REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 190 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 214 of 2011 dated 1st November 2011 in the Senior Resident Magistrate's Court at Kangema by Hon. D. A. Orimba - SRM)

STEPHEN IRUNGU MUTIRE……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The Appellant Stephen Irungu Mutire was convicted by the Hon. Orimba SRM for the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced upon conviction to serve 20 years custodial sentence.

He has appealed to this Court against the said conviction and sentence. In the Appeal, he set out *inter alia* Grounds as follows:-

1. That the learned Magistrate erred in facts and in law when Sharon a witness talked of hearsay.

2. That the learned Magistrate erred in facts and in law when the complainant and the doctor said sex was conducted with a condom and no specimen or injury was seen.

3. The learned Magistrate erred in facts and in law when the examination was done in Appellants absence.

4. The learned Magistrate erred in facts and in law when he ruled out that the conduct of the girl was bad and Appellant was a first offender and Magistrate gave a harsh sentence.

5. The learned Magistrate erred in facts and in law when there was a lot of contradiction between the complainant mother and Cpl. Fundi on arrest of Appellant.

6. The learned Magistrate erred in facts and in law when the Appellant was not informed in advance of the evidence the prosecution relied on i.e. witness statements not issued.

For hose reasons he held the conviction was very harsh and thus sought a diminishing of the sentence or acquittal

He was furnished with the certified proceedings and filed an Amended Memorandum Grounds of

Appeal. The additional grounds were given as follows:-

1. That the pundit Magistrate erred in both law and fact while convicting the Appellant on reliance of PW1 and PW2's evidence which some remained doubtful.

2. That the pundit Magistrate erred in both law and fact while convicting the Appellant on reliance of charges laid down in respect of the Appellant which were complicated as confirmed by the trial records.

3. That the pundit Magistrate erred in both law and fact while convicting the Appellant by neglecting his defence which was not challenged by the prosecution side as they were duty bound to.

The Appellant stated that what was there was not an act of defilement but of love. He stated that there was nowhere PW1 alleged that the Appellant abducted her or had invaded her in any way as means of rape or defilement. He urged that there was no indication as to what transpired after the issue of referral to the Attorney General was raised. He further submitted that the matter proceeded without response on the withdrawal of the matter contrary to Article 50(2)(a) and 54 of the Constitution. He said that even his defence alongside that of his defence witness clearly proved the relationship. He stated that PW1 was not taken for age assessment in spite of there being two different ages – 14 and 15 years. He argued that the charges were invalid and that it was contrary to the provisions of Section 214 of the Criminal Procedure Code thus occasioning a failure of justice toward the Appellant. He relied on the case of **Singilai v. R. [2004] 2 KLR 480**. He said that if the Magistrate had intrinsically examined the Appellant's defence in light of the prosecution case definitely he ought to have found the rules laid down in that case had not been complied with and the evidence adduced did not meet the defilement charges.

Mr. Njeru, State Counsel opposed the Appeal. He submitted that the evidence was sufficient and cogent. The complainant explained how she went to the Appellant's house twice and had sexual intercourse. The mother of the complainant (PW2) found the complainant in the house of the Appellant. The Appellant also agrees there was intercourse. Mr. Njeru submitted that any person below the age of 18 years cannot give consent. He did not do anything to confirm she was more than 18 years as required under Section 16 of the Sexual Offences Act. It was his responsibility to ascertain her age. The Section the Appellant was charged with provides 20 years as a minimum, the case he faced was not one where parties can agree and withdraw. Only the DPP can withdraw per Section 40 of the Sexual Offences Act. It was submitted that the issue of being underage was not raised before the Magistrate and was a mere afterthought. If he was underage he would have raised it thus Mr. Njeru urged that the evidence was cogent and the trial Magistrate saw the witnesses and believed them. The Court should dismiss the Appeal and uphold the sentence.

In an offence where there is an age in issue, the Court will look at the evidence and any consequences flowing therefrom would be guided by such analysis. PW1 the victim of the defilement stated on 6th September 2011 when she testified that she was aged 15. She later said she was born on 11th February 1996. She produced her birth certificate which was MFI II. The Appellant only asked her one question to which she replied that she had called the Appellant to tell him she was coming. If there was any doubts on her age, there was an opportunity begging. The Appellant did not raise any. A simple calculation of her age based on the birth certificate at the time of the incident is that she was 15 years. This accorded with her testimony.

As regards withdrawal of the charges, only the DPP can withdraw charges in tandem with the provisions of Section 40. The Act also provides that complainant means the victim and may also include the State. In this case, the offence was one to which there was no room for maneouver regarding withdrawal. It was the preserve of the State through the Director of Public Prosecutions (DPP). Appellant claims that he and PW1 were lovers. It may well be but the complainant was under the age of 18 years and thus she could not legally consent to sexual intercourse. Section 42 of the Sexual Offences Act provides as follows:-

42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

The complainant PW1 was a minor and was incapable of giving consent.

I have evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate and find that the said Magistrate did not err either on the law or facts. The conviction was safe and the sentence of 20 years lawful. I find no merit in this Appeal and dismiss it in its entirety.

Dated, signed and delivered this 29th day of November 2013

Nzioki wa Makau

JUDGEa