REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 50 OF 2018

FOO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Othaya Principal Magistrates Court Criminal Case No. 643 of 2016 (Hon. B.M. Ekhubi, Senior Resident Magistrate) on 30 March 2017,

JUDGMENT

The appellant was charged in the magistrate's court with the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 17th day of July 2016 at [particulars withheld] village, Kianguthu sub location within Nyeri County, he intentionally attempted to cause his penis to penetrate the vagina of AWM a child aged 12.

In the alternative count, he was charged with the offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 particulars being that on the 17th day of July 2016 at [particulars withheld] village, Kianguthu sub location within Nyeri County, he intentionally and unlawfully caused his penis to touch the vagina of AWM a child aged 12 without her consent.

In the second count he was charged with the offence of detention of a female person for an immoral purpose contrary to section 151 (1) (a) of the Penal Code, cap. 63 and here the particulars were that on the 17th day of July 2016 at [particulars withheld] village, Kianguthu sub location within Nyeri County, he detained AWM a girl aged 12 against her will in his dwelling house with intent that she might be unlawfully and carnally known by the appellant.

The third count was attempting to infect another person with HIV contrary to section 24 (2) (3) of the HIV and Aids Prevention and Control Act, No. 14 of 2006. The particulars in this count were that on the 17th day of July 2016 at [particulars withheld] village, Kianguthu sub location within Nyeri County he attempted to infect AWM with HIV or placed her person at risk of becoming infected with HIV by trying to defile her well knowing that he was infected with HIV or carrying HIV.

The appellant pleaded not guilty to all the three counts. At the conclusion of the trial he was acquitted of the first and the third counts but convicted of the second count.

The appellant appealed against both the conviction and sentence and as far as I understand the grounds raised in the petition filed on 3 December 2018 and the supplementary petition filed on 19 June 2019, the learned magistrate's decision was impugned on grounds that:

1. He erred in law and in fact in relying on the evidence of the complainant despite the fact that it was not corroborated and could not sustain a safe conviction.

2. He misdirected himself in relying on the testimony of the 3rd, 4th and 5th prosecution witnesses yet it was inconsistent and contradictory

3. The ingredients of the offence for which the appellant was charged and convicted were not proved satisfactorily.

4. He erred by failing to find that key witnesses were not called.

As always, it is incumbent upon this honourable court, as the first appellate court, to consider the evidence on record afresh and come to its own factual conclusions notwithstanding the conclusions reached by the trial court. In doing so, I am conscious that the trial court had the

advantage of seeing and hearing the witnesses and therefore was ideally placed to assess such aspects of evidence as the disposition or demeanour of the witnesses. This point is best illustrated in **Okeno versus Republic (1972) EA 32** where the Court of Appeal stated as follows: -

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See page 36).**

In prosecution of its case, the state summoned eight witnesses the first of whom was the complainant herself. The court concluded that she was not a child of tender years and therefore proceeded to take her sworn testimony.

It was her evidence that that she was aged 12 and on 17 July 2016 at about 12:00 P.M., she was at her neighbour's house together with her siblings. She identified the neighbour as mama Maggie (PW5). Her own mother had gone to church. Mama Maggie asked her to hang clothes on the washing line. While she was hanging the clothes, the appellant came out of his house and pulled her into his house which was in the same plot as the complainant's and Mama Maggie's. He closed the door. She screamed, calling out Mama Maggie's name. Mama Maggie came but not inside the appellant's house. The complainant could only see her from the appellant's window. The appellant went outside the house and stood at the door from where she could hear him talk with Mama Maggie; as a matter of fact, she heard him tell Mama Maggie that he had sent the complainant for air time.

The appellant hit her when she screamed. After Mama Maggie left, the accused locked the window and left. Before he left, he attempted to undress the complainant but she resisted. She however testified that he did not touch her anywhere.

At about 5:00 P.M. the accused pulled her out of the house. One Baba Nekesa and John (PW4) both of whom were neighbours in the same plot witnessed the accused pulling the complainant out of his house and he even warned them not to tell anyone. She returned to Mama Maggie's house but she did not find her. She informed her sister, MW, what the appellant had done to her.

During cross-examination, she testified that the appellant had given her a credit card. She reiterated that she could hear the conversation between the appellant and Mama Maggie. The appellant's door had been "pulled" but not locked.

The second prosecution witness was PWM (PW2), the complainant's mother. It was her evidence that on 17 July 2016, she left the complainant under the care of Mama Maggie as she went to church. She came back at 5:00 P.M. although she had been called much earlier by one Silas Gachoka who asked her to rush back home.

She found a large crowd at home; police officers were also present. The appellant and the complainant had been locked inside the appellant's house. They then went to Chinga police station and Othaya sub county hospital where the complainant was examined and treated. She testified that the appellant had detained the complainant in his house and threatened to kill her if she screamed. She knew the appellant as her neighbour and they had been neighbours for one year. During that period, the appellant would send her children to purchase things for him though she had warned them against going to the appellant's house.

Vincent Cheloti (PW3) testified that on 17 July 2016, at about 12:30 P.M., she was with John (PW4) when they met Mama Maggie washing clothes. She told them that she could not find the complainant though the appellant had told her that he had sent her to purchase airtime for him. They suspected that the complainant was in the appellant's house. John had even told him that he had heard the complainant talking in the appellant's house. Cheloti's house was next to the appellant's house.

The appellant opened the door for the complainant to come out at about 4:00 P.M. Cheloti and John stopped the complainant and the appellant from leaving and alerted the community policing elder who in turn called the police. Between 12:30 P.M. to 5:00 P.M, Cheloti and John had camped outside the appellant's house; meanwhile the appellant would occasionally leave his house and join them and for all that time the appellant never locked his door. They also never heard any screams from the complainant. It was their evidence that the complainant left on her own when the appellant opened the door.

In answer to questions put to him during cross-examination, Cheloti testified that Mama Maggie told him that the complainant was in the appellant's house as she left for the market. Although they suspected or knew the complainant to be in the appellant's house, they never searched it. The witness also testified that he used to visit the appellant's house. For the entire period they were outside the appellant's house, the complaint never screamed.

John Wekoba Nabisi (PW4) whom Cheloti (PW3) referred to in his testimony testified that Mama Maggie had suspected that the complainant was being detained in one of the houses in the plot where they lived. Like Cheloti (PW3), he suspected the complainant to have been detained in the appellant's house and so they decided to camp outside the house. At about 4:00 P.M. the appellant ushered the complainant outside his house. It is then that they decided to detain both the appellant and the complainant inside the appellant's house. He also testified that he lived elsewhere except that he had come to visit Cheloti on that particular day.

Mama Maggie whom the previous prosecution witnesses referred to in their testimony was Charity Wanjiku (PW5). She conformed in her testimony that on 17 July 2016, the complainant's mother asked her to take care of her children while she was away in church. At about 11:00 A.M., she could not see the complainant. She called on the appellant who informed her that he had sent the complainant to the shop. She went back to the accused after about 20 minutes but the appellant told her that he had not seen the complainant. The conversation between her and the appellant was outside the appellant's house. She told Cheloti and John to search for the complainant.

The officer who investigated the complaint against the appellant was sergeant Ruth Chetum (PW6) who testified that on 17 July 2016, she received a call from Gathanje Administration Police Post to the effect that a suspect had been arrested over an allegation of defilement. She proceeded to the scene with two of her colleagues. They found the complainant who was alleged to have been rescued from the appellant's house. It was her evidence that the complainant had screamed shouting out Mama Maggie's name when the appellant pulled her to his house. Mama Maggie went to the appellant's house, where the complainant was shouting from but never entered the house. The appellant is alleged to have been touching the complainant's breasts and vagina. She also established that the appellant was an HIV/Aids victim.

Ian Ngumo (PW7), a clinical officer at Othaya sub county hospital examined the complainant and filled her P3 form on 31 August 2016. It was his evidence that the complainant had alleged that she had been defiled by a person well known to her on 17 July 2016. However, upon examination he established that the complainant had not sustained any injuries in her private parts; her hymen was intact and the vaginal swab and urinalysis had been found to be negative.

The last prosecution witness was Peter Maina Mureithi (PW8), another clinical officer who was based at Gichiche Health Centre. He confirmed the appellant was a regular outpatient at the centre where he was being treated for HIV/Aids. He had been diagnosed of this disease on 16 December 2015.

The appellant gave a sworn statement in his defence. It was his evidence that he was accosted by members of community policing while on his way to visit a friend on 17 July 2016. They asked him to go back to his house and open it; they searched the house for the complainant but they did not find her. They were led to the appellant's house by Cheloti (PW3) and John(PW4). He later saw Cheloti (PW3) talking to the complainant. He denied having detained the complainant in his house. It was his case that the charges against him were fabricated and the complainant had been coached to implicate him. Her mother, according to him, had complained against several neighbours and she had a grudge against him. He testified that he had disclosed his HIV status to the complainant's mother. Previously he could share food with the complainant's mother's children but she warned them against interacting with him after he disclosed his status to her.

My assessment of the record shows that the prosecution evidence is replete with contradictions and inconsistencies that ought to have been enough to raise a reasonable doubt on whether the appellant committed the offence of which he was convicted. The same record also suggests that the first five witnesses may not have been credible witnesses and a conviction based on their evidence would not have been safe.

To begin with, the complainant testified that Wanjiku (PW5) was in her house when she went to hang the clothes implying that she could not have seen what the appellant did to the complainant. But Cheloti (PW3) testified that Wanjiku was washing her clothes outside her house and if this was the case it is possible that she could not only have seen the movements of the appellant and the complainant but she could also have heard the complainant scream. If Cheloti (PW3) and John(PW4) were also outside, it is possible that they could have seen the complainant and the appellant.

Considering that all the three were in the same plot as the appellant and the complainant it is not possible that neither of them could have overlooked the latter's movement or failed to hear her screams for rescue.

Further, the complainant herself testified she could not only see Wanjiku outside the appellant's door but also that she could hear her conversation with the appellant. One would suppose that if she was forcefully pushed into the appellant's house and was being detained against her will she would have taken advantage of that moment and raised alarm for rescue. If she could see and hear Wanjiku (PW5), there is no reason why Wanjiku could not possibly hear her if she was to shout or even just call her out while she was at the appellant's door. As a matter of fact, John (PW4) was categorical that although they were seated outside the appellant's house from about 12.00 P.M. to 4.00 P.M. the complainant never raised any alarm.

It follows that the evidence by the complainant that she was pulled to the appellant's house and that she screamed in the process raised a reasonable doubt that any of these things happened. If at all she was in the appellant's house and remained there for the alleged period, it must have been out of choice and not against her will or, to be precise, she was not detained there for whatever reason as alleged.

The complainant's credibility as a witness was also put to test by the evidence of Ian Ngumo (PW7), the clinical officer who examined the complainant and filled her P3 form. It was his evidence that the complainant alleged that she had been defiled by a person well known to her. However, despite the allegations of assault, no injuries of any sort, on any part of her body, were established. The complainant herself had testified that the appellant never touched her and that being the case she deliberately misled the medical officer that she had been defiled by a person known to her.

It is also puzzling that Wanjiku in whose custody the complainant was left would suspect that the complainant was in the appellant's house but continue to attend to her own errands, away from her home, without confirming whether the complainant was in the appellant's house or was elsewhere for that matter. It stands to reason that having been left in charge of the complainant she could not simply leave the matter to Cheloti and John and continue with her business as if nothing had happened; at the very least, she owed the complainant's mother an explanation if anything happened to any of the children she left in her custody, including the complainant.

There is also some material contradiction between the complainant's testimony and that of Cheloti and John on the complainant's departure from the appellant's house and where she was at the time the appellant was arrested. The complainant's evidence in this regard was that, just like he had pulled her into his house, the appellant had also pulled her out of the same house. She testified that the appellant warned Cheloti and John not to tell anyone. She proceeded to Wanjiku's house where she found her sister and told her about it.

But Cheloti's evidence was as follows:

> **"At about 4:00 P.M., the accused opened the door and the complainant came out of the house. We stopped either of them from leaving. We called Nyumba Kumi who called the police."**

Similarly, John (PW4) testified that they detained the complainant and the appellant in the latter's house when he attempted to usher the complainant out.

Apart from the contradictions that are rather obvious, if the complainant was to be taken at her own word, it would follow that the she had to be forced out of the appellant's house; that fact, in itself, would dispel any notion that the complainant had been detained in the appellant's house all along.

Worth of note is the fact that the complainant's sister whom the complainant identified as MW was not called to testify to corroborate the complainant's testimony.

The conclusion that one can make from the contradictions between the testimony of the complainant, on the one hand, and Cheloti's and John's evidence, on the other hand, is that either of them may not have been truthful. Their testimony in effect raised reasonable doubt as to the fact sought to be proved and which doubt could only be resolved in the appellant's favour.

According to Cheloti (PW3), John (PW4) and Wanjiku (PW5), they suspected from the word go, that the complainant was in the appellant's house yet none of them took any step to confirm whether she was indeed in that house and if so whether she was detained there for immoral purposes. Instead, despite their suspicions, Wanjiku went about her business as usual as if nothing had happened while Cheloti and John staked outside the appellant's house for close to five hours. The appellant would join them and sit with them but for all this while, none of them raised the issue of the whereabouts of the complaint with him.

This is difficult to believe for the reasons that Wanjiku would not be concerned about the whereabouts of her neighbour's daughter yet she was under her care and secondly, either Wanjiku herself or Cheloti could venture into the appellant's house and confirm whether the complainant was there or not; it is worth noting that Cheloti testified that he and the appellant were not only good neighbours but also he usually visited the appellant's house. The question is, why wouldn't he disguise another visit to the appellant's house for the sake of checking whether the complainant was there? There was evidence that the house was a single roomed house and therefore all that would have been required of him to confirm whether the complainant was in the appellant's house was a momentary visit or a simple glance in the house.

The complainant's mother's testimony also created a further reason to doubt the prosecution case; it was her evidence that she had been summoned home much earlier by one Silas Gachoka apparently because of the incident involving her daughter but it was not until 5:00 P.M that she returned home. No explanation was given why she could not turn up earlier when she was called and why the said Silas Gachoka did not testify to shed light on whether he actually called the complainant's mother or why he was calling her.

For all these reasons, there is no basis for the learned magistrates finding that the complainant had been detained in the appellant's house and was detained there for immoral purposes.

If the evidence of Cheloti (PW3) and John (PW4) is anything to go by, the complainant was always at liberty to leave the appellant's house if at all she was there. It was their evidence that the complainant's door was always open at the material time.

While answering the appellant's questions in cross-examination, Cheloti's evidence was as follows:

> **"On the material day you never locked your house whenever you came where we were. The complainant did not scream."**

On his part, John stated:

> **"While seated outside the victim did not raise any alarm."**

The testimony of these two witness does not present the complainant as someone who was in such a dire situation that she could neither escape from a purported detention or raise any alarm.

Section 151 (1) (a) of the Penal Code under which the appellant was charged reads as follows:

> **151. Detention of females for immoral purposes**
>
> **(1) Any person who detains any other person against his or her will—**
>
> **(a) in or upon any premises with intent that he or she may have unlawful sexual connection with any person, whether any particular person or generally; or**
>
> **(b) …**
>
> **is guilty of a felony.**

As noted, there is no evidence that the appellant had detained the complainant in his house against her will. At any rate, there was no evidence of the appellant's intent of unlawful sexual connection with the complainant. The complainant herself testified that the appellant never touched her anywhere and the medical evidence showed that there was no assault of any sort. There was also no evidence that the appellant may have suggested any "unlawful sexual connection" with the complainant.

In the face of this evidence there was no basis for the learned magistrate's conclusion that the appellant detained the complainant for immoral purposes.

There are two other gaping faults in the learned magistrate's judgment which would entitle the appellant success in his appeal. The first of these faults is this: although the learned magistrate subjected the complainant on oath on the basis that she was not a child of tender years, he stated in his judgment that the complainant had infact gone through a voire dire before her evidence was taken. This is what was recorded on 24 October 2016 when the hearing took off:

> "**Prosecution counsel**: My witness is a child aged 12 years. (sic)
>
> **Court**: Since the child is over the age of 12 years (not of tender years). Witness to proceed to give sworn statement."

But in his judgment the learned magistrate stated as follows:

> "**(7) The prosecution case is straight forward and can be summarised as follows. The complainant A.W.M (identity withheld) aged twelve years(sic) and as such a child of tender years. Before the complainant testified a voire dire examination was conducted and it was established that she possessed sufficient intelligence to give a sworn testimony**."

The second fault relates to the evidence of the clinical officer; his evidence was fairly short and this is what he said:

> "**I am Ian Ngumo, a clinical officer based at Othaya Sub county hospital. I have a P3 belonging to the complainant filled on 31/8/2016. The complainant alleged to be defiled by a person known to her on 17/7/2016. OP No. 19074/2016. The complainant was 12 years. No injuries on her private part. (sic). Hymen not broken. HVS-negative. Urinalysis-negative. I signed the P3 and I wish to produce it as P.Exhibit 2.**

The witness was not cross-examined and so this is all he said in evidence; however, in his judgment, the learned trial magistrate quoted him to have stated as follows:

> "**History given is consistent with attempted defilement".**

What these faults demonstrate is that the judgment is obviously inconsistent with the rest of the record and the learned magistrate misdirected himself on the facts and on the law; this misdirection may have probably led him to err in his ultimate decision.

In conclusion, I find merit in the appellant's appeal and it is hereby allowed. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless he is lawfully held.

Dated, signed and delivered on 2nd October 2020

Ngaah Jairus

JUDGE