REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 247 OF 2011

PIUS ARAP MAINA…...……..……..……APPELLANT

VERSUS

REPUBLIC…….…...….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 97of 2008 Republic vs Pius ArapMaina in the Resident Magistrates' Court at Iten by B. N. Mosiria, Senior Resident Magistrate on 10th November 2008)

JUDGMENT

1. The appellant was convicted for the offence of attempted defilement of a girl aged seventeen years contrary to the Sexual Offences Act, No 3 of 2006. He was sentenced to ten years imprisonment. The appellant has appealed against his conviction and sentence. The appeal was filed out of time pursuant to leave of the Courtgranted on 27th October 2011.
2. There are seven grounds in the petition of appeal dated 2nd November 2011: first, that the evidence led did not support the charge; secondly, that the evidence tendered by the appellant was no taken into account; thirdly, that the complainant's evidence was not corroborated; fourthly, that the trial court misinterpreted the relationship between the appellant and complainant *visavis* the charge; fifth, that there was inconclusive medical evidence; six, that the trial court shifted the onus of proof to the appellant; and, finally, that the sentence meted out was manifestly excessive. Accordingly, the appellant contends that the charge was not proved beyond reasonable doubt.
3. At the hearing of the appeal, learned counsel for the appellant submitted that the complainant's evidence was not corroborated by the other five witnesses. He contended that PW2 and PW3 gave hearsay evidence. In the circumstances, there was no evidence connecting the appellant to the offence. Counsel imputed bad faith on the prosecution in preferring the charge. He submitted that there was no direct medical evidence to support the charge. Lastly, learned counsel submitted that the court made unfavourable remarks on the appellant's unsworn statement. By so doing, it was argued, the trial court shifted the onus of proof to the appellant.
4. The appeal is contested by the State.This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190, *Felix Kanda v Republic*Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).
5. The particulars of the charge stated that on 4th March 2008,at Keiyo district, the appellant attempted to defile [name withheld] a girl aged seventeen years. The appellant denied the charge. The complainant was the first witness (PW1). Before she was sworn, the court expressed an opinion that the complainant understood the nature of an oath. I agree with the trial court on that aspect. A girl of seventeen is *not* a child of *tender* years requiring any *voire dire* examination. See

Johnson Muiruri v Republic [1983] KLR 445.

6. That said age is always material for offences of this nature. See *John Wagner vs Republic* [2010] eKLR, *MachariaKangi v Republic*Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), *Samuel Chelelgo v Republic* Eldoret, High Court, Criminal Appeal 79 of 2012 (unreported). I have studied the record of appeal. The age of the complainant is stated in the charge sheet as 17. No evidence was led by the complainant or her sister (PW3) on *her* age. It could not certainly be established by the baptismal card or the mere entry of age in the P3 form. Considering that the complainant was almost of majority age, it was a material matter. I cannot then say conclusively that the complainant was a child as known under the Sexual Offences Act as read together with the Children Act. That was a material defect in the proceedings.
7. I will now turn to the evidence. PW1 stated that on 4th March 2008, she was asleep in her sister's house. She was on the bed with her sister's baby. Her sister had travelled to Nairobi.The house, a single room, is number 18. The appellant was a neighbor in room number 16.The appellant resided there with his wife. On the material day, the complainant said she had not locked the door. The appellant budged in and jumped into the bed. She protested. The appellant told her that she had refused to open for him the previous night. She testified as follows:

> *"when he threw himself to the bed he touched my waist. He told me he loved me and wanted to sleep with me….I saw from his actions he wanted to sleep with me."*

8. She made noise. The accused left but said he would return. She locked the door. She said that at 1.00a.m the appellant came back and knocked at the door. She did not open. She later informed her sister about the conduct of the appellant. Some neighbours also enquired about the noise. The complainant's sister confronted the appellant and his wife. The matter degenerated into a heated argument. The complainant's sister reported the matter to the police. The appellant was later arrested and charged with the offence.
9. PW2 is a neighbour to the complainant and appellant. He is an athlete. He was not there when the offence was committed. He was told about the incident by the complainant. His evidence to the court was thus classic *hearsay*. PW3, is the sister to the complainant. She had left the complainant with her child when she travelled to Nairobi. She was obviously not there when the incident occurred and relied largely on information from the complainant. Another case of *hearsay* evidence. She is the one who reported the matter to the police. She was issued with a P3 form. The police instructed her to call them if she saw the appellant. She saw him two days later and alerted the police. The appellant was arrested by PW7, a police constable at Iten Police Station. PW4 was the arresting officer and acted *upon* the information supplied by PW3. The circle of hearsay evidence was thus expanding. PW5 was the clinical officer at Iten District Hospital where the complainant was examined. The examination revealed *no* injuries or infections. No specimen was taken. In PW5's opinion, this wasan *"attempted rape and assault"*. She filled the P3 produced in court. From her examination, I find that there was clearly no *basis* to conclude that there was an *attempted* rape or assault.
10. The appellant made an unsworn statement. He denied touching the complainant. He testified that he and the complainant knew each other. He was welcome to visit their house and vice versa. He said he was living with his wife. He said the police beat him up. They had guns. They wanted him to seek forgiveness. He said he was framed up.
11. Section 9(1) of the Sexual Offences Act defines attempted defilement as follows;

> *"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."*

Under section 9 (3), the penalty for the offence is imprisonment for a term *not* less than 10 years.

12. Penetration on the other hand is defined in section 2 of the Sexual Offences Act as follows-

> *"'penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".*

13. The evidence of the complainant did not disclose *any* element of the offence of attempted defilement. Attempted defilement is a *failed* defilement. That is why the intention to *penetrate* a minor is a key ingredient. In the complainant's words, all that the appellant did was to touch her on the *waist* and proclaim he *loved* her. She formed the impression that the appellant wanted to *sleep* with her. Neither the *actusreus* nor the *mensrea* for the offence were thus established. Even if one were to accept her version that the accused said he wanted to sleep with her, it would still be miles apart from an intention to penetrate a child. The *ingredients* of the offence were thus not *proved* beyond reasonable doubt.
14. The complainant's evidence was not corroborated by any other witness. The reason is self-evident: all the other witnesses were not present. They merely narrated what they heard from each other. It was a tall pyramid of *hearsay* built atop the complainant's shaky evidence. Therein lay the danger. The appellant and complainant knew each other. The day before, he had bought her and the small child sodas. When this matter blew out, the complainant attempted to refund the 50 shillings he had spent; just in case the appellant thought she was indebted to him for the drinks. The appellant and complainant may have had different intentions in their friendship. Granted such history, it was *unsafe* to convict the appellant. See *Benard Ngaruiya v Republic* Nairobi High Court Criminal Appeal 238 of 2007 (unreported).The conduct of the appellant on 3 March 2008 wasmorally deplorable: but it did not amount to attempted defilement. I cannot say that the appellant was framed up; I have no such evidence. But the investigations and prosecution of the charge lacked firm legal foundation.
15. I have then looked at the judgment of the lower court. The learned trial Magistrate stated the following-

> *"The accused in his defence gave unsworn evidence which does not carry any legal weight and which cannot be believed"*

16. That was a serious misdirection. The burden of proof, subject to section 111 of the Evidence Act, rested with the prosecution throughout. The appellant was entitled, for example, to remain mute. An unsworn statement cannot be said to carry *no* legal weight. It is a safeguard granted to an accused person by section 211(1) of the Criminal Procedure Code. True, it is *not* evidence. See *Amber May v Republic* [1976-80] 1 KLR 1118. But it is not *worthless*. Fundamentally, a trial court should never make an adverse comment on an unsworn statement in the manner the learned trial Magistrate did. See *Johnson Muiruri v Republic* [1983] KLR 445.
17. It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused.For all of the above reasons, I find that the conviction of the appellant on the charge of attempted defilement was *unsafe*. I allow the appeal. I hereby quash the conviction and sentence. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr……for the appellant.

Mr…….……..…..…for the State.

Mr. P. Ekitela, Court Clerk.