REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 12 OF 2015

OMAR NACHE UCHE ..... APPELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(From the original conviction and sentence in Criminal Case No.121 of 2013 of the Principal Magistrate's Court at Marsabit by Hon. T.M Wafula – Resident Magistrate)

JUDGMENT

The appellant, **OMAR NACHE UCHE**, was charged with an offence of defilement offence of rape contrary to section 8(1) (3) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 23rd February 2013 at Dakabaricha Central District Marsabit of Marsabit County, intentionally and unlawfully caused his penis to penetrate the vagina of **G.A.H** without a child aged 14 years.

He was sentenced to serve 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Omari, learned counsel, who relied on six grounds of appeal which can be compressed into three as follows:

1. That the learned magistrate erred in law and in fact in convicting the appellant when there was no sufficient evidence tendered against the accused thus a miscarriage of justice was occasioned.

2. That the learned trial magistrate erred in law and in fact by relying entirely on evidence of the complainant alone.

3. That the learned magistrate erred in law and in fact by convicting the appellant without evidence that supported the charge.

The state conceded the appeal through Mr. Motende, the learned counsel.

Briefly the facts of this case are as follows:

The complainant on the material date at about 12 noon left her home to visit the appellant. She found him at home. He asked her to have sexual intercourse with him. They both entered into the bedroom and had sex. The appellant then left her there and went to her home. Later at about 5pm the appellant returned in company of her father and a police officer and both were arrested.

In his defence the appellant contended that when the complainant went to his home, he requested her to leave for there was a defilement case pending where she had complained against him. She refused to leave and even after his father and another relative implored her to do so she still refused. He denied that there was any sexual intercourse between them.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and 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 VRS. REPUBLIC 1972 EA 32.**

I must start by observing that this is a curious and strange case. There was a pending case between the complainant and the appellant on allegations of defilement and yet she purports to have gone to visit the appellant. I can only make two possible conclusions to explain the conduct of the complainant;

1.Either the complainant was out to frame the appellant or;

2. She was forced to falsely complain against him to appease her parents. I make this observation for the evidence does not support the charge.

The complainant's evidence in chief is very sketchy as compared to her evidence in cross examination giving an impression that she may not have been candid in her testimony. In my view she volunteered more information during cross examination to either please her parents or to shift the blame to the appellant. She cannot be relied upon unless her evidence is corroborated. She is the type of a witness who was described by the Court of Appeal in the case of ***Ndungu Kimanyi vs. Republic [1979***] **KLR 283** as follows:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

The complainant's contention that they had sex was contradicted by the medical evidence. The observation by **Dr. Mwanzia** is that there was no sexual intercourse. This was testified to by **Dr. Sereti** during cross examination. However earlier during evidence in chief he had said that **Dr. Mwanzia** had concluded there was penetration because of a tear he had noted. The doctor also had noted that the complainant was 18 years of age.

The complainant and her mother **F G (PW2)** gave her age as 14 years but the doctor said she was 18 years. Age of a complainant in a defilement case is very important especially in the circumstances akin to this case. Failure to prove the same in this case is fatal to the prosecution case. If indeed she was 18 years of age, her evidence suggest that she consented to sexual intercourse.

There were many material contradictions which did not support the charge. Where the particulars of the charge and the evidence are at variance then an accused person is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. Republic High Court Criminal appeal no. 181 of 1981(Nairobi).**

The variance between evidence and the particulars of the charge coupled with the many contradictions in the evidence must have informed the learned state counsel to concede the appeal. I find that it was not safe to convict the appellant. I accordingly allow the appeal quash the conviction and set the sentence aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at MARSABIT this 5th day of July 2016

KIARIE WAWERU KIARIE

JUDGE