REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 38 OF 2018

JOSEPH GACHARA KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 202 of 2016 of the Chief Magistrate's Court at Nakuru by Hon. V. Wakumile– Senior Principal Magistrate)

JUDGMENT

1. **Joseph Gachara Kinyua,** the appellant herein, was convicted for the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.

2. The particulars were that on the 16th October 2016 in **Nakuru** North sub County, of **Nakuru** County, intentionally and unlawfully inserted his penis into the vagina of **JWM**, a girl aged 16 years.

3. The appellant was sentenced to serve 15 years imprisonment. He now appeals against both conviction and sentence.

4. The appellant was in person. He raised four grounds of appeal as follows:

a) The learned trial magistrate erred in law and in fact by convicting the appellant on insufficient medical evidence.

b) The learned trial magistrate erred in law and in fact by relying on contradictory and inconsistent evidence.

c) The learned trial magistrate erred in law and in fact by failing to appreciate that some material witnesses were not called.

d) The learned trial magistrate erred in law and in fact by dismissing the appellant's defence without consideration.

5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. The prosecution is obligated to prove three ingredients of the offence of defilement before a conviction can be founded on the evidence on record. These are (a) that there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were spelled out in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.

8. **JWM (PW1)** in her evidence, testified that as at 14th November 2016 when she testified, she was 17 years old. Her mother, MW (PW2) supported this evidence for she said she was born 30th June 2000. This evidence was confirmed by a copy of the certificate of birth (prosecution exhibit1). The age of the complainant was therefore proved to the required standards.

9. The import of the evidence of **JWM (PW1)** was that her sexual congress with the appellant was consensual. She voluntarily engaged in the act. She only revealed what transpired the following day upon interrogation by one Grace.

10. The complainant was first attended to by Dr. Mbugua who indicated in the PRC form that the complainant was defiled in a pub and that

she was given soda laced with alcohol. No other witness including the complainant testified to this effect. If this information came from the complainant why did she not testify about it?

11. In his examination Dr. D.K Mbugua observed no physical injuries or tears on the genitalia except the torn hymen. In her evidence the complainant testified that the appellant broke her hymen an indication that this was her first sexual encounter. If indeed the intercourse took three hours as testified to by the complainant, this being her first sexual intercourse, obvious bruises ought to have been observed on 17th October 2016 when she was examined. Lack of such findings raises reasonable doubts about her credibility. In absence of any other evidence to the contrary, one is persuaded to disbelieve her after giving information to Dr. Mbugua which she never repeated in court.

12. It is now settled law that a broken hymen without any other supporting evidence is not prove of defilement. The court of appeal in the case of **P. K.W vs. Republic [2012] eKLR** observed at paragraph 16:

> **Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.**

It is my finding that the ingredient of penetration was not proved.

13. The appellant contended that some material witnesses were not called. Since he did not indicate which these witnesses were, I am unable to make a finding on this ground.

14. The upshot of the foregoing analysis of the evidence, is that the conviction of the appellant was not safe. I accordingly quash it and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE