REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 238 of 2007

BERNARD KIAI NGARUIYA.....….....……..…….....APPELLANT

-AND-

REPUBLIC….……..…..……..……..……RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate

L. Mutai dated 17th April, 2007 in Criminal Case No. 1655 of 2006

at Githunguri Law Courts)

JUDGEMENT

The appellant was tried for the offence of defilement of a girl contrary to s.8(1)(4) of the Sexual Offences Act, 2006. The particulars were that on divers dates between 17th and 28th September, 2006 at N[PARTICULARS WITHHELD]Village, I[particulars withheld]Location in Kiambu District, the appellant committed an act of defilement upon a girl aged 16 years, namely *NNN*, by penetrating into her genital organs.

On the same facts, the appellant faced the alternative charge of indecent act with a child contrary to s.11(1) of the Sexual Offences Act, 2006.

PW1, the complainant, who is aged 16, testified that on 17th September, 2006 she returned home from Church, and found that her mother was absent; but she found her step-father, who accosted her with insults. Thus repelled from home, the complainant decided to go to the home of the appellant, where she remained for one-and-a-half weeks up to the time Police officers came and apprehended the appellant. PW1 is the one who identified the appellant to the Police, so he may be arrested.

PW1 testified that she used to have sex with the appellant when she stayed with him. She said the appellant's parents had not been aware of her presence in the home where the appellant lived. PW1 said that after the appellant's arrest, she was taken to Githunguri Health Centre for treatment.

PW2, *Police Constable Wanyonyi* of Ngewa Police base, testified that he had received a complaint from the complainant's mother, and this led to the arrest of the appellant at his house, where the complainant was found seated on the bed. PW2 said he did establish that the complainant was 16 years old.

PW3, the complainant's mother, said she had returned home on 17th September, 2006 and did not find the complainant at home; and for days, the complainant did not show up. She started looking for the complainant when she received word that the complainant had been seen with the appellant herein. She reported the matter to the Police, who visited the appellant's house, and found the complainant there. PW3 testified that the complainant was then aged 16, and had been attending school though she had now abandoned school. PW3 testified that she tried to take the complainant to Kiambu District Hospital, following her co-habitation with the appellant, but the complainant refused, and consequently the P3 medical-reporting form supplied by the Police, was not filled in.

The appellant took the option of silence, when he was put to his defence; and he called no defence witness.

On those facts, the learned Magistrate found the appellant guilty on the alternative charge, convicted him, and sentenced him to a ten-year term of imprisonment. The following passages in the judgement show how the trial Court arrived at its judgement:

(i) "...I find that although [the] complainant told the Court that she had had sex with the accused [for the entire three-week period] she was with him, no evidence from any medical expert confirming the same was exhibited in Court. The complainant, although issued with a P3 form was not able to identify the same before [the] Court. It was not exhibited before the Court for [the reason] that the complainant declined to undergo any medical examination..."

(ii) "I find that it would be.... fatal to rely on the sole evidence of the complainant in finding that she had had sex with the accused person at all material times, without any evidence from a medical doctor confirming the same. I found PW1's evidence needed corroboration from that of a doctor...."

(iii) "The complainant's evidence was that the accused person had known her carnally at all material times...I observed that the complainant's evidence was not disputed by the defence on cross-examination...If then the aforesaid did take place, I find...that the complainant's body or person must have been felt by that of the accused person. Her genitals must have been viewed by the accused person during the said sexual intercourse."

(iv) "Although only one witness present at the scene of crime was availed before [the] Court, being the complainant herein, upon analysing her evidence, I find that the same was clear, cogent and very consistent, and I had no reason to doubt the same."

(v) "It was revealed that at all material times the complainant was aged 16 years, meaning that she was a young person. I find that the prosecution evidence did demonstrate that the accused person did commit an offence of [an] indecent act on a minor, the complainant herein."

Although the learned Magistrate acquitted the appellant of the defilement charge, on the basis that she needed corroboration of the alleged sexual liaison, when she came to the indecent-act charge, she founded her decision on the basis that sexual intercourse *had been* taking place between the complainant and the appellant. This is a notable inconsistency in the reasoning that led to a finding of guilt, on the alternative charge. The second shortcoming in the finding of guilt is that it is founded not on the corroborative evidence said to be necessary, but on a *conjecture*; in the learned Magistrate's words, "If the aforesaid [i.e., carnal knowledge] did take place I find then that the complainant's body or person must have been felt by that of the accused person. Her genitals must have been viewed by the accused person during the intercourse."

It cannot be right that the trial Court, after *doubting* the evidence of sexual intercourse, then assumes such sexual intercourse to have been there, and to be proof that the body of the appellant had touched on that of the complainant in circumstances of *indecency.* This means, in fact, that there was no *proof* of indecency, and the same is only being inferred from assumptions.

Besides, by doubting the complainant's evidence that sexual intercourse had taken place between her and the appellant, the learned Magistrate had passed judgement on the demeanour of the witness: the complainant was not a *reliable witness*.

The appellant came into Court with amended grounds of appeal forming part of his written submissions; and he stated in Court that the said document presented the only canvassing of his appeal; he had no oral submissions.

It was the appellant's contention that the circumstances held to constitute an offence, by the trial Court, were nothing but a normal state of *friendship b*etween a boy and a girl. He also urged that the penalty imposed on him had been manifestly harsh and excessive.

The appellant drew this Court's attention to specific aspects of the evidence. He stated, and this is confirmed by the record, that he spoke in Court on 24th November, 2006, and told the Court: "The complainant is before the Court. She has something to tell the Court"; and the complainant thereupon said to the Court: "I am 16 years [old]. I urge the Court to discharge the accused. He committed no offence. I am the one who went to their home. I went to hide there, since I did not want to continue with my education." The prosecutor then said to the Court: "I leave it to the Court." This led the learned Magistrate to make a short ruling, as follows:

"I have considered the nature of the offence committed. The complainant is a minor and her application to have the matter withdrawn is not acceptable. The records are clear that she, the complainant has not been coming to Court. The prosecution [is] advised to avail the Police file, and her evidence [be] extracted immediately. The seriousness of the offence should also be considered."

It is noted that when the learned Magistrate made the foregoing remarks, the first witness had not yet taken the witness stand. At that *early stage* the learned Magistrate is speaking of "the seriousness of the offence." The matter, quite clearly, was at that stage squarely in the hands of the *Prosecution.* Did the learned Magistrate enter the partisan arena reserved or others? I will return to this question later.

In his submission, the appellant stated that, just as the "complainant" herself had stated in her evidence (as PW1), the two had been boyfriend and girlfriend *for long*; in his words: "...the issue of defilement in the circumstances cannot and does not arise." The appellant submitted that his position on the relevant facts, on his relationship with the "complainant," was confirmed by the evidence of her mother (PW3) given during cross-examination on 12th March, 2007; PW3 had said: "I came to learn that you were my daughter's lover."

The appellant raised an issue of principle: "If [the complainant] exonerated me from [the charge] of committing any sort of offence against her, how could I then be convicted and sentenced?" He went on to say: "Had she [PW1] not consented to our friendship, she would not have stayed for that long without even raising an alarm." The appellant said in his final submission that "no offence was disclosed in the complainant's evidence and in the entire prosecution evidence."

Learned counsel for the respondent, *Mr. Makura*, submitted that there was no basis in the evidence to support the appellant's

conviction – and he *conceded* to the appeal. Counsel was also in agreement that the ten-year term of imprisonment was harsh and excessive.

As already noted, the fact that the trial Court acquitted the appellant on the charge of defilement, suggests that the feeble evidence of defilement could not then be made a foundation for conviction on the alternative charge.

"Indecent act", which is the alternative charge, is thus defined in s.11(1) of the Sexual Offences Act, 2006 (Act No. 3 of 2006):

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

The appellant has urged firmly that the circumstances of friendship between himself and the "complainant", which even the complainant's mother acknowledges, were such that the sex relationship between him and the "complainant" did not constitute an indecent act.

An "indecent act" must be related to the traditional category recognised as "indecent assault"; and that term is defined in *Blackstone's Criminal Practice* (Oxford U.P., ed. *Peter Murphy*, 2000), at section B3.84, p. 235):

"The test for indecent assault is primarily objective. An indecent assault is defined as an assault committed in circumstances of indecency. Circumstances of indecency need not involve any indecent touching of the victim or a threat of indecent touching. The assault or the circumstances accompanying it must, however, be capable of being considered by right-minded persons as indecent...If *the circumstances of the assault are incapable of being regarded as indecent*, the assault cannot become indecent because of some secret motive of the accused..."

From the evidence, it is beyond doubt that the appellant and the "complainant" had repeatedly lain in proximity, and partaken of voluntary sexual relations over a rather long period of time. Is it right, therefore, as the learned Magistrate says, that *indecency* now existed when, in the trial Court's words, "the complainant's body or person must been felt by that of the accused person", or when "her genitals must have have been viewed by the accused person during the said sexual intercourse?"

The answer must be no. From the evidence, an intimate relationship between the "complainant" and the appellant could not satisfy the test of "indecent act"; and it follows that on a charge of committing an indecent act, the appellant could not rightly be convicted.

It is my opinion that a conviction on a charge of committing an indecent act was far-fetched, as it did not tally with the evidence adduced. I have, besides, already expressed anxiety that the learned Magistrate may have entered the *arena of litigants*, by bestirring a prosecution cause which the prosecution itself was not keen to press. And in the end the Court delivered a verdict that had no support in the evidence, nor in law.

The appellant's appeal is allowed; the conviction is set aside; and the sentence vacated.

The appellant shall forthwith be released, unless held for some other lawful cause.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 29th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person