REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 29 OF 2015

(FORMERLY MERU HCCRA 105 OF 2013)

NAHASHON KIRIMI MUSEE…….....…….……APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

(***An Appeal from the Judgment and conviction of P.M. KIAMA – P.M made on 15/10/2013 in Marimanti Principal Magistrate's Court Criminal Case No. 586 of 2012).***

J U D G M E N T

1. On 1st October, 2012, Nahashon Kirimi Musee was arraigned before the Principal Magistrate's Court, Marimanti with a charge of defilement contrary to Section 8 (1) and (4) of the Sexual Offences Act, No. 3 of 2006. It was alleged that between the 19th and 30th of September, 2012 at ***[particulars withheld]*** village, Nkondi sublocation, in Nkondi Location in Tharaka South District within Eastern Province, the Appellant intentionally caused his penis to penetrate the vagina of "A K" a child aged 17 years.
2. The Appellant denied the charge but after trial, he was found guilty was convicted of the offence and sentenced to 15 years imprisonment. Aggrieved by that decision, the Appellant has appealed to this court and sets out six (6) grounds of appeal in his Petition which can be summarized as follows:-

a. **that the trial court failed to consider that the that the Appellant and the complainantwere age mates;**
b. **that the trial court failed to consider that the medical evidence was inconclusive and did not prove the offence of defilement; and**
c. **that the trial court failed to consider that no under pants were produced to prove the offence.**

3. This being a first appeal, it behoves this court to review and re-evaluate the facts afresh and draw its own independent findings and conclusions. **See Ekeno.V. Republic [1972] EA 352.** However, in so doing this court must at all times have in mind that it did not have the advantage of seeing the witnesses testify and gauge their demeanour.
4. The prosecution case was that on 19th September, 2012 the complainant "A K" left her home in Marimanti and went to the Appellant's place at Nkondi. They met at a place called "public" where they had arranged to meet before hand. The two used a bicycle and went to the home of the accused. They engaged in sex on a Thursday and Friday. The police came and arrested the two on Sunday the 30th September, 2012 and took them to Marimanti Police Station. During the time

the complainant was staying with the accused, his mother used to cook food and his sister will being the same to the two. In cross-examination, the complainant told the court that on that day the accused did not ask her for her age; that when she went to write her statement to the police, her father told the police that she was 19 years. PW2 S N R, the father of the complainant, told the court how after he came from work on the 19th September, 2012, he found the complainant missing from the home. That at the time, the complainant was a 17 year old girl at ***[particulars withheld]*** High School. That they searched for the complainant everywhere but could not find her. That he reported the matter to, inter alia, to her school and the area chief. Later, he learnt that the accused and the complainant had been arrested and were at Marimanti Police Station.

5. PW3 Josphat Banda told the court how PW2 had on 25th September, 2012 reported to him that his daughter had gone missing. That he advised him to report to the police and that on 30th September, 2012, he received a report that the accused and the complainant had been taken to Marimanti Police Station. Dr. Felix Oindi (PW4) appeared and produced a P3 form PExh 1 which showed that the complainant's hymen was broken but the genitalia was normal. The examination was conducted on 4th October, 2012. He also produced an age assessment report which showed that the complainant was under 18 years. PW5 the investigations officer told the court how PW2 had lodged with the police a report of his missing daughter, how the accused and the complainant were both arrested and taken to Marimanti District Hospital whereby only the complainant was examined.
6. In his defence, the Appellant told the court that on 26th September, 2012 he received a call from the complainant that she wanted to meet him since she had a domestic problem. That she came to his home but then refused to go back to her home.
7. At the hearing of the appeal; the Appellant only told the court that he was 20 years old and did not argue his grounds of appeal. On his part, Mr. Ongige Learned Counsel for the state did not oppose the Appeal. He submitted that at the time trial commenced, there was an order that the Appellant's age be assessed which was never done; that PExh 2 which was the age assessment report was not conclusive as to the exact age of the complainant; that the exact age of the complainant was in issue as the police statements indicated that she was 19 years. In this regard, counsel conceded the appeal.
8. The Appellant did not argue his grounds of appeal and as noted, the prosecution conceeded the appeal. This court has carefully considered the record. It is clear from the Appellant's defence before the trial court that, he never attempted to deny the offence.He never denied the act of sexual intercourse with the complainant. What he attempted to do was to show that the act was consensual; that it is the complainant who brought herself to him and that she threatened suicide if he chased her away. From the evidence of PW2, S N R the father of the complainant and PW5, PC Martin Mureithi, the complainant may have eloped with the Appellant. It came out clear at the trial that the complainant had refused to go back to school until she was charged in court. PW2 is recorded as telling the court:-

"I found the accused and my daughter already under arrest at the camp. My daughter refused to attend school and told me she wanted to get married. At Marimanti Police Station, the police tried to resolve the matter but the girl refused to go back to school. ….. ….. The girl has since agreed to go back to school. The child had been charged in count (sic) 2."

9. In cross-examination, PW5 testified:-

"When you eloped with the girl, she had no school uniform. <u>Whether one is supposed to inquire the age of the girl depends on the individual"</u>. (Emphasis supplied).

Then the complainant told the court in cross-examination:-

"I did write a statement with the police. At the police station, my father said I was nineteen (19) year old. My father is the one who brought the case to police……. It is true we were brought to court together. I did say I would go back to school. In the other court, I was told to bring the age certificate."

10. All that I have set out above goes towards considering two issues; the Appellant's defence that he and the complainant were age mates and the lack of clear evidence of the exact age of the complainant. The age of the complainant seems to have been very central in these proceedings as submitted by Mr. Ongige. While the father is said to have told the police that his daughter was nineteen (19) years, the complainant told the court she was seventeen (17) years. The record shows that she and the Appellant's intention may have been to elope and get married. That is why she was with the Appellant between 19th and 30th September, 2012, when both were arrested at the Appellant's house, with the connivance and probably encouragement of the Appellant's mother who kept them well fed throughout that period.
11. The question that arises is, what was the exact age of the complainant? Was she the child of 17 years named in the charge sheet or someone else? The trial court made a finding that she was seventeen (17) years. At the commencement of the trial, the court had made a direction that the complainant's age and that of the Appellant be assessed. There is no evidence that any of them was assessed. The court relied on a document produced as PExh 2 by Dr. Felix Oindi (PW4) from Tharaka District Hospital. That document is dated 10th April, 2013. It is shown to emanate from Meru level 5 Hospital and it was in respect of one Alice Karwirwa and not the complainant. Though it was admitted in evidence, the document was not made by PW4. There was no evidence before court to show that the person named in that document was the same as the complainant. In this regard, the court fell into serious error in relying on that document to convict the Appellant for two reasons. Firstly, the document did not indicate the exact age of the complainant and secondly, the document did not relate to the complainant who testified before court. Their names were completely different and that was no suggestion that the names referred to one and the same person. The age of the complainant who was before court was in serious dispute yet the same was not proved.
12. In this regard, I think the state was right in conceding the Appeal. Accordingly, the Appeal is hereby allowed, the conviction quashed and the sentence set aside. The Appellant is to be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at Chuka this 12th day of May, 2016.

A. **MABEYA**

JUDGE