REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 22 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case (S.O.) No. 2 of 2014 of the Chief Magistrate's Court at Naivasha – P. Gesora, CM)

MARTIN KUNGU NJUNGE…….……...APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. The Appellant was convicted and sentenced for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In that on an unknown date between January and May 2014 *particulars withheld* area of Naivasha Sub-County within Nakuru County, he unlawfully and intentionally did cause his genital organ namely penis to penetrate the vagina of **E.S.M.** a girl aged 16 years.

2. The Appellant's amended grounds of appeal principally challenge the quality of the evidence upon which the conviction was based. He further complains that his defence was not given due consideration. His written submissions, while not disputing the fact the Complainant spent the night of 25/5/2014 in the Appellant's house takes issue with the question whether penetration was proved.

3. Citing the evidence of **PW2** the Appellant submits that though present in the same house as the complainant she did not confirm the allegations of the complainant, and further that the trial court did not record reasons for believing the complainant's evidence. He argues that the medical evidence while confirming the broken hymen did not indicate the time of the rapture relative to the offence, and that the presence of a discharge in the complainant's genitals did not necessarily prove sexual intercourse between the Appellant and the complainant, the latter who had allegedly spent time with other men prior to the material period.

4. Miss Waweru for the Director of Public Prosecutions opposed the appeal. She reiterated evidence by the complainant that she was in a relationship with the Appellant and that the fact of sexual intercourse was confirmed by **PW2** who accompanied her to the Appellant's house, and by medical evidence.

5. As was stated in **Okeno -Vs- Republic [1973] EA 32**:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -Vs- R [1957] EA 336) 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 (Shantilal M. Ruwala -Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see 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 magistrate's findings should 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 Peters -Vs- Sunday Post [1958] EA 424."

6. In the trial before the lower court, the prosecution called five witnesses. The prosecution case was that **E.S.M.,** the complainant (**PW1**) was aged 16 and a student at N. Primary School. She was in class 8. The Appellant was a co-worker of **PW1's** mother at Aquilla Flower Farm and had befriended **PW1** some months prior to the material date.

7. On 25th May 2014 **PW1** in the company of a classmate **M.W. (PW2)** went out to a place called Manyatta but when they overstayed their parents started searching for them. Not finding them, **PW1's** mother **R.M.** (**PW3**) made a report to police. Meanwhile the girls had reached the home of **PW2** and learned that their parents had sworn to chastise them. They left in the night, arriving at the Appellant's home at 9.00pm. He welcomed them and at bed time shared a bed with **PW1**. He had sex with her. Information came through to **PW3** that the girls were at the Appellant's home. The girls were eventually traced and the Appellant arrested.

8. The Appellant's unsworn defence statement was to the effect that on 25/5/2014 he went to the local market to buy provisions and met with the two girls and a lady. He returned home only for the two girls to come there. He called the girls' aunt and settled in for the night. The girls slept in the house, leaving on the next morning. He was subsequently arrested.

9. There is no dispute that the Appellant and the complainant and her mother were well known to each other and that the complainant, a girl aged 16 years and **PW2** spent the night of 25/5/2014 at the Appellant's house. It would seem to me that the sole question in disputation in the matter was whether the Appellant had sexual intercourse with the complainant, or in other words whether there was penetration.

10. In that regard, the prosecution relied on the evidence of the complainant and medical evidence. The casual manner in which the Appellant took in the girls appears to support the evidence by **PW1** that indeed, the two had a relationship prior to the material date. The spending of the night together tends to strengthen the complainants assertion of sexual activity as she asserted.

11. Although **PW2** did not testify that she witnessed the same, clearly this mUst of necessity have been a discreet activity. **PW1's** description of what happened is explicit:

"we explained to him what happened (escaping from punishment). At midnight we all slept in the same bed. I removed my clothes and he too and we had sexual intercourse…… He used a condom and we slept till morning……"

12. Despite these assertions, the Appellant did not suggest to **PW1** that no sexual activity occurred, or that the boys who had earlier been with **PW1** and **PW2** had sex with either girl. Besides, even if true, prior sexual activity would not affect PW1's evidence necessarily as the Appellant had ample opportunity, to also do so while spending the night in the same bed with **PW1.** The fact that **PW1** may have had sex with other persons before the Appellant does not matter. It is telling that he did not in any way suggest that he takes the girls home rather than share a bed with them.

13. The trial magistrate in his judgment considered the pre existing relationship between **PW1** and the Appellant stating *interalia*:

"Infact the two were close friends as explained by the complainant and this informs why the two girls chose to go to accused on the night in question for fear that they were going to be disciplined by their parents…… Accused had a duty to ensure that the two girls did not sleep in his house. He did not for example explain why he did not inform the parents and neighbours of the presence of the girls in his house so that appropriate action can be taken.

He took advantage of the situation……"

14. The foregoing are sound reasons why he believed that indeed sexual intercourse occurred. Indeed the circumstances admitted by the Appellant give credence to evidence by **PW1**. What other reason could there have been for the Appellant to host the complainant, his girl friend in the night rather that send her home?

15. Medical evidence tendered confirms that the complainant's hymen had been ruptured. The trial magistrate correctly noted that the minor may have engaged in sexual intercourse before the material date. It does not matter therefore that the P3 form did not indicate the age of the rupturing of the hymen on whether the smelly discharge noted in the complainant's genitalia had anything to do with the sexual activity on 25/5/2014. All that the medical evidence supplied was proof that the complainant was not a virgin, and had been involved in sexual activity on earlier dates prior to 25/5/2014, but not excluding the said date.

16. In other words, the evidence increases the probability that the complainant had sex though not for the first time, on 25/5/2014 and other prior dates. Thus the complaint by the Appellant that the trial court should not have acted on **PW1's** evidence or the medical evidence has no substance. Nor is there substance in the complaint that his brother was not called to testify. It is not clear what his role was in regard to the transaction in question.

17. Under Section 124 of the Evidence Act the trial court was entitled to record a conviction based on the sole testimony of **PW1**, if it was found to be true. In this case the trial magistrate was thus persuaded and though not explicitly identifying the reasons for such belief, the rational thereof is clearly expressed in his judgment.

18. The Appellant was properly convicted. There is no merit in the amended grounds of appeal. The appeal is accordingly dismissed.

Delivered and signed at Naivasha, this **23rd** day of **February, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

C/C – Barasa

Appellant – present

C. MEOLI

JUDGE