IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.41 OF 2011

JOTHAM OMONDI ONGUR …..…..……..….APPELLANT

VERSUS

REPUBLIC……..……..…..…RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.97 of 2006 by Hon H.M. Nyaga, Senior Resident Magistrate, dated 17th November, 2006)

JUDGMENT

The appellant, **Jothan Omondi Ongur**, was charged, in the main count with defilement of a girl under the age of 16 years contrary to **section 145(1)** of the **Penal Code**.

In the alternative, he was charged with indecent assault on female contrary to section **144(1) Penal Code**. It was alleged that on 20th April, 2006, at Manyani estate in Nakuru the appellant unlawfully had carnal knowledge of the complainant, **MWW**.

It was the evidence of **MWW** that on 19th April, 2006 she was visiting the appellant who was her boyfriend when her mother, **PW5** went for her but she refused to leave the appellant's house. **MWW** spent the night and had sex with the appellant.

The next day her mother came with police officers and arrested the appellant, **MWW** and another young man, **PW2, David Owino**. **MWW** and **David Owino** were set free while the appellant was detained by the police. **MWW** was subjected to medical examination by **PW3, Dr. Paul Gachunga** who gave the age of **MWW** as 14 years. The doctor found that her hymen had been broken earlier. He also noted the presence of seminal fluid in her private part. He concluded that **MWW** had had sexual intercourse and further that it was not her first time.

The appellant was charged. In his defence the appellant stated that he was sharing a house with **PW2 David Owino**; that on the 19th April, 2006, he returned home and found **David Owino**, **MWW** and her mother **PW5**; that **MWW** was **David Owino's** girlfriend; that he told **David Owino** not to invite **MWW** to their house as it was bringing trouble to them; that **MWW** declined to go with the mother; that on 22nd April, 2006, **David Owino** came with **MWW** to the house. Shortly thereafter the complainant's mother came with the police and arrested the three of them. The complainant's mother and the police demanded money from him but since he did not have the amount of money they demanded he was charged. He denied any relationship with **MWW**.

The learned magistrate weighed the foregoing evidence and found that it disclosed the commission of the offence charged in the main count against the appellant and sentenced him to eight years imprisonment.

The appellant was aggrieved and through counsel brought this appeal on nine grounds as follows:

i) that there was no evidence against the appellant

ii) that the court failed to consider that the appellant was a minor

iii) that the evidence against the appellant was not corroborated

iv) that the prosecution evidence was contradictory

v) that the trial court shifted the burden of proof to the appellant

vi) that the appellant's defence was ignored

vii) that the sentence was excessive and harsh

Learned counsel for the respondent conceded the appeal with regard to sentence on the ground that **MWW's** conduct ought to have been considered in imposing the sentence. He urged the court to reduce the sentence.

Both counsel relied on **Athman v R**, Criminal Appeal No.168 of 1996 and **Musyoki v R** Criminal Appeal No.24 of 1981. In both cases the court considered the conduct and morality of the complainants and reduced the sentence.

I have considered the evidence on record, submissions by both counsel and the above authorities. There is no doubt from the evidence that **MWW** was under the age of 16 years. Her age at the time of the hearing was given as 14 years. There is also medical evidence that she had been engaged in sexual intercourse as her hymen was broken and there was seminal fluid in her private part.

The main, indeed, perhaps the only question that fell for determination in the court below which is also the crux of this appeal is whether the appellant had sexual intercourse with **MWW**.

MWW was categorical that she was a girlfriend to the appellant and that they had consensual sexual intercourse. The appellant's house mate, **David Owino** confirmed that **MWW** was the appellant's guest. **PW4, Beatrice Nyaboke**, the wife of the caretaker of the appelllant's house confirmed that the appellant came with **MWW** and introduced her to Beatrice Nyaboke as his wife. **MWW's** mother traced her in the appellant's house, a fact also confirmed by the arresting officer. Like the learned trial magistrate I find that there is overwhelming evidence that the appellant was with **MWW**.

Before the amendment of section **145(1)** of the **Penal Code** by **Act No.5 of 2003** increasing the age of the victim of defilement from **14** to **16** years, the punishment was 14 years imprisonment with hard labour. **Act No.5 of 2003**, apart from increasing the age as stated, also enhanced the punishment to life imprisonment. An accused person would be entitled to an acquittal if he satisfied the court that he reasonably believed that the girl victim was above the age of 16 years or was his wife. **Section 145** has been repealed by the **Sexual offences Act**.

The appellant did not rely on any of the above two defences, namely that he reasonably believed **MWW** was over **16 years old** or that he thought she was his wife. He appeared to suggest that **MWW** was **David Owino's** girlfriend. That defence lacks credibility in view of the overwhelming prosecution evidence.

The learned magistrate believed **MWW's** evidence and I too believe it, that the appellant had sexual intercourse with **MWW**. It is immaterial that she consented in view of her age.

In the result I find that the charge of defilement was proved beyond any reasonable doubt. The appellant's age was not in issue at the trial hence the trial magistrate was not bound to take it into consideration. It was raised for the first time in this court.

In terms of **Section 124** (Proviso) of the **Evidence Act**, corroboration is not a requirement in criminal cases involving sexual offences so long as the trial magistrate is convinced that the victim of the offence is a witness of truth.

Regarding sentence, the learned magistrate ought to have considered the conduct of **MWW**. She refused to go with the mother even after the appellant demanded that she leaves.

For that reason the sentence is reduced to the period served, **since 17th November, 2006**.

Orders accordingly.

Dated and delivered at Nakuru this 27th day of September, 2011.

W. OUKO
JUDGE