REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 116 of 2010

MUTUKU MARTIN……APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

(Being an appeal from the original convicting and sentence in Kitui Principal Magistrate's Court Criminal case No. 1199/2009 by Hon. B.M Kimemia SRM, on 26/5/20010)

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JUDGMENT

The appellant was charged before the Principal Magistrate's Court at Kitui with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act. Particulars being that between 25th –28th October, 2009 at unknown times at ***{particulars withheld}***, Kitui District, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of **A. K. M.** a girl aged 14 years. In the alternative he was charged with Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. Particulars once again being that between 25th - 28th October, 2009 and in similar circumstances, the appellant unlawfully had an act of indecency with **A. K. M.** a girl aged 14 years by touching her private parts namely vagina. The appellant denied both counts and his trial ensued.

The prosecution case in brief was that PW1, the mother of the complainant on 29th October, 2009 noticed that her daughter who had earlier gone to church disappeared. She received information though that she had been seen with the appellant. She reported the occurrence at Kitui Police Station and a search was mounted. Eventually the appellant and the complainant were found at the appellant's aunt's home. They were all apprehended. The complainant was taken thereafter to Kitui District Hospital where she was examined and P3 form filled. The complainant was 14 years old.

PW2, **A. K. M.,** the complainant confirmed that on 25th October, 2009 at about 12.30pm, she went to church and on her way home met the appellant who told her to go to his home. She agreed. Her sister later went for her but she ran away again and returned to the appellant's home where she stayed overnight. The appellant called her mother (PW1) the next day and told her that the complainant had said she would not go home. However, PW1 impressed upon him to return her into her custody. However, the 2 moved to the appellants Aunt's home and stayed there for 3 days where she was sleeping with the appellant's cousin, a girl by the name **M.** It was from there that they were arrested and taken to hospital. She claimed that on the 1st day, she slept with the appellant the same way a woman sleeps with her husband and they had sex and that they did not have sex again thereafter. She complainant knew the appellant as her boyfriend.

PWIII, **P.C Japheth** interrogated the appellant who stated that he had married the complainant. He took

him for examination and subsequently charged him with the offences.

PWIV **P.C Woman Salome Makhulo** escorted the complainant for examination and the filing of the P3 form.

PWV, **Martin Njue** a clinical officer testified on behalf of his colleague who had left the hospital and who had examined the complainant. His findings were that the hymen was absent, no bruises and no discharge, that the lab results showed no spermatozoa, no pus cells and HIV test was negative. However, he came to the conclusion that there was no enough evidence of defilement. That the appellant too was examined and was found to be HIV Negative and the P3 form filled.

Put on his defence the appellant elected to give a sworn statement and called 2 witnesses. He stated that the complainant followed him and refused to go back home saying she would commit suicide if he was to force her to do so. That this case was just a mere frame up.

DWII the father of the appellant confirmed that he had seen the complainant prior. She used to come to his home t to see the appellant. He had complained to the authorities to no avail. DWIII the brother of the appellant stated that he did not know why the appellant was charged.

Having carefully considered the evidence on record. The learned magistrate was convinced that the prosecution had established the charge of defilement against the appellant. She accordingly convicted him and sentenced him to 20 years imprisonment.

It is against this conviction and sentence that the appellant through **Messrs Mulinga Mbaluka** lodged this appeal on 12 grounds to wit that:-

"**1**. ***The learned trial magistrate erred in fact and law by failing to acknowledge the appellant did not commit the offence of defilement and indecent act with a child as charged.***

2. The learned trial magistrate erred in fact and law by failing to appreciate the appellant's defence.

3. The learned trial magistrate erred in fact and law by failing to take into consideration the appellant's defence.

4. The sentence meted on the appellant is harsh and excessive.

5. The learned trial magistrate erred in law and fact when she failed to appreciate the complainant was intimated (sic) to complain against the appellant.

6. The learned trial magistrate misdirected herself and erred in both law and fact when she failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellant.

7. The learned trial magistrate misdirected herself when she failed to appreciate the clinical officer's evidence that there was no enough evidence of defilement.

8. The learned trial magistrate misdirected herself in law and fact by admitting the evidence of clinical officer who did not fill the P3 form.

9. ***The learned trial magistrate misdirected herself and erred in law and fact by admitting clinical officer's evidence instead of medical officer (doctor) as it is required in sexual offences.***

10. That the decision of learned trial magistrate was against the weight of the evidence.

11. The learned trial magistrate erred in law and fact when she considered the P3 form filled by

clinical officer when P3 form was filled by a doctor.

12. The learned trial magistrate erred in law and fact when she sentenced the accused without giving reasons for the sentence.

When the appeal came before me on 12th July, 2012 for hearing. **Mr. Mbaluka** and **Mr. Mukofu,** learned counsel for the appellant and State respectively agreed to urge the same by way of written submissions. The same were duly filed and exchanged. I have carefully read and considered them.

As a first appellate court, it is a statutory duty and command of precedent that this court must itself consider and evaluate the evidence before the trial court and make its own findings and draw its own conclusions.

On my own assessment of the evidence on record, I am not persuaded that there was sufficient evidence to convict the appellant. None of the witnesses called by the prosecution save for the complainant, testified in a manner to show that the complainant was indeed defiled. Even the testimony of the complainant linking the appellant to the crime needed to be treated with a lot of caution and circumspection considering that she was literally forced to testify against the appellant and against her with. There is evidence that all was not well between the complainant and her mother. She had infact decided to run away from her mother's violence. The appellant came in handy. He came to her rescue. The appellant had even the courtesy of contacting the complainant's mother with regard to the whereabouts of her daughter. I do not think that this is the kind of a person who would all of a sudden turn into a beast and prey upon the innocent complainant. The complainant's own testimony with regard to having had sex with the appellant, if at all attests to this fact. It comes much later as she winds up her testimony. Indeed it appears that she was even prodded into saying that she had sex with the appellant on the first night.

The foregoing misgiving notwithstanding, there is the evidence of the clinical officer who was categorical that though the hymen was absent, there was no enough evidence of defilement. One is therefore left wondering how the trial magistrate ended up convicting the appellant of a crime that had not properly been proved, due to lack of enough evidence. In sexual offences, medical examination evidence is very crucial. If such evidence creates doubt in the mind of the trial court, that doubt must of necessity be resolved in favour of the appellant. That is what the trial court in this case should have done. Instead, the trial court took the view mistakenly though, that the absence of the hymen was corroborative of the sexual banter between the appellant and the complainant. The absence of the hymen is explainable and must not necessarily be linked to sexual escapades. She may have innocently broken it whilst playing or even scratching. The trial court also tried to explain away the absence of spermatozoa by stating that this may have been because of the time it took the complainant to be examined. No such evidence was led by the prosecution. It is dangerous for a court to advance its own theory regarding certain incident of event. It is better to leave the evidence on record to speak for itself.

Penetration is an essential ingredient of the offence of defilement. The offence cannot suffice if there is no cogent and credible evidence showing that penetration indeed occurred. There must in essence be penetration of a sexual organ of a person to the genital organ of another. In the instant case, there was no such evidence. If anything, PW5 poured cold water on the allegation when he stated that though the hymen was absent, there was no enough evidence of defilement. Considering the harsh and strict punishments under the Sexual Offences Act, there must be strict construction of the ingredients establishing the offences under the Act. PW5 went on to state that he noted no bruises and no discharge on the complainant's vagina and no spermatozoa in her. If indeed the appellant had stayed with the complainant for the days alleged in the charge sheet, could not the clinical officer have traced discharge of spermatozoa? The trial court however glossed over this issue by advancing the theory that since it was established that the complainant and appellant had stayed together and indeed slept together, they must have had sex, hence penetration can be assumed. Again, the trial court here advanced its own theory which was unsupported by evidence. There is no room for assumptions and or speculations in criminal proceedings. It is the bounden duty of the prosecution to prove each and every element of the offence. It is even possible for people of opposite sex to sleep together but not to have sex. I have no doubt at all in

my mind that the evidence against the appellant was choreographed by complainant's mother for the reasons which are not clear or readily apparent. What is certain is that there was no love lost between the complainant and her mother. Indeed for that reason the complainant had ran away from home. Could this case have been framed by the complainant's mother so as to get her back into her custody? Perhaps!

For all the foregoing reasons, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty at once unless otherwise lawfully held.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **NOVEMBER, 2012.**

GEORGE DULU
JUDGE