REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 107 OF 2012

ERICK MUMO KYUMU……..…..APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(*Being an appeal from the original conviction and sentence in Makueni Criminal Case No. 663 of 2011 by Hon. R. Yator, RM on 31/7/12)*

JUDGMENT

1. **Erick Mumo Kyumu** was charged with two (2) counts;-

> i. Attempted **defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars are that on the 28th day of November, 2011 in **Mbooni East** District within the **Makueni County** intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **NM,** a child aged 13 years.

2. In the alternative, he was charged with committing **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 28th day of November, 2011 in **Mbooni East** District within the **Makueni** County, intentionally and unlawfully caused his penis to come into contact with the vagina of **N M** a child aged 13 years.

> ii. Committing an **un-natural offence** contrary to **Section 162(a)** of the **Penal Code.** Particulars are that on the 28th day of November, 2011 in **Mbooni East** District within the **Makueni** County, unlawfully had carnal knowledge of **NM** against the order of nature.

3. Having denied the charges he was subjected to trial, convicted and sentenced to 10 and 14 years for the 1st and 2nd counts respectively.

4. Being aggrieved by the conviction and sentence thereof he appealed on grounds as follows:-

> **i. That** the trial magistrate erred and misdirected herself both in law and fact in convicting without proper consideration and analysis of the evidence adduced;
>
> **ii. That** the trial magistrate erred and misdirected herself in law by meting out the full sentence under the provisions of **Section 9(1)** as read with **subsection (2)** of the **Sexual offences Act** and **Section 162(a)** of the **Penal Code Cap 63** in a manner that amounted to injudiciously fettering the

wide discretion and policy given in sentencing by law;

iii. That the trial magistrate erred and misdirected herself in law in injudiciously meting out an excessive sentence that violates the appellants rights to the benefit of the least severe punishment under the constitution;

iv. That the Honourable learned trial magistrate erred in law in that she admitted inadmissible evidence;

v. That the Honourable learned trial Magistrate erred in law in that she convicted the appellant against the weight of the prosecution evidence and when there was no evidence to connect him with the commission of the offence;

vi. That the Honourable learned trial magistrate erred in law in failing to find that it was critically important in the offences of this nature that the age of the victim be proved beyond reasonable doubt and by credible evidence which was not done and therefore major ingredients of the offence had not been proved thereby rendering the conviction unsafe;

vii.That the Honourable learned magistrate erred in law and fact in relying on hearsay evidence to convict the appellant; and

viii. That The learned trial magistrate erred in law in convicting the appellant when there was no corroboration on the evidence of the complainant and without warning itself of the danger of acting on the uncorroborated testimony of the complainant.

5. Facts of the case were that the Appellant herein is the complainant's cousin. On the 28th November, 2011, PW1, **JNM,** the complainant was alone at home in the kitchen cooking when the appellant entered and held her hands and mouth to deter her from screaming. He forced her to lie on her abdomen. He unzipped his pair of trousers and inserted his penis into her anus. He also attempted to penetrate her vagina but she struggled and freed herself. The appellant fled as the complainant locked herself up in the bedroom.

6. **PW2, CN,** the complainant's mother retuned home. She found the complainant locked up in the bedroom. She informed her what had transpired. They arrested the appellant and took him to the Police Station. **PW3, No. 54523 P.C. Stephen Ondava** re-arrested him. Both the complainant and the appellant were taken to hospital for examination. **PW4, Tabitha Njahi Ireri** a Clinical Officer on examining her found that she had laceration on the anal opening. The appellant had no injuries. Consequently, he was charged.

7. In his defence, the appellant stated that charges were trumped up. He testified that on the material date he ploughed their land that is adjacent to that of the complainant's family. He saw the complainant bang down his radio which broke. Her action provoked him, he acted by slapping her. This is what prompted them to frame him up.

8. The appeal was canvassed by way of written submissions that I have taken into consideration.

9. This being the first appellate court, it has the duty to subject evidence adduced at trial to fresh and exhaustive examination so as to reach its own independent conclusion as to the guilty of the appellant. ***(See Okeno versus Republic (1972) E.A. 32).***

10. The learned trial magistrate has been faulted for having accepted and relied on inadmissible evidence in that the P3 form and treatment notes adduced in evidence did not bear the name and stamp of the medical officer who examined the complainant. A perusal of the P3 form produced in evidence confirms that indeed, it bears a signature but has no stamp impression. Without a rubber stamp being embossed/impressed thereon, it cannot be proved that it was filled at any medical institution/hospital.

11. That notwithstanding, medical evidence is not mandatory in a case of rape/defilement. In the case of ***Geoffrey Kioji versus Republic – Criminal Appeal No. 270*** of ***2010(Nyeri)*** the court stated that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome, we however hasten to add that such evidence is not mandatory or even the only evidence upon which the accused person can be properly convicted for defilement. The court can convict if satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80 of the Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such believe"***

12. The Clinical Officer, PW4 who failed to cause the medical report (P3) to be stamped stated that she personally examined the complainant. She personally confirmed that the anal opening of the complainant had laceration and it was not actively bleeding. Her evidence was direct evidence of what she perceived with her eyes. As a Clinical Officer she was qualified to tell what a laceration was. Her evidence therefore corroborates that of the complainant that indeed she was defiled. (Also *see* ***Wyson Ngulube - versus- the State- Criminal Appeal No. 63*** of ***2011(Malawi).***

13. The complainant was taken through *voire dire* examination by the trial magistrate and found to be seized of sufficient intelligence to understand the duty to speak the truth. In her evidence she stated that she was 13 years old. Her mother **PW2, C N** was silent on her age. In the case of ***Francis Omuroni versus Uganda – Criminal Appeal No. 2 of 2000*** - it was held *inter alia* that:-

> ***"In defilement case, medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by Birth Certificate, the victim's parents or guardian and by observation and common sense".***

14. In this case the trial magistrate had an opportunity of observing the complainant when she testified in court. After her testimony no comment was recorded in the course of proceedings. In her judgment the learned trial magistrate stated:-

> "***On considering the age of the child, the child said she was 13 years old which fact was confirmed by her mother and in P. Exhibit 2".***

15. Prosecution witness exhibit 2 was a doubtful document that the court should not have relied on while PW2 was silent on the child's age. The age of the child was therefore not confirmed.

16. According to **Section 9(1)** of the **Sexual Offences Act, 2006,** a person who attempts to commit an act which would cause penetration with a child would be guilty of attempted defilement. At the outset per the evidence adduced by the complainant the appellant penetrated her anus, there was no evidence of ejaculation which means he was interrupted when the complainant kicked him. If at all his penis touched the vagina it may have been in furtherance of the act of defiling her through the anus. In my opinion evidence adduced does not establish any attempt to penetrate the vagina.

17. In the premises there was no sufficient evidence to prove the first count of attempted defilement.

18. With regard to **count 2** of committing an un-natural offence, the prosecution had a duty of proving beyond any reasonable doubt that the appellant had carnal knowledge of the complainant against the order of nature.

19. Natural carnal knowledge would involve penetration of a female by the male organ. Having carnal against the order of nature would entail anal penetration.

20. It is the complainant's evidence that the appellant inserted his penis into her anus after removing her

pant. She sustained a tear. It bled. This happened at about 11.00am. She wore her pant thereafter which got stained with blood.

21. PW2, her mother observed and confirmed the injury she sustained. Later PW4 also examined her and found indeed she had a laceration in the anus.

22. The learned magistrate having heard the testimony remarked as follows:-

> ***"… The child who was a cousin to the accused courageously narrated to the court on all the happenings (sic) and from her demeanor this could not have been a coached witness".***

She indeed found the child to have been truthful. In his defence the appellant claimed he was framed up because he had assaulted his cousin. Had it happened nothing would have been easier than bringing up such an issue while cross-examining PW1 and PW2. The learned trial magistrate did not misdirect herself in disregarding the evidence adduced in his defence. Consequently, the evidence adduced proved the charge beyond any reasonable doubt. It is stipulated by **Section 162** of the penal code that;-

"***Provided that, in the case of an offence under paragraph (a) , the offender shall be liable to imprisonment for 21 years if the offence is committed without the consent of the person who was carnally known".***

23. It is in evidence that the complainant did not consent to the act of anal penetration. She kicked and struggled prior to the appellant releasing her. It was indeed forcible penetration.

24. From the foregoing the appeal against the **1st count** succeeds. The conviction entered is quashed and sentence imposed set aside.

25. With regard to the **2nd count**, the conviction is confirmed. The sentence imposed of **14 years** was not in accordance with the law; the same is set aside and substituted with **21 years'** imprisonment.

26. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **21ST** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE