REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 39 OF 2018

PETER MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the subordinate court dated 17th October 2017 in Criminal Case No. 519 of 2016 at Kilgoris Law Courts before Hon. R.M. Oanda (RM).

JUDGMENT

1. The appellant herein was chargedwith the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2016. The particulars were that on 30th August 2016 at [particulars withheld] area in Transmara West District of the Narok County he intentionally and unlawfully caused his penis to penetrate into the vagina of a girl namely M.M. aged 16 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. The trial court found the appellant guilty on the main count and sentenced him to 15 years imprisonment. He now appeals against the conviction and sentence of the trial court. His petition of appeal dated 27th June 2018 was based on the following grounds;

a. That he did not plead guilty to the charge and he maintained this plea;

b. That the trial magistrate faulted both in law and fact when he maliciously contravened article 50 (1) (2)(j) and Article 25 (a) (c) of the Constitution as the proceedings in the instant case were not properly conducted and grossly contravened his rights ;

c. That the trial magistrate further faulted both in law and fact when he based the conviction on flawed process and varied evidence demonstrated in court by the prosecution which was below standard and was highly questionable and unsafe to sustain a conviction;

d. That the trial magistrate faulted both in law and fact when he appreciated the allegation by PW1 yet her allegations were merely fabricated against him under the pressure of his work associate whose intention was seemingly meant to fix him;

e. That the trial magistrate faulted both in law and fact when he based the conviction on hearsay and misapprehension by the prosecution side without proper observation and analysis of the authentic evidence on record;

f. That the trial magistrate faulted in law and fact when he maliciously objected to his defence without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution's case.

3. The appellant urged the court to look into the sentence meted out on him and reduce it. The prosecution's counsel on the other hand opposed the appeal. He stated that based on the offence the appellant had been charged with, the sentence was not excessive. He submitted that ordinarily, we ought not to disturb the sentence unless there has been a transgression of the law. Mitigation was done and the evidence was sufficient to sustain the conviction.

4. Mr. Orinda for the respondent submitted that PW1 gave clear evidence which was corroborated by the evidence of PW2 and was not shaken on cross examination. The medical evidence adduced was clear that there had been defilement and the age of PW1 proved. That though PW2 had been transferred from co accused to witness, his testimony had been sufficiently corroborated. The court did not have to rely on his sole evidence to convict. His transfer was based on plea bargain which is provided for by the law and was not prejudicial to the accused person. The evidence was clear, cogent and appealing and the trial court's decision unavoidable.

5. Being a first appellate court, this court is duty bound to exhaustively examine the evidence adduced, weigh conflicting evidence and draw its own conclusion, bearing in mind that it neither saw nor heard the witnesses testify. ***(See Okeno v. Republic (1972) E.A. 32)***

6. The appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act** which provides:

> *8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.*

7. The prosecution needed to prove beyond reasonable doubt that the accused person had penetrated the complainant aged between 16 and 18 years to sustain a safe conviction.

8. The minor M.M. testified that she was 17 year old a pupil in class 6. She told the court that the accused whom she had known for 3 weeks wanted to marry her. On 30thAugust 2016 at around 2 p.m. she was at home when the accused sent PW2 to pick her clothes. She met the accused at Lolgorian town and went all the way to Magena township. PW2 left them at a house where she and the appellant had sexual intercourse. The following day, when the appellant left for town to charge a phone, the police came for her.

9. B.M, PW2 testified that he was 15 years old and attended the same school as the complainant. On 30th August 2016, he was at home when the appellant, who was his friend, came and asked him to go and help M.M. carry her clothes. They arrived at Magena at night and waited for the appellant. The appellant slept with M.M. while he slept on a separate mat. He testified that the appellant and M.M were lovers.

10. PW3 B K testified that on the 30/8/2016 she left for her business and came back at about 7:00 p.m. She did not find her daughter at home. She was told that her daughter had left with PW2 and the appellant. The next day she went to the appellant's home and was later informed that the appellant had been seen at Magena. She reported the matter to the police station whereupon the appellant was arrested.

11. PW4, a clinical officer at Lolgorian sub-county hospital testified that his colleague Rose Omuse filled in the P3 formof Pw1 on 4th September 2016. He testified that he had worked with her and knew her handwriting. The complainant was examined and found to be in a fairly general condition. Her hymen was missing and there were pus cells and traces of blood in the urine. She was given medication to cure an infection she had acquired. The conclusion by the clinical officer was that the complainant had been defiled. Age assessment was also carried out on PW1 and PW2. PW1 was found to be 16 years of age whereas PW2 was found to be 17 years old.

12. The investigating officer, PW5, stated that he received a complaint that PW1 and PW2 had gone missing. His investigations revealed that M.M. had been seen with the appellant. The appellant's employer informed him that the appellant had been seen boarding a vehicle to Magena and to Kakamega. The appellant was found with the minor and PW2. They were taken for medical examination and the appellant was later arrested.

13. The appellant testified in his defence that he used to work at a hotel. He was at work and was arrested by police. The police informed him that he had gone with a certain girl which he did not know. He recorded a statement that he was to take her to Kakamega. He was taken to Kilgoris where he met her parents. He was later charged in court. He had nothing to do with the girl. He did not know her before. He was asked for Kshs. 10,000/- to sort out the matter.

14. It is noteworthy that PW1 had initially declined to respond to questions put to her by the prosecution. Prior to her detention, she had simply testified that on the material day the appellant took her to his aunt who gave her money and that when she was there the police came and arrested her. It is only after the prosecution applied for her remand in a juvenile institution that she gave the testimony set out above.

15. The prosecution then entered into a plea bargain agreement with PW2 who agreed to testify for the prosecution in exchange for the charges preferred against him being withdrawn. PW2 had been charged jointly with the appellant for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act. In the alternative, he faced a charge of child trafficking contrary to Section 14 (a) of the Sexual Offences Act.

16. The question that then arises is whether it was safe to base the conviction of the appellant on the testimony of PW1 and PW2.

17. **Section 152** of the **Criminal Procedure Code** defines a refractory witness and sets out the procedure to be followed in dealing with such witnesses:

> ***152 (1)*** *Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence—*
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> *(a) refuses to be sworn; or*
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> *(b) having been sworn, refuses to answer any question put to him; or*
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> *(c) refuses or neglects to produce any document or thing which he is*
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> *required to produce; or*
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> *(d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.*

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.

18. The Court of Appeal in **Daniel Odhiambo Koyo v Republic CA Criminal Appeal No. 182 of 2010 [2011]eKLR** held that the probative value of such a witness is negligible and may only be relied upon in clear cases to support the prosecution or defence case.

19. PW1 was clearly a refractory witness and the trial court should have exercised caution in considering her evidence. In this case the trial court did not consider the inadequacy of PW1's testimony in light of its refractory nature. The trial court held that PW1's evidence was sufficient to convict the appellant.

20. The prosecution's case on identification of the perpetrator was hinged on the evidence of PW2. After entering into a plea bargain agreement with the prosecution, PW2 testified that he had taken PW1 to the rendezvous as directed by the appellant. He also stated that the two were lovers.

21. Counsel for the prosecution submitted that the plea bargain agreement entered into between PW2 and the prosecution was legal and was not prejudicial to the accused. A look at **Section 137 N** of the Criminal Procedure Code shows that this is not the case. Plea agreements are provided for in **Section 137 A** of the Criminal Procedure Code as follows:

(1) Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—

(a) reduction of a charge to a lesser included offence;

(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

22. Section 137 N of the Criminal Procedure Code is clear that such agreements shall not apply to offences under the Sexual Offences Act.The evidence of PW1 and PW2 was the only direct evidence against the appellant. I find that relying on the evidence of both witnesses was prejudicial to the appellant and insufficient to sustain a safe conviction.

23. The upshot is that this appeal is allowed and the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

Dated, delivered at Kisii on this 9th day of January 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant	**In person**
Mr. Orinda	**For the Respondent/State**
Rael	**Court clerk**