REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.291 OF 2011

BETWEEN

PATRICK GEORGE NYAUCHUBA....................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from original conviction and sentence of the PM's court at Kilgoris

in criminal case No.203 of 2011 – Hon. Ochieng B.O., PM, dated 9th December, 2011.)

JUDGMENT

The appellant herein Patrick George Nyauchuba was the accused in SRM's court at Kilgoris Criminal Case No.203 of 2011. He was charged with defilement in violation of **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 27th day of February 2011 at [Particulars Withheld] in Transmara District, within Narok County, he caused his penis to penetrate to the vagina of V K O, a girl aged 15 years in violation of **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006**.

He also faced an alternative charge of committing an indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 27th day of February at [Particulars Withheld] in Transmara District within Narok County, he intentionally touched the vagina of V K O a child aged 15 years with his penis.

He pleaded not guilty to the above charges and trial ensued.

PW1 was the complainant V K. After conducting a vore dire examination upon her, the trial court concluded that she possessed sufficient intelligence to understand the meaning of an oath. Therefore she gave sworn testimony. She told the court that she was 15 years old though she could not recall the year she was born. She testified that she was a standard 8 pupil at [Particulars Withheld] primary school in Transmara District. She recalled that on 27th February 2011 at about 8.00 p.m., she sneaked out of her mother's house and went to the appellant's house. The complainant and the appellant had made prior arrangements for the visit, so when the complainant arrived, she found the appellant waiting for her. On arrival, the appellant asked her to prepare a meal of ugali which she did and the two had the meal together. Thereafter, the appellant asked the complainant for sex and although she was initially reluctant, for fear that her mother would come after her, she eventually agreed and the two spent the better part of

that night (up to 3.00 a.m. according to the complainant) having sex.

At 6.00 a.m. The following day, the appellant woke up and went to look for milk. He returned without milk but asked the complainant to go and fetch water. Soon after that, her mother F M who testified as PW4 arrived at the appellant's home in the company of a certain old man. The complainant was found washing clothes. With the help of the complainant's school teacher, the police from Kilgoris police station were called. They arrested both the appellant and the complainant and took them to Kilgoris police station. The complainant was issued with a P3 form before both of them were taken to the hospital for examination.

The complainant testified further both in examination in chief and during cross examination that she and the appellant had engaged in sex many times before since August 2010 and that as the time of her testimony on 2nd March 2011, she was 2 months pregnant. She also testified that the appellant had promised to pay her stand 8 examination fee.

When the appellant and the complainant were taken to Transmara District Hospital for examination, they were examined by Dr. Patricia Onguti, PW2. The complainant was presented with a history of sexual defilement by a person known to her. The doctor's findings were that admitted the sexual encounter between the appellant and the complainant on 27th February 2011 was not the first one, as the complainant had reportedly had another encounter with the appellant some two days prior to that date. The complainant was found to be 18 weeks pregnant. Her genitalia was normal save for some discharge on the outer genitalia. The hymen was broken. There was no bruising or laceration. Dr. Onguti produced the complainant's P3 form as **P. Exhibit 1**

Regarding the complainant's age, Dr. Onguti assessed the same as being between 15-16 years of age. Dr. Onguti also testified that she was much later shown a birth certificate which gave the complainant's date of birth as 30th December 1997. The alleged birth certificate was never produced as an exhibit in the case, but the age assessment report dated 21st March 2011 was produced as **P. Exhibit 2** plus or minus 2 years.

Dr. Onguti also testified that it is common for there to be bruises after sexual contact, and that recent sexual contact can be established by hyphenation of the vaginal wall. There was no such evidence in the case of the complainant.

PW3, Wapali Susan Oshipai was a teacher at the complainant's school. On the 28th November 2011, the complainant was taken to the school after being found in the appellant's home. On terrogation by PW3, the complainant admitted she was 2 months pregnant. The appellant also told PW3 that he wanted to marry the complainant. She sent the two to Kilgoris police station where she also went and recorded her statement.

According to F M, the complainant was born in 1995; though she could not remember the exact date when she gave birth to her. On the day of her testimony on 12th July 2011, she told the court that the complainant left her home in April 2011 and that since then, the complainant and the appellant were staying together as wife and husband, though she had never visited the home to establish the fact.

Number 84184 Police Constable Chrispus Maige testified as PW5. He partially investigated the case. He told the court that he took over the case from PC Likami who had since died. He produced the statement made by PC Likami as **P. Exhibit 3**. This was done pursuant to the provisions of **Section 77** of the **Evidence Act**. According to the said statement, upon receipt of the report from the complainant's mother and teacher, PC Likami took the complainant to the hospital where her age was assessed to be 16 years. PC Likami then charged the appellant with the offence of defilement.

At the close of the prosecution's case, the appellant was put on his defence. He testified under oath as DW1. He readily admitted that he was licing with the complainant as husband and wife and that they had a baby. The complainant was in court with a baby girl whom she told the court was the appellant's child.

The appellant further stasted that he was working hard to look after his family.

DW2 was David Matundura, father of the appellant. He told the court that the appellant and the complainant were staying together as man and wife and urged the court to let them continue staying as such. On cross-examination, DW2 stated that he did not know how old the complainant was when she came, but that when he asked her for her age, she told him she was over 18 years. DW2 stated that the appellant was born in 1994.

DW3 was Grace Kemunto, mother of the appellant. She testified that the parents of the complainant never informed them (DW3 and DW2) that the complainant was below the statutory age of marriage. DW2 also stated that when the complainant joined the apellant at the latter's home, she was already pregnant.

After carefully considering the evidence that was placed before him, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. He found the appellant guilty as charged on the main count, convicted him and sentenced him to 29 years imprisonment.

The appellant being dissatisfied with both conviction and sentence preferred an appeal to this court. In his homemade petition of appeal received in court on 23rd December 2011, the appellant set out the following grounds of appeal:-

> *1. That the trial magistrate erred in law and facts by not realizing that the only document to prove the complainant's age that is BIRTH CERTIFICATE OR CLINIC CARD was NOT tendered in court to prove the same. The age was only speculated, and therefore that the prosecution side failed to prove this case beyond reasonable doubt.*
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> *2. That the learned magistrate erred in point of facts by not considering the conditions and circumstances prevailing that both the complainant and appellant were in love and lived as husband and wife with the awareness of the parents from either side, only for one side (mother-in-law) to be aggrieved due to family conflicts.*
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> *3. That the trial magistrate failed to accept and consider appellant's sincere mitigation that appellant was a sole breadwinner of his family and the only person to take good care of his young beloved daughter.*
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> *4. That the appellant has no option but to face the reality that he is a father of a young family and therefore 20 years in prison custody shall greatly hamper the progress of his family and end up losing his child and wife.*

The appellant prays that the appeal be allowed, conviction quashed and sentence set aside so that he may be released from prison custody.

At the hearing of the appeal, Mr. Minda, counsel for the appellant condensed all the four grounds of appeal into one and canvassed them as a block. He submitted that the evidence that was placed before the trial court did not meet the standard of proof required for the offence with which the appellant was charged.

First, counsel submitted that the critical element of penetration for the offence of defilement was not proved. That the mere fact that the appellant and complainant had sex did not necessarily mean that there was penetration. Further, that the evidence by Dr. Onguti was clear that upon examination on the day after the alleged offence, the complainant's genitalia was found to be normal except for some slight discharge on the outer genitalia which she attributed to the fact that the complainant was 18 weeks pregnant. Counsel also submitted that during cross examination, Dr. Onguti could not confirm that there had been penetration.

Secondly, that the age of the pregnancy, which was 18 weeks as at 28th February 2011 was not consistent with the alleged act of defilement on 27th February 2011. Further that the age of the pregnancy was reason enough to explain the broken hymen as testified to by Dr. Onguti.

The second issue raised by counsel concerned the age of the complainant. That according to Dr. Onguti, the complainant's age was anything between 14-15 years though a belated certificate of birth shown to Dr. Onguti put the complainant's age at 14 years. Counsel submitted that whereas the evidence showed that the complainant was 14-15 years, the trial magistrate in his judgment concluded that the complainant was 15-16 years old, so that in the final analysis, there was no clear evidence before the court as to the age of the complainant. That in the face of such discrepancy concerning the age of the complainant, the offence of which the appellant was convicted was not proved by the prosecution.

Further, counsel submitted that the trial court ought to have given the benefit of the doubt regarding the complainant's age to the appellant. He also submitted that all along, the appellant was under the impression that the complainant was over 18 years. Counsel also submitted that the sexual act between the appellant and the complainant on 27th February 2011 was consensual apart from the fact that the appellant could not have assessed the age of the complainant with his naked eye.

In conclusion, counsel submitted that from the evidence on record, the appellant was serving on undeserved sentence.

In response to the submission made on behalf of the appellant, counsel for the State submitted that the prosecution proved its case against the appellant beyond any reasonable doubt. He submitted that the complainant clearly testified that she was 15 years old and that on the night of 27th February 2011, she and the complainant engaged in sex in the appellant's house. Further, that complainant told the court that the pregnancy was the appellant's since the two had engaged in sex many times prior to the 27th February 2011.

Regarding age of complainant, counsel submitted that according to Dr. Onguti, the complainant was aged between 14-15 years. That the complainant's testimony was corroborated by the appellant's own evidence when he said that he was staying with the complainant as his wife; that the appellant's father and mother, who testified as DW2 and DW3 respectively also confirmed to the court that the appellant and the complainant were living as man and wife. Counsel submitted that though there was no evidence of recent penetration, it was clear that the complainant's pregnancy was that of appellant and that the two had engaged in sexual exploits since August 2010.

On whether or not a minor can give consent to engage in sex, counsel for the State submitted that there was no law allowing for such consent. Counsel urged the court to dismiss the appeal and to confirm the conviction by the trial court and the attendant sentence of 20 years' imprisonment.

Mr. Minda in reply submitted that by referring to the fact that just because the appellant was married to the minor should not be used against him. Further he submitted that proving the prosecution's case was a duty for the prosecution and it was therefore erroneous for the trial court to have based conviction of appellant on the fact that the appellant and the complainant were living together as man and wife.

As a first appellate court, it is my duty to evaluate afresh the evidence that was tendered before the trial court and arrive at an independent determination remembering however that I have neither heard nor seen the witnesses. I have carefully analyzed the evidence and given due consideration to the petition of appeal and submissions made by respective counsel thereof. I have also carefully considered and weighed the judgment of the learned trial court. The issue for determination in this appeal are two:-

1. Was the age of the complainant proved conclusively?

2. Was there evidence proving that indeed there was penetration on the 27th November 2011 of the complainant's vagina by the appellant's penis?

From the evidence adduced before the trial court, PW1 (complainant) stated that her age was 15 years. PW2, the doctor who examined her and did her age assessment estimated the complainant's age to be between 15-16 years. However, she referred to a birth certificate which was not produced in court showing that the complainant was born on 30th December 1997 thus she placed her age as 14 years.

That notwithstanding, PW4, the complainant's mother stated that the complainant was born in 1995. The question is: what was the complainant's correct age?

In **Francis Omunoni -vs- Uganda, Court of Appeal Criminal Appeal No.2 of 2010**, it was held thus:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and 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 …."

Back home in **Faustine Mghanga -vs- Republic [2012] e KLR**, the Court held that:-

"Age may be proved by a birth certificate or particularly in the case of Africans, by the evidence of a person present at the birth."

In the instant case therefore, since the complainant's mother testified to the fact that she gave birth to the complainant sometime in 1995, her evidence cannot be rebutted as she was the one present at her birth. This would mean that as at 27th February 2011, the complainant was aged 16 years. The charge sheet put the age of the complainant as 15 years.

Secondly, on the issue of whether or not there was penetration of the complainant's vagina by the appellant's penis according to PW1's testimony, she stated:-

> **"He told me we sleep. He told me to remove clothes. I refused. He removed my blouse and pants. We slept together. We had sex together. He inserted his penis into my vagina. He did it up to 3.00 p.m."** (sic)

However, the evidence of PW1 was not corroborated by PW2 Dr. Onguti who stated:-

> **"It is common for there to be bruises after sexual contact. Recent Sexual contact can be established by hyphenation of the vaginal wall. We did not have those in this case."**

It was also the doctor's evidence that she examined the complainant sometime in March 2011 while the said defilement according to the charge sheet took place on 27th February 2011.

Justice Linet Ndolo faced with a similar predicament in the case of **Dominic Kibet Mwareng -vs- Republic [2013] e KLR** observed:-

> **"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the medical examination Report produced as MF1, there were no obvious tears on the complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence. The complainant in the instant case testified that the appellant was previously known to her. She even claimed that he had defiled her on two previous occasions although she had not reported the previous defilement."**
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> **"According to the charge sheet, the complainant was defiled in 20th June 2011 and from the medical examination report, she was examined on 24th June 2011 at which point she showed evidence of old penetration with no obvious tears. The court was therefore unable to relate**

> **the alleged defilement by the appellant on 20th June 2011 with the medical examination report. The court treated the complainant's evidence that the appellant had defiled her on two previous occasions with extreme caution as it could well have been intended to fill gaps in the prosecution case."**

In the instant case, there is clear evidence of the fact that the complainant had had sexual intercourse with the appellant prior to the 27th February 2011. The complainant did not report the said incidences and no wonder her hymen was already torn and she was now expecting a baby.

However in my humble view, the charge of defilement against the appellant is strictly constricted to 27th February 2011. The charge sheet does not mention the issue of pregnancy nor other sexual encounters between the appellant and the complainant. I am therefore not satisfied that the defilement which took place on 27th February 2011 was supported by medical evidence, and therefore the charges against the appellant were not proved beyond any reasonable doubt. It was thus unsafe for the learned trial magistrate to convict the appellant on the evidence on record.

Much more critical to the court in this matter is the fact that due to the discrepancies in the age of the complainant, the appellant was entitled to believe that the complainant was over 18 years old. DW2 testified that when he asked the complainant for her age, she told him that she was over 18 years old. DW3 also testified that the complainant's parents never told them (DW2 and DW3) that the complainant was under age.

In view of all the foregoing, I allow the appellant's appeal, quash his conviction and set aside the sentence imposed upon him. The appellant should therefore be set at liberty forthwith unless otherwise lawfully held.

Delivered, dated and signed at Kisii this 24th day of September, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Moracha h/b for Minda for the Appellant

Mr. Otieno (present) for the Respondent

Mr. Bibu - Court Assistant