REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 53 OF 2017

ALEX MUNYAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Senior Resident

Magistrates Court Criminal Case No. 136/2014 (S.O) by Hon. B.M Kimtai (SRM) on 12/8/2016)

J U D G M E N T

1. **Alex Munyao,** the Appellant was charged with the offence of **Defilement** Contrary to **Section 8(1)** as read with **Subsection (4)** of the **Sexual Offences Act NO. 3 of 2006.** Particulars were that on the **2nd**day of **April 2014** within **Kitui County,** intentionally caused his penis to penetrate the vagina of **GMM** a child **aged 16 years.**

2. In the alternative, he was charged with **committing an indecent Act** with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars were that on **2nd** day of **April 2014** within **Kitui County** intentionally touched the vagina of **GMM** a child aged **16 years** with his penis.

3. He was tried, convicted and sentenced to **twenty (20) years** imprisonment.

4. Aggrieved, he appeals on grounds that: the charge was defective; the case was not proved beyond reasonable doubt; extraneous matters were taken into consideration; evidence was contradictory, doubtful, questionable, inconsistent and insufficient; the age of the complainant was not proved; and the sentence imposed was harsh.

5. Facts of the case were that on the **31.3.2014**, PW1 **GM,** a pupil at **[Particulats Withheld] Primary School** left home purportedly going to hospital to seek treatment for a skin rash. Instead of going to hospital she went to watch games at **[Particulars Withheld] primary School.** Therefore she feared going back home. She decided to go to her aunt's home. The following day she encountered the Appellant and shared with him her fears. He offered her a place to sleep. While at his home she voluntarily engaged in sexual intercourse with him. In the meantime PW4 **MKM,** was informed by the complainant's mother of her disappearance. He investigated and found that she was at the home of the Appellant. He traced her to the house of the Appellant and notified her mother. They went to the police station and made a report. She was later examined at the **Kyuso Sub District Hospital** for treatment. Investigations carried out culminated into the arrest of the Appellant.

6. Upon being put on his defence, the appellant stated that on the **2.4.2014**, Mutua visited him and notified him that he was to invigilate examination and gave him **Kshs. 1500/=** to give to the AEO. He went to supervise examination. While at **[Particulats Withheld] primary school** for a meeting, he got a phone call from Mutua who asked him to go to school for a meeting. As they proceeded with the meeting he was called by MM and interrogated about PW1 who was alleged to have been found in his house that he shared with Phillip Kimanzi. On his way to the police station he encountered the complainant's mother who asked for money but he did not give her as he had not committed any offence.

7. It was the contention of the Appellant that the charge sheet was defective for failure to include the term ***"unlawfully''*** in the particulars of the offence; the case was not proved beyond any reasonable doubt in that there was not proof of penetration of the complainant; that the complainant did not make a complaint on her own violation and therefore she only lied as she feared to be punished.

8. Further, he argued that the actual age of the complainant was not proved and failure to subject the complainant to voire dire examination was fatal to the prosecution's case. With regard to contradictions it was urged that the inconsistencies in evidence especially that of the complainant should have been resolved in favour of the Appellant and that the sentence imposed was harsh and excessive.

9. The Respondent (State) through prosecuting counsel, Mr. Mamba urged that evidence of age was proved by the age assessment document.

He noted that evidence adduced by the complainant (PW1) and PW2 introduced doubt in the mind of the court that ought to have been analysed. That both of them were not credible. That PW4 was also not credible since his evidence was marred with contradictions which made him unreliable, such that he was not even stood down. That the contradiction and inconsistency in the evidence adduced during the first hearing was not sufficient to prove the offence beyond doubt. Therefore the State conceded to the Appeal.

10. This being a first appellate court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

11. In the Case of ***Republic Vs. David Ruo Nyambura & 4 others (2001) eKLR*** it was stated that:

> ***"The Cardinal principle of law is that in a Criminal Case the legal onus is always on the prosecutor to prove the guilt of an accused person and the standard of proof is beyond reasonable doubt. The burden of proof therefore lies on the prosecution to prove the guilt of an accused".***

12. The complaint of the Appellant is that the prosecution failed to discharge the burden of proof.

In a case of defilement the prosecution is required to prove:

> ***(i) Age of the victim***
>
> ***(ii) The act of penetration***
>
> ***(iii) Positive identification of the perpetrator.***

13. The complainant gave her age as **sixteen (16) years.** PW2 **RM** also told the court that she was sixteen (16) years old. What was not given was the year of birth. PW3, **David Mbiti, a Clinical Officer** from **Kyuso District Hospital** adduced in evidence what was referred to as an age assessment report. He testified that he enquired from the school and per the information he got the complainant started school when she was about **six (6) years.** Her first menses were when she was in standard 7 and he estimated the menses to usually start between 14-15 years old. Therefore he estimated the age to be 15-16 years. This in my opinion was a vague way of assessing the age of a person.

14. It has been held that age can be proved by oral evidence of a child if sufficiently intelligent or the evidence of the parent. The learned trial Magistrate was of the view that the complainant's indication that she was 16 years old was buttressed by the evidence of PW3 the Clinical Officer who produced the Age Assessment Report. Evidence adduced by PW3 was wanting. Other than stating that the complainant was 16 years old, there was no suggestion of her year of birth.

15. On the act of penetration, the complainant was examined by a Medical Doctor. The genetalia was normal. The vaginal wall was normal. But the hymen was broken. Contrary to what was written on the P3 Form that the broken hymen was a sign of vaginal penetration, it is common knowledge that a broken hymen *perse* may not be proof of penetration (**See P.K.W. VS. REPUBLIC (2012) Eklr).** It was not indicated when exactly the hymen got stretched.

16. In the case of ***Ali Kassim Vs. Republic Criminal App. No. 84 of 2005 (MSA)*** it was stated that:

> ***" .. (the) absence of Medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence''.***

17. Medical evidence adduced by the prosecution having not been conclusive proof of the fact of penetration by a male genetalia, the court had to consider relying on evidence adduced by the complainant.

18. At the outset PW1 stated that thus:

> ***"On 2.4.2014 I left home going to hospital at Kamuwongo. I decided to go for games then left for home. I went for games and on my way home; I got scared of my mom and went to my auties (sic). The next day I went to school. I did my exams and returned to my aunties to take me home. While on the way, I met someone. He said he would show me where to sleep. I went with him. He said he was called Peter. The next morning he told me to wait for him. He did not return. I went to A's place so that he could take me home. He was not there. He was in school. His house was unlocked. I stayed there. At 1.00pm, I saw mom with MM...."***

19. At that juncture, an application was made to have her treated as a hostile witness. The court declared her a hostile witness. The case was consequently adjourned and on the next scheduled date for hearing she testified and stated that she had engaged in coitus with the Appellant.

20. In the Case of ***Batala Vs. Uganda (1974) EA 402,*** the court held that:

> ***"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable, it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight''.***

21. In the Case of ***Abel Monari Nyanamba & 4 others Vs. R (1996)eKLR*** the court stated thus:

"The evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt''

22. This is a matter where the complainant was declared a hostile witness by the court. This meant that the prosecution was mandated to cross-examine her as she was an unreliable witness. Instead of the prosecution adopting the laid down procedure of dealing with such a witness, she was called to testify afresh and went on to state that she voluntarily had coitus with the Appellant. If indeed she was a minor, she was incapable of consenting to an act of coitus. However, she was an unreliable witness and there was no other evidence to confirm her allegations.

23. The Appellant put up a defence of having not been with the complainant on the material night. He called a witness DW2 **Phillip Kimanzi** who stated that he used to share a house with the Appellant and on the material morning the Appellant left going for the assigned duties and when he (DW2) left the house he did not lock it. That they were later required to go and record a statement as someone had been found at the house.

24. The prosecution had a duty of disapproving the defence that was put up by the Appellant. Evidence adduced by the complainant herself created a doubt which entitled the Appellant to an acquittal.

25. In the result the appeal succeeds. I do quash the conviction that was unsafe and set aside the sentence meted out. The Appellant shall be **set at liberty unless otherwise lawfully held.**

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF SEPTEMBER 2019.

L.N. MUTENDE

JUDGE