REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 135 OF 2018

MARTIN KIRIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Martin Kirimi ("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 No 3 of 2006*** and an alternative charge of committing indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act No.3 of 2006***.

2. It was alleged that on diverse dates between 29/5/2018 and 4/6/2018 in Katheru West Location, Meru Central Sub County within Meru County, the appellant intentionally caused his penis to penetrate the vagina of NK a child aged 16 years. In the alternative charge, it was alleged that on the same date and location, the appellant touched the vagina of the said **NK.**

3. On 27/9/2018 the trial court found the appellant guilty of the offence of defilement and sentenced him to fifteen (15) years imprisonment. Aggrieved by that decision, the appellant filed this appeal raising thirteen grounds of appeal contesting the proof of penetration and the evidence of the complainant and that of the medical officer.

4. As the first appellate court, it is now well settled that the Court must revisit the evidence afresh, evaluate the same and reach its own independent conclusions and findings. (See **Ekeno v Republic [1972] EA 123).**

5. The evidence before the trial Court was that, the complainant was a form two student at [Particulars withheld] Secondary School. When she first appeared, she was hesitant to testify and the prosecution made an application to have her remanded in custody for 8 days. The trial court heeded to the application and remanded her at the Meru Remand Home from 14/6/2019 to 12/7/2019.

6. She told the Court that on 29/5/2018, she went to the accused's house and had sexual intercourse with him. That she stayed in his house for 3 days. The area chief came and took her to the police who took her to Githongo Hospital. In cross-examination, she stated that the appellant did not force her to engage in sexual intercourse.

7. **Pw2 George Kithinji Mberia,** the Assistant Chief of [Particulars withheld] Sub-location testified that, on receiving information that the complainant had refused to go to school, he went to the appellant's home on 4/6/2018 and found her there. That she was with the appellant and that they told him that they had agreed to get married. **Pw3 Lucy Wamiya Magire, Assistant Chief [Particulars withheld] Sub-Location** testified that she escorted Pw2 to the residence of the appellant.

8. **Pw4 Peter Mbogori** was the Clinical Officer working at Githongo Sub-County Hospital who examined the complainant on 4/6/18. He told the Court that on examining the complainant, he concluded that she was sexually active. He did not find any spermatozoa.

9. **Pw5 P.C. Antonio Kioko** told the court that 2 chiefs brought the complainant and the appellant to the station and reported that the complainant had been missing for 1 week. They took her to Githongo Sub-County Hospital for examination. He produced the complainant's birth certificate which confirmed her age to be 16 years.

10. When placed on his defence, the appellant told the Court that the complainant came to his house on the night of 29/5/2018 after an argument with her father. That she insisted on staying over for the night. That he left her in his house in the morning and did not return. On 1/6/2018 he called her and informed her that he did not want to find her in his house. She however refused and threatened to kill herself if he insisted. He stated that he slept in the chair on that day. That on 4/6/2018, **Pw3** came to his house and he informed him that the complainant had refused to leave his house. They woke the complainant and accompanied **PW3** went to the police station where he was arrested by PC Cheruiyot.

11. The appellant set out a total of 13 grounds of appeal which can be collapsed into 4; *that the trial Court erred in failing to find that the*

prosecution had failed to call vital witnesses, that the trial Court erred in relying on a P3 form filled by a Clinical Officer rather than a doctor, that the trial Court misapplied ***section 152 of the Criminal Procedure Code*** *which led to a miscarriage of justice and that the charge of defilement was not proved.*

12. It was submitted for the appellant that the complainant only testified on the element of penetration after being remanded by the trial court. That the medical examiner did not mention whether there was any penetration but only stated that the hymen was broken. It was further submitted that the p3 form was filled by a clinical officer and not a medical officer as required by law. The case of **Geoffrey Muriu Kamau vs Republic Criminal Appeal No. 129 of 2012 (UR).**

13. On its part, the prosecution submitted that all the elements of defilement had been proved against the appellant. That a clinical officer can equally fill a P3 Form as was held in **Fappyton Mutuku Ngui vs Republic (2014) eKlr.**

14. On the first ground, the trial Court was criticised for not considering that vital witnesses were not called to testify. It was submitted that the parents and teachers of the complainant were not called to testify. That this weakened the prosecution case.

15. The cardinal principle of the law of evidence is that evidence adduced must be not only admissible but also relevant. There was nothing to show that either the parents of the complainant or her teachers were in possession of any evidence that would have assisted the trial Court to arrive at a just decision. There was nothing to show that they knew anything about the charge facing the appellant. In this regard, the criticism of the trial Court on this count was unfounded.

16. The second ground was that the trial Court erred in relying on the P3 form which was a frame and did not indicate that there was any penetration. It was submitted for the appellant that the P3 form was filled by a Clinical Officer instead of a Medical Officer. The case of **Geoffrey Muriu Kamau vs Republic Criminal Appeal No. 129 of 2012 (UR)** was relied on. The respondent was of the opinion that the P3 form was in order and that there was nothing wrong in the same having been filled by a Clinical Officer. The case of **Fappyton Mutuku Ngui vs Republic (2014) eKlr** was relied on.

17. In **Raphael Kavoi Kiilu v Republic [2010] eKLR,** the Court held that:-

> ***"The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means: -***
>
> ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ……"***
>
> ***Section 7(4) of the Act states:-***
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> ***The Act goes further to provide that such officers may engage in private practice "in the practice of medicine, dentistry or health work for a fee." It follows that the clinical officer did testify in this case on his area of competence.***
>
> ***We have examined the provision of the Sexual Offences Act. There is no such requirement that a P3 form must be produced only by a medical doctor."***

17. In the present case, the P3 was filled and produced by a Clinical Officer working at Githongo Sub-County Hospital. It was not alleged that he was not qualified as a Clinical Officer. The contention was that he was not a doctor. To that extent, I do not think that ground has any merit and I reject it.

18. The next ground was that the trial Court erred in applying the provisions of ***section 152 of the Criminal Procedure Code.*** That its application amounted to intimidation of the complainant thereby leading to a miscarriage of justice.

19. ***Section 152*** aforesaid provides: -

> ***"(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***
>
> ***a) refuses to be sworn;***
>
> ***(b) having been sworn, refuses to answer any question put to him; or***
>
> ***(c) refuses or neglects to produce any document or thing which he is required to produce; or***
>
> ***(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.***

19. It is clear that the said provision is to be resorted to when a witness fails or refuses to testify, However, such witness is to be remanded at intervals of 8 days or less and is supposed to be produced in court to state whether he/she will testify.

19. The record shows that when the matter came up for hearing on 14/6/2018, the complainant was called as the first witness. After a short testimony, she refused to continue with her testimony prompting the prosecution to apply for the invocation of ***section 152*** aforesaid. The Court remanded the complainant at the Meru Remand home and adjourned until 5/7/2018. That was a period of 21 days, 13 days over and above the period allowed by law.

20. When the complainant was produced on 5/7/2019, the Court was not sitting and the matter was adjourned to 12/7/2019. On 12/7/2019, the matter came up for hearing and the complainant testified. It is then that she testified that she and the appellant had sexual intercourse. While it is true that the complainant refused to give further testimony, the law allows the Court remand such a witness and adjourn for not more than 8 days.

21. In the present case, the complainant was remanded for 21 days. That was irregular and it can be safe to conclude that the evidence given when the Court resumed was not obtained wilfully but through intimidation of the complainant. Such is evidence which if it has to be admitted, it must be with extreme caution. In the present case, although the Court had acted illegally by detaining the complainant for 21 days, it did not warn itself the danger of relying on the complainant's evidence.

22. It should be noted that when she was recalled again to testify on 18/8/2018, she denied having had sexual intercourse with the appellant. She then admitted in re-examination that she had had sexual intercourse with a man whom she did not disclose.

23. The last ground was that the offence of defilement was not proved to the required standard. The appellant submitted that the ingredient of penetration was not proved. That the medical evidence fell below the required standard and did not show that there had been penetration.

24. The Court has already found that the testimony of the complainant regarding penetration should have been received with great caution. The P3 form produced showed that there were no injuries noted on the labia majora labia minora. There were no bruises noted on the external genitalia. The minimal bleeding that was noted was attributed to the complainant's menses according to **PW4** who examined her.

25. In clause 6 of the P3 form, the medical examiner did not state what his opinion was. In this Court's view, it is mandatory that the medical examiner should indicate what his opinion is regarding the results of his examination. In this case there was no opinion that there had been penetration of the complainant. In his testimony, he only said that because of lack of hymen, he concluded that the complainant was sexually active.

26. In my view, there was no conclusive evidence that there had been penetration of the complainant. The trial Court erred in convicting the appellant on weak and uncorroborated evidence. It failed to warn itself against relying on the testimony of the complainant whom it had illegally remanded for more than the period allowed in law.

27. In view of the foregoing, I am satisfied that the prosecution did not prove its case beyond reasonable doubt. Accordingly, the appeal is meritorious and I allow the same. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and **DELIVERED** at Meru this 14th day of November, 2019.

A. MABEYA

JUDGE