REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 65 OF 2014

MWENDWA MAKAU ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(from the conviction and sentence in Mwingi Senior Resident Magistrates Criminal Case No. 707 of 2013 – Nyaberi Ag.SPM)

JUDGMENT

The appellant was charged with defilement contrary to Section 8(1) as read with (4) of the Sexual offences Act No. 3 of 2006. The particulars of the offence were that on 28th December 2013 at **[particulatrs witheld]** village in Mwingi East District in Kitui County he intentionally did an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of A.M.M. a girl child aged 16 years and 6 months. In the alternative he was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally and unlawfully did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of A.M.M. a child aged 16 years and 6 months. He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to serve 15 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has filed the present appeal. He filed his initial grounds of appeal on 11th August 2014. However before the appeal was heard the appellant filed an amended petition of appeal which he relied upon. His grounds of appeal are as follows:-

1. That the learned trial magistrate erred in law and fact to convict him without considering that the medical evidence failed to confirm penetration as required by the law.

2. That the medical evidence was altered hence losing credibility.

3. That the trial magistrate erred in law and fact to convict him without considering that the prosecution witnesses evidence was contradictory and inconsistent.

4. That he was not (medically) examined to ascertain whether the prosecution allegations were true.

5. That the prosecution evidence adduced was hearsay and failed to corroborate the complainant's evidence.

6. That the learned trial magistrate failed to note that there was a vendetta between him and the complainant's guardian Kithome.

The appellant also filed written submissions. He relied on the said written submissions and opted not to make oral submissions.I have perused and considered the appellants written submissions.

The learned prosecuting counsel Mr. Mwangi opposed the appeal. Counsel submitted that the age of the complainant was proved through the production of a birth certificate. Counsel also submitted that the charge sheet relied on the correct section of the law and was thus proper. With regard to penetration, counsel submitted that the doctor PW7 produced a P3 form in which a healed six days old injury was noted.

With regard to corroboration, counsel submitted that PW2 the mother of the complainant corroborated the evidence of PW1 the complainant. Counsel also submitted that initially on arrest, the appellant had admitted committing the offence. Counsel emphasized that PW1 and PW2 knew the appellant well before, and that there was no possibility of mistaken identity. Counsel further submitted that the right procedure was adopted in sentencing the appellant.

In response to the prosecuting counsels submissions, the appellant stated that he was convicted and sentenced wrongly. He asked the court to assist him.

During the trial, the prosecution called seven witnesses. PWI was the complainant. It was her testimony on oath that she was born on 9th June 1997 and was in Standard 7 in 2014 when she testified. She identified her birth certificate. It was her evidence that on the 28th December 2013 at about 8.00 a.m she had gone to the river to fetch water. She met the appellant whom she knew before as an employee of a neighbour at the river. She fetched her water, put the jerican on her back and started walking home. The appellant followed her for about 70 metres persuading her to accept having sexual intercourse with him. She refused but the appellant removed her jerican and threw it in the bush then tied her with a lesso on her neck and dragged her into the bush where he forced her to lie down, undressed and forcefully had sexual intercourse with her. He then left and she picked her jerican and clothes and went home and reported the incident to her mother. The mother took her to Mathuki Administration Camp where they were advised to bring the clothes she wore during the incident and also to go to Mwingi District Hospital. It was also her evidence that the appellant was arrested by an uncle by the name N K on the same day.

In cross examination she stated that she used to visit the home of B M. She maintained that though she knew the appellant she was not in the habit of talking to him. She stated that she was medically examined by a doctor. PW2 was T M K the mother of the complainant. She identified and produced the birth certificate of the complainant as an exhibit. She also confirmed that the complainant was born on 9th June 1997. It was her evidence that on 28th December 2013 at around 7.30 am she sent the complainant to the river to fetch water. The complainant came back after an hour crying and explained that she met the appellant at the river who followed and removed her jerican, tied her neck with a piece of cloth pulled her into the bush and defiled her. According to this witness the skirt of the complainant was torn and the lesso was soiled. It was her evidence that she knew the appellant before as a person working for a neighbour M B. She then explained the incident to D N who made arrangements for the arrest of the appellant. They then proceeded to the Administration Police Camp where they were referred to the police and the hospital. She stated that the complainant was taken to hospital, treated and a P3 form completed. She took the skirt and the lesso to the Nguni Police Station.

In cross examination she maintained that the lesso was soiled and that it had rained at the time of the incident. She denied a suggestion that the carton herded by the appellant had trespassed into her land thus cattle a grudge.

PW3 was N K an uncle of the complainant. It was his evidence that on 28th December 2014 at 9.30 am while at home, he saw K K approaching while crying. K then requested him to accompany her. They proceeded to the witness father's home where K explained that the complainant, a daughter of T, had come to inform him that she had been raped by the servant of B M. They immediately called Gitonga Kitome a youth leader and informed him about the incident. They then proceeded to arrest the appellant and relayed the information to the Assistant Chief who advised them to take the suspect to the Administration Police Camp. They then proceeded to the victim's home and brought her to Mwingi

District Hospital for treatment.

In cross examination he stated that he did not visit the scene of the incident. He denied a suggestion that the appellant was beaten during arrest but admitted that they carried sticks during the arrest. He stated that initially the appellant admitted committing the offence.

PW4 was Felix Mulinge the Assistant Chief Nduvani Sub Location. It was his evidence that on the day in question at 10 am, he received a phone call from PW3 informing him that M M had reported a rape incident on the complainant. He proceeded to the market and on arrival met the suspect, the complainant and Community Policing Members. He spoke to both the complainant and the appellant. According to this witness, the appellant said that there was agreement between the two to have sexual intercourse and that he did not understand why there was a turn of events. They then proceeded to Mathuki Administration Police Camp where they handed over the appellant to the officers. In cross examination he stated that he did not visit the scene of crime. He stated that he did not know whether the appellant had been taken to hospital. He said he did not know of any existing grudge between the appellant and Kithome.

PW5 was Administration Police Constable Willie Karani. It was his evidence that on 28th December 2013 at about 2.00 p.m while at the office, members of the public brought the appellant to the Administration Police Camp on an allegation of defilement. The complainant was also present. After making enquiries from both the appellant and the complainant, he referred the complainant to Mwingi District Hospital and took the suspect to Nguuni Police Station. In cross examination he stated that the appellant was not beaten to admit the allegations.

PW6 was Corporal Simon Luguya. It was his evidence that on 30th December 2013 at 8.00 a.m, Chief Inspector Munyoki brought him the appellant on allegation of defilement. He was made the Investigating Officer. He interrogated the complainant who gave her story about the incident. He also interrogated the appellant who alleged that the charges have been a frame up. He issued the complainant with a P3 form and escorted her to Mwingi District Hospital. The complainant also brought a lesso and a skirt which he produced as exhibits. He was not cross examined by the appellant.

PW7 was Doctor Mustach a Medical Officer at Mwingi District Hospital. It was his evidence that on 2nd January 2014 he examined the complainant. He found her to be in general fair condition. He found healed vaginal lacerations. There were also pus cells and bacteria. He did not medically examine the appellant. He completed the P3 form for the complainant and produced the same as an exhibit. He also produced medical post care form for the complainant as an exhibit. In cross examination he maintained that no medical examination was done on the appellant.

When put on his defence, the appellant gave sworn testimony. He initially indicated that he was going to call one witness but later relied on only his testimony. It was the appellants defence that he was a herdsman for one B M and that he was aged 26 years. That on 28th December 2013 he woke up a few minutes to 8.00 a.m and saw four people entering his compound. He knew them by facial appearance and one was N K. They told him that he had raped the complainant. He denied the allegations that he was arrested on a Saturday and on Monday he was taken to Nguuni Police Station and finally to Ukasi Police Station and charged in court on Tuesday. He stated that he did not know the complainant. He denied committing the offences. He stated that nobody saw him doing the act.

In cross examination he maintained that the charges were framed against him by the uncle of the complainant. He stated that previously one Robert Mwakali Kithome had reported him and he was charged with an offence of theft though he was later acquitted because the complainant never testified. He said that he was arrested in the presence of his employer.

That is a summary of both the prosecution and the defence evidence.

This is a first appeal. As a first appellant court I am duty bound to reevaluate all the evidence on record and come to my own conclusions and inferences see the case of ***Okeno –vs- Republic (1972) EA 32***.

I have re-evaluated the evidence on record. The appellant has raised a number of issues on appeal.

The burden is always on the prosecution in a criminal case to prove a case against an accused person beyond any reasonable doubt. In cases of defilement the prosecution is required to prove three elements. Firstly, the prosecution has to prove the age of the complainant. Secondly, it has to prove that there was penetration. Thirdly, the prosecution is required to prove that the accused is the culprit.

In the present case, the complainant relied on a birth certificate which indicated that she was born in June 1997. The birth certificate was produced as an exhibit by her mother PW 2. The appellant did not raise any issue with the birth certificate or the entries therein. The incident occurred in December 2013 which meant that the complainant had not turned 17 years. In my view it was thus proved by the prosecution beyond any reasonable doubt that the complainant was below the age of 18 years. The first ingredient for the offence of defilement was thus proved.

The second element to be proved by the prosecution was whether there was penetration. The appellant denied committing the offence. The prosecution maintained that the appellant committed the offence and some witnesses stated that he initially admitted having sexual intercourse with the complainant. The appellant has also complained that the medical evidence was altered. I have perused the medical evidence and the P3 form which was produced as an exhibit. I find no alterations herein. The appellant has also not pointed at any specific alterations. The medical evidence in my view, supports the version of the complainant that sexual intercourse or penetration did occur. The doctor found healed lacerations in the genital parts of the complainant. In my view that was sufficient evidence of penetration. Though the appellant was not medically examined, in my view sexual penetration was proved by the prosecution beyond reasonable doubt.

The third element to be proved by the prosecution was whether the appellant was the culprit or offender. PW1 the complainant and PW2 her mother knew the appellant well as a neighbour. The incident occurred in broad day light during the morning hours. The evidence of all prosecution witnesses is consistent that the person who was mentioned by the complainant was the appellant. Though the appellant has raised the issue of an existing dispute over grazing, I find no basis to accept that defence. The appellant raised that defence as an afterthought. The evidence of the prosecution witnesses was consistent and straight forward. In my view the learned magistrate was correct in coming to the finding that the appellant was the offender. I will thus uphold the conviction.

With regard to sentence, the complainant was aged between 16 years and 17 years. The sentence for that offence of defilement for a girl aged between 16-18 years is a term of imprisonment of not less than 15 years. The trial court therefore had no choice but to impose the minimum sentence of 15 years imprisonment which it did. The sentence was therefore lawful and cannot be said to be harsh and excessive. It will thus uphold the sentence.

In the result, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 22nd day of September 2015.

GEORGE DULU

JUDGE