim of the crime allegedly perpetrated by the appellant. But the complainant herself was discredited and her testimony impeached; her credibility was dented and she was found to be untruthful. Would anybody believe that she had a genuine complaint against the appellant in these circumstances? According to the foregoing authorities, there would be no basis for such a complaint against the appellant.

Granted, the doctor may have come to the conclusion that the complainant was sexually assaulted, by virtue of the fact that her hymen was perforated; however, the complainant was not examined immediately after she appeared home on 6th January, 2012. It was not until the following day that she was taken to hospital. Her own father said that she was taken to hospital on 8th January, 2012.The possibility that she may as well have been assaulted in the intervening period was not discounted particularly when it was the doctor's opinion that the injuries were only hours old; suffice it to say that there was no proof beyond reasonable doubt that the appellant was the assailant.

As long as there was no independent evidence against the appellant, devoid of any reference of what the complainant said before or at the trial, I would respectfully disagree with the learned magistrate that the offence of which the appellant was convicted was proved beyond reasonable doubt. There was simply no evidence of the complaint and more importantly, there was no evidence of the complaint against the appellant. For these reasons, I am inclined to conclude that the appellant's appeal is merited and it is hereby allowed; the conviction is quashed and the sentence set aside; the appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 16th December, 2016

Ngaah Jairus

JUDGE