THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 27 OF 2010

PMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Cr. Case No.1308 of 2005 by the Hon. H. M. Nyaberi, Senior Resident Magistrate, in Mwingi delivered on 24th November, 2008)

JUDGMENT

This appellant, **PMM** was charged before the Senior Resident Magistrate's court at Mwingi with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the charge were that on 15th August, 2005 in Mwingi District within Eastern Province, he had carnal knowledge of **VM** a girl of the age of 16 years. The appellant denied the charge and was tried.

The prosecution case was heard by **Mr. JK Ngarngar** (RM) whereas **HM Nyaberi,** Senior Resident Magistrate heard one prosecution witness and defence case.

The complainant, **VM** (PW.2 a girl aged 8 years gave unsworn evidence and stated that on 15th August, 2005 she was at the farm with her younger siblings when the appellant who is her step brother came and got hold of her. He took her to a river, removed her pant and his trouser and defiled her. She screamed and the appellant left her without saying anything. She went and reported the incident to her mother (PW.1) who subsequently reported to the chief, (PW.3).

The mother of the complainant **SM** stated in her testimony that the complainant was a step sister to the appellant. The complainant had informed her that she had been defiled by the appellant. When she examined her private parts she saw blood as well as on her pant. She reported the incident to area chief and the following day, Mwingi Police Station. The complainant was finally referred for treatment to Mwingi District Hospital where she was admitted and discharged the following day. A P3 form was completed by **Felix Mulwa** (PW.4), a Clinical officer.

PW.3 **Mr. Paul Musili Katu** Assistant Chief, Maseki Sub-location in his evidence confirmed that he had received a report of defilement of a girl called **VM**. He visited the complainant's home as well as the scene of crime. He stated that the scene of crime appeared disturbed. On interviewing the appellant, he admitted having committed the offence. He then arrested him.

Felix Mutua (PW.4) a Clinical Officer at Mwingi District Hospital examined the complainant and found

that she had torn labia majora with moderate pus cells. He came to the opinion that she was defiled and infected with sexually transmitted disease and in particular gonorrhea.

Put on his defence, the appellant denied the charge and stated that on 14th August, 2005 he had gone to Kimangao trading centre. At about 5.00 p.m. he came back home and retired to bed. At about 2.00 a.m., he heard the chief waking him up. He opened the door and found him with several people. He was beaten and forced to admit to the offence. He was then brought to Mwingi Police Station where he stayed for 2 weeks. When he raised the issue with the OCS, he was taken to Kyuso Police Station and on 13th October, 2005, he was arraigned in court.

The learned magistrate having evaluated the evidence on record albeit carefully came to the conclusion that the appellant was guilty as charged. Accordingly, he convicted him and sentenced him to twenty five (25) years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on four (4) grounds to wit; that the learned magistrate erred in law and fact by convicting him without enquiring as to why his fundamental rights were violated by the police who kept him in custody for a period in excess of 24 hours contrary to article 49(1) of the constitution, the charge was defective, the defence was not given due consideration and finally, the sentence imposed was manifestly harsh and excessive.

When the hearing of the appeal commenced before me on 15th February, 2012, the appellant opted to canvass the same by way of written submissions. I have carefully read and considered them.

On her part, **Mrs. Gakobo**, learned Senior State Counsel orally submitted in opposing the appeal that the appellant was initially charged with defilement under the Penal Code. But upon conviction, he was sentenced under the Sexual Offences Act. This was a mistake which this court ought to correct. The offence was committed in broad day light. The complainant recognized the appellant who was known to her as a step brother. This fact was confirmed by PW.1. Thus the evidence on record was credible and sufficient to sustain a conviction.

I have anxiously considered the evidence on record, the judgment of the learned Senior Resident Magistrate, the grounds of appeal, the rival written and oral submissions as well as authorities cited. First, this is a first appeal and the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analyzed afresh.

The fate of this appeal will however, be determined on certain technical aspects. Those aspects are captured in ground 2 of the appeal. I do agree with the appellant that the charge sheet as drawn was and is still incurably defective because it omitted in its particulars, the magical words ***"... had unlawful carnal knowledge of the complainant***" It is the unlawful act of carnal knowledge of the complainant that creates the offence. A charge is drawn among other reasons as a means of making known to the accused person the offence with which he is charged. This is to enable him to fully prepare his defence. The law prescribes the manner in which the charge is to be framed. It contains three basic parts: the commencement, the statement of the offence and the particulars of the offence. The particulars must be clear enough to enable the accused person to know the offence he is charged with. As stated in the case of **Nahashon Marenya Vs. Republic**, **Court Appeal No.786 of 1982 (UR):**

> ***"... Charges and particulars should be clearly framed so that the accused person knows what they are charged with, and proper references should also be made. Otherwise confusion may arise and if confusion arises, it cannot be said that failure of justice may not have been occasioned...."***

In my view, it is fundamental that every charge should allege all the essential constituents of an offence. In the present case, since "***unlawfully and carnally knowing a girl...***" was central pillar in the charge of defilement, under the Penal Code then, these words ought to have appeared in the particulars of the charge sheet. In their absence, the charge sheet can only be held to be defective. This issue was

extensively covered in the written submissions of the appellant. I would have expected from the State counsel some form of rebuttal. None was forthcoming however. If anything, the State appears to have given the issue a wide berth.

From the evidence on record, it is common ground that the appellant and complainant were siblings. The complainant was a step sister to the appellant. That being the case was it proper, for the appellant to be charged with defilement instead of incest? I do not think so. The evidence on record clearly point to the offence of incest as opposed to defilement.

Then there is the aspect of the complainant on examination by PW.4 was discovered to have sexually transmitted disease, in particular Gonorrhea. However, the prosecution failed to take the appellant for medical examination of the same to prove that it was him who infected her with the disease. Failure by the prosecution on this score creates doubts in their case. Those doubts must be resolved in favour of the appellant.

From the set of facts on record, I think that the defence advanced by the appellant was plausible. Right from the word go, the appellant maintained that there existed a grudge between the mother of the complainant and the appellant's mother. Indeed PW.1 conceded to that fact whilst under cross-examination by the appellant. That being the case, it behoved the learned magistrate to approach the evidence of PW.1 and PW.2 with a lot of care and circumspection. I do not think that the learned magistrate can be said to have treated the evidence of the 2 witnesses as aforesaid. It is possible that this case could have been framed against the appellant by the complainant's mother. After all he was a mere step son to her.

On the whole, I am not satisfied that the appellant was convicted on sound evidence. Accordingly, his appeal is allowed, conviction quashed and sentence imposed set aside. He shall be set free forthwith unless otherwise lawfully held.

Ruling dated signed and delivered in Machakos this 29th day of February, 2012.

ASIKE-MAKHANDIA

JUDGE