REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL CASE NO.39 OF 2008

A. N. N…….....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Mutuku, Senior Resident Magistrate in Criminal Case No.465 of 2007 delivered on 16th January, 2008 at Othaya)

J U D G M E N T

A. N. N. the appellant herein is before this court on appeal against the conviction and sentence in Othaya Senior Resident Magistrate's Criminal Case Number 465 of 2007. The appellant was tried on a charge of defilement of a girl contrary to *Section 8(1)* of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on 10th day of March, 2007 in Nyeri District of Central Province, the appellant had canal knowledge of N. W. M. a girl aged 12 years. After undergoing a full trial the appellant was convicted and sentenced to 14 years imprisonment. Being aggrieved he preferred this appeal.

On appeal, the appellant listed the following grounds in his petition: -

"1. That the learned trial magistrate erred in law and fact in admitting for the trial and/or proceeding to trial and conviction on a defective charge.

2. That the learned trial magistrate erred in law and fact in finding that the elements of the charge were proved.

3. That the learned trial magistrate erred in law and in fact in holding that the prosecution witnesses were reliable, consistent and truthful while there were glaring material contradictions in the prosecution story.

4. That the learned trial magistrate erred in law and fact in holding that the prosecution case was proved beyond all reasonable doubts while the nature of the evidence tendered in support of the charge required that the STD status of the Appellant be medically ascertained.

5. ***That the learned trial magistrate erred in law and fact summarily dismissing the Appellant's defence as a mere denial."***

The prosecution's case before the trial court was supported by the evidence of five witnesses. N. W.

M. (P.W.1) said she was on her way to school on 10th March, 2007 at 8.00 a.m. when she met the appellant. The appellant is said to have greet her and started to follow her from behind and held her hand. P.W.1 said the appellant covered her mouth with his hands and took her to the nearby forest where he laid her down, removed her under pant and had sexual intercourse with her. P.W.1 said the appellant left almost immediately after sexually assaulting. She said though she felt pain she still proceeded to school. She claimed that after a week she started itching on her privates hence she was prompted to reveal what happened to her to her mother. Her mother took her to hospital for treatment. P.W.1 said she did not want in the first instance to disclose to her mother about the incident because her mother was sick hence emotionally unstable. E. N. (P.W.2), P.W.1's aunt was told that P.W.1 was suffering from a sexually transmitted infection when she took the complainant for treatment on 26th March, 2007. A complaint was reported to the police when P.W.1 revealed that she had been sexually assaulted by the appellant. P3 Form which was produced indicated that P.W.1 had a perforated hymen thus proving that there was vaginal penetration.

When placed on his defence, the appellant denied the offence and alleged that there was a grudge between his family and that of the complainant. The trial magistrate came to the conclusion that the appellant was placed at the scene of crime and that the appellant was somebody well known to the complainant being their neighbour. The trial magistrate believed the complainant told the truth. The appellant's defence was dismissed as a mere denial.

When the appeal came up for hearing, Miss M. learned advocate argued the appeal on behalf of the appellant. It is the submission of the learned advocate that the evidence of the complainant was not properly taken. She was of the view that sworn evidence should not have been taken. Miss M. further pointed out that there was contradictory in respect of the time when the offence is alleged to have been committed. In one instance it is said the offence took place at 8.00 a.m. at some stage it is alleged it took place at 1.00 p.m. Miss M. further tore into the complainant's evidence claiming that at one point she stated she was defiled in forest while in another time she claimed she was defiled on the road. It is also alleged that the complainant at one time had sexual encounter with one Mr. M. It is argued that the appellant's defence was dismissed without due regard. Miss Ngalyuka on her part was of the view that the contradictions did not weaken the prosecution's case.

I have considered the rival submissions and I think the apparent contradictions in the evidence of the complainant are so material that her evidence cannot be trusted. I would have entertained her evidence as containing minor contradictions. I cannot comprehend how a witness can say she was defiled in the morning at 8.00 a.m and later turn around and say she was defiled at 1.00 p.m. It is also inconceivable for a witness to say she was defiled in the forest and later turn around and say no! she was defiled on the road side. The complainant only reported her case for defilement when she her private parts started itching. With respect, I think the contradictions indicate that the complainant is not a trustworthy witness.

It has been argued that there is credible evidence linking the appellant to the offence. There is no doubt that the appellant was not medically examined. The complainant was examined and found to have a sexually transmitted disease. The complainant admitted in cross-examination that she once had sexual intercourse with someone called Mwangi. It is possible the complainant was infected by Mwangi with the disease. In the absence of a medical examination of the appellant in the circumstances of this case it is extremely difficult to create the nexus between the appellant and the offence.

Finally, it has been argued that the appellant's defence was dismissed without due consideration. The appellant had stated that there was no forest within the vicinity hence it was not possible for him to commit the offence. The appellant also alleged that there was a grudge between his family and that of the complainant. The trial magistrate dismissed the defence as a mere denial. I have re-considered the aforesaid defence. It is clear from the evidence of P.W.2 that there was no grudge between the two families. The question as to whether the scene was a forest or not should have been critically considered in view of the apparent contradictory evidence by P.W.1. On this score, I agree with the appellant's counsel that her client's defence was casually dismissed without serious thought.

In the end and on the basis of the above grounds, the appeal is allowed. The conviction is quashed

and the sentence set aside. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 2nd day of December, 2011.

J. K. SERGON
JUDGE