REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.184 OF 2012

BETWEEN

SAMUEL ITHAGI MUHIRA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Being an appeal from original conviction and sentence in the SRM's Court at Karatina in Criminal

Case No 643 of 2010 dated and delivered on 23rd October, 2012– Hon. L. Mutai, SPM)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual offences Act No.3 of 2006**, the particulars of which were that on diverse date from 31st August 2010 to 5th September 2010 in Nyeri District of Central Province intentionally caused his penis to penetrate the vagina of C.W.N. a child aged 15 years.

2. He 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 which were that on diverse dates from 31st August 2010 to 5th September 2010 in Nyeri District of Central Province intentionally touched the buttocks, breasts and vagina of C.W.N. a child aged 15 years.

3. He pleaded not guilty to the charges, was tried, convicted and sentenced to serve 20 years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

1) That the Learned Trial Magistrate erred in law and fact in concluding that the prosecution had proved its case beyond any reasonable doubt despite the cogent defence raised by the appellant.

2) That the Learned Trial Magistrate erred in law and fact in relying on the evidence of the complainant C.W.N. which was contradicted in all material particulars by both the medical evidence by PW5 as well as the appellant's defence.

3) That the Learned Trial Magistrate erred in law and fact in dismissing the defence of the appellant which was probable and hence raised doubt in the prosecution's case.

4) That the sentence of Twenty (20) years imprisonment meted out to the appellant was harsh,

oppressive and excessive in the circumstances.

4. At the hearing of this appeal Mr. Muchiri appeared for the appellant while Miss Kitoto Learned State Counsel appeared for the State and opposed the appeal.

Submissions

5. On behalf of appellant it was submitted that the age of the complainant was never proved since there was no birth certificate produced. It was submitted that the age of the complainant was a very important factor which could not be treated casually by mere production of the birth certificate. It was further submitted that as per the evidence of the investigation officer the accused was found to have had sex with a child below 18 years whereas the charge sheet talks of a child aged 15 years. Failure by the prosecution to prove the age of the complainant beyond reasonable doubt was therefore fatal to the prosecution case.

6. It was submitted that there was contradiction in terms of the evidence adduced between the complainant and the clinical officer as to whether there was penetration. It was further submitted that the trial court should have looked at the demeanor of the complainant who switched off her phone for all the said five days and that there was possibility that the complainant was sexually active before.

7. It was submitted that the appellant in his defence had accommodated the complainant as a sister since she had problems with her mother and that the fact that they stayed in the same house did not mean that they had sexual intercourse. The appellant's defence was therefore not lawfully rejected.

8. Miss Kitoto for the State submitted that on the issue of age a baptismal card was produced to prove that the complainant was born on 31st January 1995. It was PW1's evidence that she went to the appellant's house and spent five days and on all those days they had sexual intercourse. The Doctor whoexamined her confirmed that her hymen was broken and there was vaginal tear which was evidence of penetration.

9. The prosecution case against the appellant was that PW1 C.W.N. then in form two (2) on 31st August 2010 at 7.00 p.m left home for Karatina where she met the appellant and went with him to his house at Muthua Estate where they slept together in one bed and had sex for all the five days. On 5th September 2010 at mid day she switched on her phone and sent a please call me to her cousin Jane in Nairobi who called her back and thereafter her mother called her and requested her to return back home.

10. Under cross examination she confirmed that she had known the appellant since childhood and that was the first time she was visiting him. PW2 Pauline Njeri Wamae testified that the complainant was aged 16 years at the time and on 31st August 2010 at 7.15 p.m she realized that she was not in the house. When she was called, her phone rung twice and then it was switched off. On 1st September 2010 she reported to Tumutumu police station and on 6th September 2010 went to Tumutumu hospital where she was examined and given P3 form. She further testified that the complainant was born on 31st January 1995 as per her baptismal card and that she confirmed having had sex with the appellant.

11. PW4 James Munuve testified that on 8th September 2010 the complainant and her mother took him to a place at Muthua in Karatina where she identified the appellant who had allegedly defiled her and after investigations they found that the accused had had sexual intercourse with a child below the age of 18 years.

12. PW5 Beline Okoth a clinical officer based at Tumutumu hospital examined the complainant with a history of defilement and on examination her system was normal. On examining her private part her hymen was found broken with vaginal tears. The labia majora and minora were normal and there was no presence of blood or discharge seen. Under cross examination she stated that she did not arrive at a conclusion of any sexual penetration.

13. When put on his defence the appellant testified on oath that he had known the complainant since childhood and on 31st August 2010 she telephoned him and asked to meet him which he did at 6.30 p.m. She told him that there had been a quarrel between her and her mother and therefore asked him to

accommodate her which he did for five days in which they watched movies together. On the fifth day the complainant called her relatives and then left after he escorted her to Karatina town. It was his evidence that he never had any sexual ordeal with the complainant.

14. In convicting the appellant the trial court had this to say:-

> **"The complainant's evidence that she met with the accused on 31st August 2010 when they proceeded to his house within Muthua Estate Karatina was clear and unchallenged by the defence both on cross examination and in defence evidence. Her evidence is entirely was clear. She was a candid witness, so I found her testified how for the five days she spent at the accused and with the accused they watched movies and they engaged in sex activities. As a 15 years old girl and in form 1, I found that she indeed fully understood the full meaning of sexual activities and that she knew exactly what she was talking about.....**
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> **The complainant was examined by a Okoth (PW5) a clinical officer Tumutumu hospital. Her evidence in chief was that complainant's hymen had been perforated. That she formed the opinion that the complainant had been penetrated via her vagina. On cross examination by defence counsel, she testified that she could not arrive at a conclusion of any sexual penetration. On re-examination she testified that she wasn't in a position to know the age of the case is very clear, that the complainant had engaged in sexual acts at the material time of examination …..**
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> **In the foregoing I am satisfied that the prosecution evidence had satisfied all the material ingredients of the case. <u>The prosecution evidence is plausible, otherwise overwhelmingly credible which evidence has tendered to link the accused person with the offence</u>."** [Emphasis added].

15. From the proceedings and submissions herein the following issues are identified for determination:-

a) Whether the complainant was defiled and if so whether by the appellant.

b) Whether the prosecution case against the appellant was proved beyond reasonable doubt.

c) Whether his conviction was safe.

16. From the evidence tendered by the prosecution, the appellant and the complainant were together for five (5) days in a single bed roomed house, the appellant confirmed that they watched movies together while the complainant testified that they slept together in one bed and had sex during all the five days whereas Mr. Muchiri submitted that the complainant was not an innocent girl taking into account the fact that she testified of having had sex with the appellant for five days and that the medical examination showed that her vagina was normal. The issue before the trial court was not the character of the complainant but whether the same had sex with the appellant.

17. From the medical report the complainant's hymen was broken and she was candid as stated by the trial court that she had sex with the appellant for the five days they were together. The sexual act might have been consensual but as the law stands she did not have the capacity to engage in sexual acts whereas torn hymen persee is not proof of defilement, the evidence of the complainant as stated by the trial court was clear and indeed fully understood the full meaning of sexual activities.

18. I therefore find that the conviction of the appellant was safe and would dismiss the appeal on conviction noting that the prosecution had proved their case against the appellant on the charge of defilement beyond reasonable doubt. The complainant admitted to her mother PW2 that she had sex with the appellant.

19. On the issue of sentence, from the evidence tendered which include the testimony of the complainant's mother PW2 and the baptismal certificate, it is clear that the prosecution had proved that the age of the

complainant was 15 years old as at the time of the commission of the offence noting that PW1 testified that she was 16 years old at the time of trial.

20. As per **Section 8 (2)** of the **Sexual Offences act No.3 of 2006** upon conviction where the child is aged between twelve and fifteen years one is liable to imprisonment for a term of not less than twenty years. I therefore find that the sentence was lawful and not harsh, excessive or oppressive and would dismiss the appeal on sentence.

21. However having taken into account the submissions by Mr. Muchiri advocate for the appellant and in particular the conduct of the complainant in leaving home, switching off her cell phone for the five days and switching it on when it suited her and declining to talk to her mother when she called her, I have also taken into account the fact that PW1 testified that she left home on 31st August 2010 at 7.00 p.m to meet the appellant whom she met and went with him to his house cooked and watched movies upto 12.00 a.m.

22. Whereas **Sexual Offences Act No.3 of 2006** was meant to protect the girl child and has indeed protected the same this being a court of justice and mercy ought to look at the sentence provided for as against the conduct of the parties involved and their respective ages and whether the sentence meted out would serve remedy the wrong in the most appropriate way.

23. PLO Lumumba in Handd book on Criminal Procedure in Kenya page 227 quote HL Packer:-

> **"There are two and only two ultimate purposes to be observed by criminal punishments: the deserved infliction of suffering on evil doers and the prevention of crime. The institution of criminal punishment draws substance from both ultimate purposes."**

24. With this in mind the question which this court ought to answer is what objective would the sentence herein serve having taking into account the conduct of the complainant herein?

25. Having taken into account that the appellant was at the time of the offence aged 22 years in form two and having sentenced to twenty years imprisonment, by the time when the same will be released from prison he shall have passed his useful age and whether the sentence imposed shall have served any useful purposes is debatable. I would therefore borrow the words of Justice E.K.O. Ogola in **Nairobi High Court Civil case No.161 of 2014 – Aljalal Enterprises Ltd -vs- Gulf Africa Bank Limited** that this is a court of mercy. **"Mercy however is given to a party who does not deserve any remedy."**

26. Whereas the appellant's conviction was safe I would extend mercy to the same and reduce the sentence meted to fifteen years as away of giving the appellant time to be a useful member of society after serving the sentence herein having noted that the complainant was 16 years as at the time of trial.

27. I would therefore dismiss the appeal on conviction but allow the appeal on sentence which I hereby reduce to fifteen years from the date of the judgment of the lower court.

Signed and dated this.....day of.....2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 18th day of December 2014

J. NGAAH

JUDGE.

In the presence of:

---------- for Appellant

---------- for Respondent