REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 84 OF 2016

GEORGE MWANGI MURUNGI……..…...……APPELLANT

VERSUS

REPUBLIC……....…...…RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Appeal No. 72 of 2015 (Hon. C. Mburu, Resident Magistrate) on 1st November, 2016)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8 (1)(4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 16th day of September 2015 within Nyeri County, he unlawfully and intentionally caused his penis to penetrate the vagina of R M W, a child aged 17. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act.** The particulars of this alternative count were that on the 16th day of September, 2015 within Nyeri county, the appellant unlawfully and intentionally touched the vagina of R M W, a child aged 17 with his penis.

The trial court found him guilty of the principal count and sentenced him to serve 15 years' imprisonment. It is against this conviction and sentence that he has now appealed to this court. In the petition of appeal drawn and filed on his behalf by his counsel, the appellant raised the following grounds of appeal:

1. The learned trial magistrate erred in law and in fact in basing a conviction on inadequate evidence;

2. The learned trial magistrate erred in law and in fact in peremptorily dismissing the appellant's defence

3. The learned trial magistrate erred in law in failing to appreciate that the burden of proof was always on the prosecution;

4. The learned trial magistrate erred in law and in fact in relying on inconclusive medical evidence which was also against "the best evidence rule."

5. The learned trial magistrate erred in law and in fact in failing to resolve the apparent inconsistencies, gaps and doubts in the prosecution evidence in favour of the appellant; and,

6. The sentence meted out against the appellant was harsh and excessive.

As the first appellate court, this court has the legal obligation to consider the evidence at the trial afresh and come to its own conclusions irrespective of the conclusions that the trial court made; however, it has to be borne in mind that the trial court had the advantage of seeing and hearing the witnesses. **In Okeno versus Republic (1972) EA 32** the Court of Appeal had this to say on this issue: -

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of a first appellate court merely to scrutinize the evidence to see if 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 magistrates' findings can 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 page 36).***

The complainant testified that she was a form-three student aged 17 as at the time she testified on 19th January, 2016. On 16th September, 2015 at about 2 PM, so she alleged, the appellant lured her into his house and had sexual intercourse with her. According to her, she consented to this sexual encounter which took about three hours before she left and went back home. She opted to remain silent and keep this encounter to herself perhaps because she felt she was an accomplice, in a loose sense, of what turned out to be an illicit engagement with the appellant.

Sometimes later, and more particularly in November 2015, she fell ill; when she went to hospital for treatment, a pregnancy test conducted on her was positive that she was thirteen weeks pregnant. It is after the results of this examination that she opened up and told her mother (PW2) what transpired between herself and the appellant on 16th September, 2015. As a matter of fact, she attributed the pregnancy to the appellant and denied that anybody else could have been responsible for it because she had not been in relationship with anybody else of the opposite sex apart from the appellant.

Dr Beatrice Maina (PW3) who produced the P3 form in respect of the complainant, testified that the complainant was examined three months after the event and indeed the examination revealed that she was pregnant. Curiously, she testified that the complainant's hymen was intact though she admitted that the doctor should have noted that the hymen was broken as a result of the sexual activity alleged.

The complainant's mother **M W M (PW2)** was informed by the complainant's school on 26th October, 2015 that the complainant was having severe gastric pains. She took her to hospital where upon examination, she was informed that her daughter was pregnant. It at this time that the complainant informed her that the appellant was the person behind the pregnancy. She then took up the matter with the police and lodged her complaint on 2nd December, 2015. Although the complainant denied having been in a relationship with anybody else, her mother testified that she had been informed that her daughter had been seen with a motorcycle rider and for this reason she had warned the chairman of the group in which this rider was a member to stop seeing her daughter.

Corporal Betty Chepkoech (PW4), the investigations officer, established that indeed the complainant and the appellant were neighbours. She also produced the complainant's birth certificate showing that she was born on 25th of April 1998 and therefore she was about 17 years and five months old at the time the offence is alleged to have been committed.

The appellant gave sworn evidence when he was put on his defence and denied committing the offence with which he was charged. He testified, and indeed he called one witness to support his case, that at the time the offence is alleged to have been committed, he was not even in his house but that he was at school where he used to teach. In effect, he offered an alibi which the trial court rejected on the ground that it was not given and the earliest opportunity possible.

In evaluating the evidence on record, I found the evidence of two prosecution witnesses to have been central to the conviction of the appellant; these witnesses were the complainant and the doctor. The

complainant's evidence was crucial because besides her complaint against the appellant there was no other person who witnessed the commission of the offence; it was her word against the appellant's. The doctor's evidence, on the other hand, was necessary to corroborate the complainant's testimony and provide medical proof of the fact of 'penetration' which amounted to defilement as understood in **section 8(1)(4)** of the Act under which, as noted, the appellant was charged and subsequently convicted.

I must say at the outset that I found the doctor's evidence contradictory for the reason that, while the complainant was confirmed to have been pregnant, her hymen was established to be intact at the time of examination. **Dr Beatrice Maina (PW3)** herself found this to be queer and in her own words the hymen ought to have been broken obviously because the pregnancy, if any, was preceded by a sexual intercourse that would not have left the hymen intact.

Perhaps Dr Valentine Kei who examined the complainant and filled her P3 form could have explained the findings and conclusions if she testified herself. However, no reason whatsoever was given as to why she could not testify and defend her findings. What the learned state counsel said while inviting Dr Beatrice Maina to testify on her behalf was as follows:

> ***I wish that Doctor Beatrice Maina produces the P3 on behalf of Valentine. She is not aware where she is, for the quick dispensation of the case.***

The learned magistrate acceded to the state counsel's wishes and proceeded to admit the P3 form in evidence apparently because the appellant did not object to its production by Dr Maina. In my humble view, this evidence was received in an apparent disregard of **section 63(1)** of the **Evidence Act, cap 80** which requires that oral evidence must be direct evidence; direct evidence is explained in **section 63 (2)** to mean that, with regard to opinion, which I suppose was what the doctor's testimony was all about, the opinion or the grounds upon which that opinion is held must be given by the person who holds that opinion or who holds the opinion on those grounds and to me, as far as the prosecution case against the appellant was concerned, this person was none other than Dr Valentine.

If, for some reason Dr Valentine could not testify and probably shed some light on her report, it had to be demonstrated to the satisfaction of the trial court that she was incapable of giving evidence or that her attendance in court could not be procured, or otherwise her attendance could not be procured without an amount of delay or expense which in the circumstances of the case appeared unreasonable. There was no such basis that was laid before her report was admitted in evidence and the trial court ought to have found that a bare assertion that **Dr Maina** did not know **Dr Valentine's** whereabouts could not be a sufficient reason to dispense with her attendance, particularly so when her findings turned out to be inconsistent with the oral testimony of Dr Maina.

I am minded that the appellant did not object to Dr Maina's testimony but considering that he was unrepresented, the trial court should have been more cautious in admitting evidence that was bound to prejudice his case.

Turning to complainant's testimony, I have found it to have also been contradictory in its material respects. For instance, though she attributed her alleged pregnancy to the appellant and denied that she was in any other relationship with a member of the opposite sex, the evidence of her own mother suggested that this may not have been true; according to her, there might have been a compromising affair between her daughter and a certain motorcycle rider that provoked her to warn the chairman of an organisation or group in which this rider belonged not see her daughter. Of course, being seen by somebody else other than the appellant could not, by itself, exonerate the appellant if at all there was sufficient evidence in proof of the fact that he had defiled the complainant; it did not matter the number of members of the opposite sex the complainant may have had affairs with and probably defiled her if it was proved beyond reasonable doubt that indeed the appellant defiled her. The relevance of the complainant's mother's testimony was that it raised doubts on the complainant's evidence that she was not involved with any man other than the appellant.

Talking about the credibility of the prosecution witnesses, the evidence of the medical treatment notes

which was produced as a bundle by the investigations officer, Corporal Betty Chepkoech (PW4), and marked as prosecution exhibit no. 4 cast doubt on the truthfulness of both the complainant and her mother. The narrative of the complainant's history as recorded in one of the notes was follows:

> ***A 17-year-old girl brought to the facility by the mother requesting for a test to rule out spermatozoa after allegedly disappearing from home for some time. After consultation, she declined having been involved in sexual activity.***

There are several conclusions, which apparently are inconsistent with the evidence of both the complainant and her mother, that one can draw from this statement. First, the complainant disappeared from home; it is not clear for how long she could have been away for all we are told is that it was "for some time"; in my humble opinion, and in the absence of any evidence to the contrary, a few hours' absence from home by the complainant could not have alarmed her mother to the extent that she felt compelled to subject her to a pregnancy test. Not that the complainant was not capable of engaging in a sexual activity within the shortest time possible, if such a window of opportunity was open to her, but the complainant's own evidence suggested that she did not evoke any suspicions on what she had been up to on the day that she is alleged to have been with the appellant. If that wasn't the case, there is no reason why she should not have been taken to hospital almost immediately but only went there for a pregnancy test almost two months after the event.

Second, if my evaluation is correct, it cannot be true, as the complainant's mother alleged, that she only learnt of the complainant's health status when she was summoned to the complainant's school and later took her to hospital

Third, the credibility of the complainant was once again brought into focus for she is quoted in the medical notes to have denied having been involved in sexual activity as at 26th October, 2015 yet she informed the police and subsequently testified in court that indeed she had had a sexual encounter with the appellant long before this date.

Besides questions raised on the credibility of the complainant, I have noted that the learned trial magistrate misdirected herself in law by admitting the complainant's unsworn testimony. For some reason, although the complainant was above 17 years old, the trial court subjected her to voire dire examination and came to the conclusion that she did not understand the meaning of an oath; accordingly, the court directed that she gives unsworn testimony. I suppose in doing so, the trial court proceeded on the mistaken presumption that the complainant was a child of tender years; she was obviously not a person who fell in that category of children.

A child of tender years was defined in the case of **Kibangeny Arap Kolil versus Republic (1959) EA 92** where the court held that though there is no definition of such a child in the **Oaths and Statutory Declarations Act**, he or she could, for purposes of **section 19 of the Act,** be taken to mean, in the absence of any special circumstances, any child of any age or apparent age of under fourteen years. S**ection 19 of the Oaths and Declaration Act**, spells out what in effect are the guidelines in taking the evidence of a child of tender years. It states as follows: -

> **19. (1) Where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court , or such person as aforesaid, understands the nature of an oath, his evidence may be received, though not given upon oath, if , in the opinion of the court or such other person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.**

Section 233 of the Criminal Procedure Code has since been repealed but the essence of **section 19(1)** of the Oaths and Statutory Declarations Act, is that before a court admits the evidence of a witness of tender

years it must first examine the witness to satisfy itself that either the witness understands the nature of an oath or, in the absence of such an understanding, the witness is possessed of sufficient intelligence and understands the duty of speaking the truth. In a nutshell, this is what voire dire examination is all about.

The complainant was way above 14 years old and therefore I need not belabour the point that her evidence was not subject to voire examination. As matter of fact, the Court of Appeal in **Malindi Criminal Appeal No. 44 of 2013, MK versus Republic (2015) eKLR** adopted the definition of a child of tender years as provided **in section 2** the **Children Act, Cap. 141**, to mean a child who is below 10 years old.

The error of treating the complainant as child of tender years when she was not led to another and a more serious error; **section 151** of the **Criminal Procedure Code, cap 75**, which requires all evidence in criminal proceedings to be given on oath was breached; that section provides as follows:

> ***151. Evidence to be given on oath***
>
> ***Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.***

This provision of the law is plain and self-explanatory that it is mandatory that all witnesses in criminal proceedings must be examined on oath; this implies that when a witness gives an unsworn statement when he should have given evidence on oath, his or her the statement cannot be regarded as evidence for it carries no probative value upon which a trial court can make any concrete decision. When this is narrowed to the case against the appellant, I cannot help but come to the conclusion that there was, in effect, no evidence against him by the complainant.

The ultimate conclusion that I have to come to is that the appellant's appeal has merits and I hereby allow it; the appellant's conviction is quashed and the sentence meted out against him set aside. He is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 15th May, 2017

Ngaah Jairus

JUDGE