REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 1224 OF 2000

GABRIEL MUCHIRA MWENJA …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the conviction and sentence of B.A.O. Asunah, R.M. in Thika Criminal Case No. 1727 of 2000)

JUDGMENT OF COURT

The appellant, Gabriel Muchira Mwenja, was charged with the offence of Rape contrary to section 140 of the Penal Code. He was convicted and sentenced to 6 years imprisonment with 6 strokes of the cane. The appeal is against both the conviction and the sentence.

The facts of the case is that the complainant is a pupil in the appellants school, the latter being a teacher. On the 2.4.2000 at [particulars withheld] the complainant , P.W, in company of PW2, A.R.N, visited the appellant's shop at [particulars withheld] at 10.00 a.m. with a view to getting some change for a note of Kshs.50/-. The appellant entertained them with soda and nyama choma. At about 1.00 p.m. A.R.N left the complainant and the appellant in his bedroom at the back of the shop and returned home. At about 7.00 p.m. the complainant's mother was worried and sought to know from A.R.N where the complainant could still at that late hour and finally persuaded A.R.N to escort her to the appellant's shop. They knocked the door and after reluctance by the occupants to open, the latter finally opened. The complainant was taken back home by her mother, PW3, M.W in company of PW2 and PW3. None of the witnesses noticed anything wrong with or on the part of the complainant as they went home. The complainant did not complain of having been raped by the appellant to her mother or any of the witnesses. There were no complaints or screams from the appellant's room during the complainant's stay there with the appellant during the whole day of 2.4.2000. But the next morning on 3.4.2000, the complainant appears to have, probably under pressure, revealed that the appellant had raped her twice. The appellant's room is next to other residences occupied by people. The complainant was said to be 15 years old. When the complainant finally informed her mother that the appellant had raped her the day before, the parents took her to Kirwara police post where they made a report of rape. The police thereafter escorted the complainant to Kirwara Health Centre where PW6, Lucy Njoki, a clinical officer, received and examined the complainant. Pw6 testified that the complainant's clothes were soiled. She found the complainant to be 15 years old and confirmed that the hymen was broken, apparently not freshly so. She found that the complainant had facial injuries or bruises, which were about two days old. A sample probably of the vaginal liquid was taken to their laboratory and as the result multiple spermatozoa were found. The above is the evidence upon which the trial magistrate returned a conviction.

I have carefully considered the said evidence, the manner the trial magistrate used it and the views of both Counsel in their submissions to this court.

In my view it is important to note from the onset that the appellant is charged with the offence of rape, not that of having carnal knowledge of a girl under the age of 16 years. Apart from proof of penetration of a male organ into her vagina therefore the prosecution also have to prove that there was lack of consent on her part. Proof of age therefore might be crucial in proving presence or absent consent. In my view the complainant has not told the whole truth as whether or not she was or was not forced to have sexual

intercourse with the appellant if such intercourse was really proved. To that issue, later. The evidence clearly establishes that the complainant, for whatever purpose she visited the appellant's shop, stayed there voluntarily, form 10 a.m. to 7.00 p.m. when her mother took her form their by force. All the time the complainant was there, she never sought for help from the neighbouring occupants, either screaming for help or in any other way. Even after her mother had taken her from the appellant's shop, the complainant did not complain to her or others with her, that she had been raped by the appellant or that the complainant had assaulted her in any way. Neither PW2 nor PW4 saw any injuries on her as they escorted her home. Despite that evidence the mother of the complainant and the Clinical Officer who examined the complainant testified seeing such injuries. PW2 and PW4 also stated that complainant was not crying when she was rescued from appellant's house. This is a contradiction and in my view, one which tends to show that the complainant was not a truthful witness, worth relying upon. In my view also, if there was sexual intercourse between the complainant, it one, which would on the face of it, be termed 'consensual' as opposed to 'forced'. Up to this point I would not therefore hesitate to allow this appeal at this conclusion.

However Mr. Mondah raised an inserting but important matter of law.

He said that even if this court should be satisfied that the complainant gave herself to the appellant voluntarily, nevertheless, it will proceed to make a finding that the complainant did not give any consent since she was incapable of giving any consent being a girl of less than 16 years. I have carefully considered that submission. I agree with Mr. Mondah that if I accept the evidence that there was sexual intercourse between the two and that such is proved on this record by acceptable evidence, then it will be my duty to confirm the conviction of rape subject however to an acceptable proof hat the complainant was below 16 years.

The evidence on record is that the complainant was 15 years old at the time. This came form her mother and from the Clinical Officer. Ordinarily, in view, the court generally accepts the evidence of the parents as to the age of their children since it often not critical or questioned. Complainant's mother testified that the former was born in 1985. She did not produce any document of age such as a birth certificate or baptismal certificate. I am aware that the appellant was properly legal represented during the trial and that the Counsel could easily have raised relevant questions and could have obtained the relevant answers. Miss Wangari advocate, however, failed to do so. Nor did the trial magistrate. In my understanding of he mater, the appellant as an accused was not under any obligation to prove himself innocent. The burden of proof throughout, lay with the prosecution to prove its case. They knew they need to rely on the age of the complainant to prove that she was incapable of giving her consent to sexual intercourse to her age. The complainant should accordingly have called exact evidence, here documentary to prove the age since it was an ingredient to be proven for the whole case.

Nor in my view did the Clinical Officer show how she came to the conclusion as the age of the complainant. Did she examined her teeth to prove age or did she merely only on the answers coming from the complainant's mother? There are no answers to these relevant questions. My finding therefore is that the trial magistrate erred and accepting the age of the complainant to be 15 years with adequate, here strict evidence, to prove the same beyond reasonable doubt. This is more so where such as in this case, the complainant and PW3 her mother, appear to have been set to obtain a conviction at any cost.

In respect to the issue of whether or not sexual intercourse was proved I am of the opinion also that the evidence on record was not sufficient. There are clear evidence that a possible vaginal swab was taken form the complainant on 3.4.2000. PW6, Lucy Njoki, a Clinical Officer testified that "we took a sample to the lab and we found multiple spermatozoa." It is not stated who is "we". It is common practice of which the court can take judicial notice of that a person who usually takes such samples is a laboratory technician or doctor who usually has the expert knowledge of search. Any other person inclusive of a Clinical Officer would be unsuitable. There is no evidence here as to who then took the sample and which sample was taken to the laboratory. No assumptions can be acceptable in criminal cases. Whoever did it was not called to give evidence as to what he did and what results he reached and how he did so. PW6 was therefore unqualified to give the said piece of important when she was not an expert in that aspect. Her evidence as whether there were spermatoa or not is in my view not conclusive and cannot be relied

upon, as did the trial magistrate, to reach the conclusion that the complainant had had sexual intercourse on 2.4.2000.

The upshot therefore is that upon the reasons canvassed above, the charge of rape was not proved beyond a reason doubt to justify the conviction of the appellant. This appeal must therefore succeed.

The conviction is accordingly quashed and the sentence of six years set aside. The appellant is hereby ordered set at liberty forthwith unless lawfully held in prison. It is so ordered.

Dated and delivered at Nairobi this 29th day of May 2003.

D.A. ONYANCHA

JUDGE.