REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 502 OF 2010

STEPHEN KAMAU MUNGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 946 of 2010 of the Principal Magistrate's Court

at Garissa by J.N. Omyiego – Principal Magistrate)

JUDGMENT

The appellant was convicted for the offence of Attempted Defilement **contrary to section 9 (2) of the Sexual Offences Act**. He was then sentenced to 10 years imprisonment.

When convicting the appellant the learned trial magistrate held that the complainant was;

"honest, truthful and reliable, from her testimony. Any discrepancy that she reported having been defiled to PW 4 is understandable as lay people do not know or distinguish between an attempt and actual act."

The trial court also made the following observation concerning the complainant;

"The fact also that she said she had never had sex before and yet the medical report by PW 5 says she had her hymen broken is not enough to conclude that she had previous sexual encounter. It has been proven that due to one's lifestyle, including vigorous exercise, girls naturally lose or break the hymen without necessarily engaging in sex."

Finally, the court held that because the complainant was found in the appellant's rear room, where she was not ordinarily expected to be at the material time;

"The only logical conclusion is that she was there for an illegal or unlawful purpose."

For those reasons, the court concluded that the Sexual Offences Act does not recognize undue technicalities which would subvert the ends of justice. Therefore, the court determined the case on the basis of substantive justice, without recourse to undue technicalities.

From the analysis conducted by the trial court, there was definitely some discrepancies in the evidence tendered by the prosecution witnesses.

The trial court also noted that whereas some witnesses talked about actual defilement, others talked about attempted defilement.

However, there was no attempt made by the prosecution to explain the said discrepancy.

The complainant, **(PW 1)** said that the appellant wanted to defile her. She was categorical that the appellant did not have sex with her.

According to **PW 1**, the appellant had not yet removed his trousers. However, he had pulled up **PW 1's** skirt and also lowered her pant to her knees. He then fondled her breasts.

During that experience **PW 1** was struggling with the appellant. But the whole thing was interrupted by the complainant's father, who arrived at the appellant's Bookshop, at that moment.

PW 1 then followed the appellant to the front part of the Bookshop; that was her evidence.

However, her father, **(PW 2),** testified that **PW 1** remained at the rear part of the shop until she thought that he (the father) had left the shop. She then tried to sneak out, only to run into her father.

PW 2 was told by **PW 1** that **PW 1** had been sent away by the catechist because PW 1 did not have money.

But when **PW 2** went with **PW 1** to verify the truth, **PW 2** found that the catechist had actually not arrived at the church.

It is then that **PW 2** slapped his daughter, insisting that she tells him the truth. **PW 2** then said that the appellant had defiled her.

During cross-examination, **PW 2** said that he thought that the touching of her daughter's breasts amounted to defilement.

According to **PW 2**, although his daughter had told him that there had been no sexual intercourse between her and the appellant;

"The first report indicated that my daughter's hymen was broken but I do not know if it was recent."

It is clear that on the one hand **PW 2** was acknowledging that his daughter's hymen was not intact. That, by necessary implication, was meant to imply that there had been penetration of the girl's female genitalia.

Why would I say so, instead of accepting the theory advanced by the trial court, concerning the other possible ways through which girls could lose their hymens?

It is because the doctor who examined the complainant testified that **PW 1** had told her that she had been sexually active.

The doctor also testified that the complainant had a whitish discharge that was foul smelling. She explained that the said discharge could be as a result of ***candida bacteria***.

In effect, the trial court had advanced a theory that was not supported by the evidence tendered before it.

In **OKALE Vs REPUBLIC [1965] E.A. 555, at Page 557**, the Court of Appeal said;

"With all due respect to the learned trial Judge, we think that this is a novel proposition, for in every criminal trial a conviction can only be based on the weight of actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial Judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches. This theory by the learned Judge was inconsistent with the evidence of Joyce that the injury on the head was caused by the second appellant with an axe, neither is it supported by the medical evidence."

In similar vein the theory regarding the loss of the complainant's hymen was not supported by the evidence tendered. If anything, the said theory was inconsistent with the medical evidence tendered by the doctor **(PW 5).**

Considering that the doctor testified that the complainant had been sexually active, whereas the complainant alleged that she had been a virgin that was another reason why the trial court's assessment of the complainant was not re-assuring.

If the complainant did struggle with the appellant, that would imply that whatever the appellant wanted to do to her was against her will. Indeed, the complainant even said that her assailant held her mouth, to stop her from screaming. If she had really wanted to scream, there was no better opportunity for her to do so, than when her assailant left her alone.

I am making the point that the complainant's conduct is not consistent with her evidence.

Of course, I am fully alive to the fact that a child cannot consent to having sex with an adult. The law presumes that the child was incapable of giving consent. That is why the offence of defilement is deemed to have been committed when there has been an act of penetration with a child.

In other words, there cannot be any lawful act of sexual penetration of a child. All such acts are unlawful.

In this case, there was no act of penetration. At worst, there was an attempt at penetration.

The evidence in that regard was tendered by the complainant alone. And, as I have already indicated herein, the complainant struck me as someone who was unreliable. Therefore, it would be unsafe to uphold the conviction.

Finally, and in any event, the charge was defective. The respondent conceded as much.

Mr. Mulati was right to have made that concession because the statutory provision under which the appellant was charged does not create any offence.

Section 9 (2) of the Sexual Offences Act simply stipulates the sentence to be handed down to a person convicted for committing the offence of Attempted Defilement.

By charging the appellant under the wrong provision of the law, the prosecution made a fatal error. That alone is sufficient to upset the conviction.

However, Mr. Mulati, learned state counsel, did ask this court to order for a retrial.

That application was opposed by Mr. Oundu, the learned advocate for the appellant.

Having re-evaluated all the evidence on record, I do share the view expressed by the appellant, that the evidence available cannot sustain a conviction. Therefore, if a retrial was undertaken, that might prejudice the appellant because the prosecution would have been accorded an opportunity to fill-up the loopholes in their case.

In **FATEHALI MANJI V. THE REPUBLIC [1966] E.A. 343**, the Court of Appeal made it clear that;

"....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. . . "
In this case, the error in the charge sheet is wholly attributable to the prosecution. The first trial was neither illegal nor defective.

In **EKIMAT Vs REPUBLIC [2005] 1 KLR 182, at Page 187,** the Court of Appeal quoted with approval, the following words of the East African Court of Appeal, in the case of **AHMED SUMAR Vs REPUBLIC [1964] E.A. 481, at page 483;**

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. "

Therefore, as the error in the charge sheet was wholly attributable to the prosecution, this court cannot order for the retrial of the appellant.

In the circumstances, I allow the appeal. The conviction is quashed and the sentence set aside. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 16th day of February, 2012

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FRED A. OCHIENG
JUDGE