IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 231 OF 2010

(From original conviction and sentence in Criminal Case No. 2389 of 2009 of the Senior Principal Magistrate's court

at Naivasha – T.W.C. WAMAE (Mrs)

PETER NGARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

PETER NGARI NYANJUA was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. He was convicted of the alternative charge and sentenced to serve 10 years imprisonment. He is aggrieved by both the conviction and sentence and filed the amended petition of appeal on 13/10/2010. The appeal was urged by Mr. Mutonyi, counsel for the appellant, while Mr. Omutelema appeared for the state.

Mr. Mutonyi urged that the magistrate erred in convicting the appellant on the alternative charge without evidence of the age of the complainant, PW1, who did not state how old she was in her testimony. He recalled that only PW3, Dr. Margaret Wainaina estimated the age of the complainant to be 15 years but did not adduce evidence as to how she arrived at that figure. Counsel further urged that though the doctor had put the age at 15 years the court ignored it and found the complainant to be aged between 16 to 18 years.

The second ground that was urged was that the offence of indecent assault as defined under Section 2 of the Sexual Offences Act was never proved. He submitted that there are 4 elements that need to be satisfied and from the evidence on record, there is no evidence of which part of the complainant's body the appellant was in contact with. Counsel made reliance on the case of **MBO V REP CA 342/08** where the Court of Appeal said that if there is not sufficient evidence to support the main charge, the alterative charge had to be proved beyond any reasonable doubt. Counsel urged that the court never analysed the evidence nor did she give reasons in support of the decision to convict on the alternative charge.

The appellant also contends that the conduct of the appellant was not considered. That the appellant met with the complainant, went to her uncle's home and it is then the uncle who told the appellant that he defiled the complainant. The complainant never disclosed to her mother about the defilement and that she was taken to the doctor on the same night.

The appeal was opposed and Mr. Omutelema, counsel for the state urged the court to peruse the record and note that the appellant did not see anything wrong with what he was doing and yet ignorance of the law is no defence.

As regards the issue of PW1's age, counsel submitted that the doctor is an expert and assessed PW1's age to be about 15 years old and the trial court had the benefit of seeing PW1 and it was entitled to make its own finding as to PW1's age. He urged the court should go by what the doctor found. As regards the ingredients of the alternative charge, the state urged that the proviso to **Section 11** which excludes penetration was not meant to assist the accused but for the benefit of a person charged with rape. He said that in the **MBO** case (supra) the court said that if anything is wrong the court can resolve to consider the minor charge as it did in this case. Mr. Omutelema urged this court to analyse the evidence and arrive at its own findings.

A brief summary of the prosecution is as follows. PW1, N. M was sent by her mother to buy sugar at about 9.oo p.m. They live at K village. PW1 met the appellant at the shop and left him there but he followed her, asked why she was not waiting for him and enquired about his child, whom she was taking care of. On reaching the gate, the appellant asked her to escort him but she declined, he got hold of her covered her mouth, dragged her to a shamba where he raped her. She said he forced himself into her and left her there. On the way home she found the appellant who told her to go back for her slippers and cap. The appellant pursued her to the house and she screamed. Her mother came out and the appellant informed the complaint's mother, PW2, that PW1 had insulted him. PW1 left the appellant with her mother and went to inform her uncle, K about her ordeal. K came and chased him away but he refused to go. PW1 and PW2 went to report at Longnot police station on the same night and she was also examined at Naivasha Hospital on the same night.

PW3, Dr. Margaret Wainaina of Naivahsa Hospital examined complainant on 17/9/09. She found the hymen was missing but did not find any spermatozoa or pus cells but she had a white discharge. She estimated the age of PW1 to be 15 years old. PW3 also examined the appellant and filled a P3 form which she produced as exhibit.

PW4, Cpl. Johnson Mbakani confirmed having received a report from PW1 on 15/9/09 at about 11.00 p.m. and PW1 led him to the home of the appellant who was arrested.

In his sworn defence, the appellant deponed that he was found with PW1 and on that day, they were on the way home when PW1's uncle saw them. They proceeded to PW2's home, PW1 went to call the uncle who enquired what he had done to her and he denied doing anything. He was told to go away and was arrested same night. In cross examination he denied knowing that PW1 was 16 years. He added that they were friends and used to make love.

Generally, the appellant did agree with PW1's evidence as to what transpired on the evening of 15/9/2010. Save for the act of defilement or indecent assault which he denied. He was not a stranger to PW1 and was in her company on that evening. Though the appellant denied defiling PW1 on that day, he agreed that they were lovers and they had made love before. This court is however, concerned not with what had happened earlier but what happened on the evening of 15/9/2010. As regards the appellant's denial that he was aware of her age, ignorance of the law is no defence in our law.

The appellant was charged with the offence of defilement contrary to **Section 8(1)** of the **Sexual Offences Act**. The section provides:-

"8(1). A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Section 2 of the **Sexual Offences Act** defines penetration as:-

"means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

The defence available to such an offence is founded for under **Section 8(5)** which reads:-

"8(5). It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged time of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(c) the belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

The appellant did not state the basis for his belief or that he ever tried to establish what PW1's age was before he allegedly made love with her. He did not tell the court that PW1 had told him her age or that he enquired from anybody else about her age.

For an offence of defilement to lie, it is prerequisite condition that the age of the complainant be established. The charge sheet states that the complainant was 16 years. The prosecution did not lead any evidence from PW1 and PW2 to establish the age of PW1. PW3, however, estimated her age to be 15 years. In its judgment, the trial court found that the complainant was between 16 to 18 years. The court did not indicate the basis of this finding unless the magistrate merely adopted what was stated in the charge sheet but that needed to be supported by evidence. The only evidence on the age of the complainant is that of an expert, PW3, which this court cannot dispute. The court therefore finds that at the time of the offence PW1 was about 15 years. The appellant was charged under **Section 8(1)** and **(2)** of the **Sexual Offences Act**. **Section 8(2)** relates to defilement of a child under the age of 11 years. **Section 8(3)** relates to defilement of a child between 12 to 15 years. That is the section under which the appellant should have been charged. The difference in the various subsections is the sentence to be inflicted if one is found guilty of the offence otherwise the ingredients of the offence of defilement are the same. The trial court found that the appellant was not guilty of the main charge of defilement because he had been charged under the wrong subsection but this court has observed above, that **subsection (2)** only relates to sentence, not the offence of defilement. This being the first appellate court, I will go ahead to evaluate the evidence of the accused consider whether or not the offence of defilement was committed. In her evidence, PW1 testified generally that she was raped by the appellant. She also alleged that he forced himself on her. She never told the court exactly what happened to her. For an offence of defilement to be proved there has to be an act of penetration. There is no evidence on record to prove the act of penetration and I would find that an offence of defilement was not proved.

In the alternative the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the charge read as follows:-

"... did intentionally and unlawfully cause his genital organ namely penis to come into contact with the genital organ namely vagina of Nancy Mwahiki Wanjiru a girl child aged 16 years."

It is true that the trial magistrate never analysed the evidence before she made a determination that the alternative charge had been proved.

The alternative charge states that the appellant intentionally and unlawfully caused his genital organ i.e. penis to touch the vagina of the complainant, a child of 16 years, I have carefully read the evidence of the complainant and I find that nowhere did she state that the appellant ever made his penis to touch her

vagina. I do agree with the appellant's submission that the ingredients required to prove an offence of indecent act were not met. **Section 2** of the SOA defines what constitutes an indecent act. It reads:-

"Indecent act means an unlawful intentional act which causes;

(a) any contact between any part of the body of a person with the genital organ, breasts, or buttocks of another, but does include an act that cases penetration;

(b) exposure or display of any phonographic material to any person against his or her will."

From PW1's evidence, it is not clear what the appellant did, she did not specifically say whether he touched her genital organ, or whether they came into contact with his body or whether he touched he buttocks or breasts. This is PW1's evidence in the lower court as regards what happened to be and I quote:-

"When I refused, he covered my mouth and then dragged me into a place where he raped me. When he released me I spat the chewing gum that was in my mouth. Accused also inserted a lollypop sweet into my mouth so that I could not scream. I was wearing a skirt, petticoat, biker and pants. When accused undressed and then forced himself into me while he forced me to lie on the ground. I do not know if accused undressed. He left me at the scene and I then recollected myself and went towards home. ..."

PW1 merely described what happened to her as being rape. Rape is a legal term. The prosecution needed to adduce facts to support that legal term. There were no facts adduced by PW1 that could have been applied to support the charge of either rape or the alternative charge of indecent act.

In this case, the complainant made a report of defilement soon after the incident occurred and the arrest was done on the same night. However, the prosecution totally failed to lead evidence that was relevant to prove a charge of defilement or indecent assault. The trial court which is supposed to be aware of the ingredients necessary for proof of such offence was not of much assistance. It seems even the court did not pay much attention to the ingredients for offences under the SOA. Consequently the alternative charge of indecent act was not proved beyond any reasonable doubt as required (see case of **MBO** supra).

Having found as above, this court finds the conviction to be unsafe and has no option but to quash the conviction on the alterative charge. Consequently the sentence is set aside. The appellant should be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED this 3rd day of December, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mutonyi for the appellant.
Mr. Nyakundi for the accused.
Kennedy – Court Clerk.