REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 213 of 2011

REUBEN NGOZI ………………………………………………. APPELLANT

VERSUS

REPUBLIC ………………………………………………………. RESPONDENT

(From the original Conviction and Sentence in the Criminal Case No. 455 of 2010 of the Principal Magistrate's Court at Voi: ***E.M. Muriithi – S.P.M.)***

JUDGEMENT

The Appellant **REUBEN NGOZI** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at Voi Law Courts. The Appellant was arraigned before the trial court on 16th June 2010 facing a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) OF THE SEXUAL OFFENCES ACT, 2006.** The particulars of the charge were that:

"On diverse dates of 7th June 2010 to 14th June 2010 at {particulars withheld} in Voi District within Coast Province, unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of R. M. a girl aged 17 years"

In addition the Appellant faced an alternative charge of **INDECENT ACT WITH A GIRL CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The appellant entered a plea of ***'Not Guilty'*** to both charges and his trial commenced on 26th July 2010. The prosecution led by **CHIEF INSP. KITUKU** called a total of five (5) witnesses in support of their case. The complainant **R. M.** was a primary school student whose age was assessed to be 17 years. **PW2 MWALEMU MWANGORO** the father of the complainant told the court that on 4th June 2010 he sent the complainant to buy items at the shop. She went and returned. The complainant prepared supper and the family ate and slept. The following day 5th June 2010 **PW2** woke up at 6.00 A.M. and found the main door of his house open. He realized that the complainant was not inside the house. Later at about 7.00 A.M. two female neighbours came and informed him that the girl had been married in their compound. **PW2** reported the matter to the Children's Department at Voi. **PW3 FAIZA SALIM** who is a community officer in Voi told the court that after receiving the report they summoned the Appellant who was said to be living with the complainant in his home. The complainant was taken for medical assessment and was found to be six (6) months pregnant. The Appellant was thereafter arrested and charged.

At the conclusion of the prosecution case the Appellant was ruled to have a case to answer and was placed onto his defence. He gave an unsworn statement in which he denied having defiled the complainant. On 7th March 2011 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of Defilement and thereafter sentenced him to serve fifteen (15) years imprisonment. Being aggrieved by both his conviction and sentence the Appellant filed this

present appeal.

The fact that the complainant was a school girl aged 17 years cannot be in any doubt. An age assessment report was produced in court as an exhibit **Pexb1** together with a letter from **{particulars withheld} SECONDARY SCHOOL** confirming that the complainant was a Form 1 student in the school. Similarly the fact that the complainant had been defiled cannot be disputed. The very fact that upon medical examination she was found to be six (6) months pregnant is undeniable proof that she had been involved in sexual relations with some person.

The question that is pertinent here is the identity of her defiler. Not surprisingly there was no eyewitness. Sexual offences are often shrouded in secrecy thus often times there will be no eyewitness to the incident. The only person who can state with certainty who defiled her is the complainant herself. It is this certainty which I find to be sorely absent in the evidence of the complainant. In her evidence-in-chief on 26th July 2010 at page 7 line 10-20 the complainant states as follows:

"On 7/6/10 I went to the aunt for Reuben [the Appellant]. She was our neighbor. She is called S. I stayed there for one week. Reuben lived there Reuben is the accused.

I had never spoken to Reuben before. I never slept with him. I slept in his aunts home."

The complainant here states categorically that she **did not** engage in sexual relations with the Appellant. The complainant goes further to reiterate her words at page 7 line 17 when she states:

"I was taken to Moi District Hospital Voi. I was found pregnant. That pregnancy was for Ben. Ben used to work in the village. I told the police the pregnancy was for Ben, not Reuben"

Further yet the complainant goes on to claim that she was forced to implicate the Appellant. She states at page 7 line 21:

"I was aware I was pregnant. It is true I said that accused and I had lived together. It is the police who insisted he was my husband so I agreed. I was not beaten up. Its true I even said he had been my boyfriend since December 2009."

For avoidance of any doubt the complainant states very categorically at page 7 line 26:

"Reuben and I never had any sexual intercourse"

The complainant though being under 18 years was a minor but she was not a child of tender years. She was a Form One student and was well aware of the fact that she was speaking under oath. I have no doubt that the complainant was fully aware not only of her words but also of the consequences thereof. The court prosecutor possibly alarmed by the utterances of his key witness sought an adjournment after the complainant completed her testimony in order to ***"take future [further] instructions on the matter".*** Thus the cross-examination was forestalled.

Surprisingly on 22nd October 2010 a full three (3) months later the complainant comes back to court this time singing a totally different tune. This time she states at page 13 line 8:

"Its not true that I first came to your [the Appellant's home on 20/4/2010. It is true I had been chased from school for school fees. It was actually on 12/5/2010. I came to your home and we had sexual intercourse. It was not our first time to have sexual intercourse then …… It is not true that I had another boyfriend called Ben. It is true I said the pregnancy is for Ben. The truth is that the pregnancy was not for you. I had 2 boyfriends so I cannot know whose baby it is"

What happened to make the complainant change her story so drastically within a space of only three (3) months? The possibility that she had been coached and/or persuaded to alter her testimony cannot be ruled out. Whereas initially the complainant totally denied having been defiled by the Appellant, she later

changes her story and claims that it was the Appellant who defiled her. Which is which? What is the true version of events? This back and forth over the identity of her defiler raises very serious doubts about the veracity of the complainant. Who was this Ben? Why did police not investigate this angle to establish what if any dealings this Ben may have had with the complainant.?

In his judgement at page 3 line 20 the trial magistrate states:

"I find that the evidence of PW1 that she had sexual intercourse with the accused during the period 7/6/10 to 14/6/10 to be unchanged"

With respect this was certainly not the case. The complainant made one statement in examination-in-chief only to completely change her position under cross-examination. The trial magistrate erred by failing to take into account such a major anomaly. Notwithstanding the strength of any other evidence it is my view that based on the inconsistencies in the complainant's evidence no conviction would be tenable. The complainant was clearly an unreliable witness. The fact that she was pregnant is not proof that the Appellant had defiled her. The complainant herself named this Ben as the father of her unborn child. From the evidence of the complainant she herself appears to be uncertain about the identity of the man who defiled her. As stated earlier whilst such confusion may be understandable in a child of tender years, in a person aged 17 years I do not accept that any such confusion would arise. For this reason I find that the conviction of the Appellant by the lower court was unsafe as the evidence on identity is neither positive nor reliable. As such I do hereby quash the Appellant's conviction. The 15 year term of imprisonment is also set aside. This appeal succeeds. The Appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 28th day of November 2012.

M. ODERO
JUDGE

In the presence of

Mr. Onserio for State

Appellant in person