**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**HIGH COURT CRIMINAL APPEAL NO. 103 OF 2012**

**M N……..……APPELLANT**

**VERSUS**

**REPUBLIC……..……....RESPONDENT**

**JUDGMENT**

1. The appellant, **MN,** appeared before the **Senior Resident Magistrate** at **Ogembo** charged with attempt to procure abortion, contrary to ***Section 158*** of the penal code, in that on the **5th June 2009**, in **Gucha District,** jointly with another not before court with intent to procure a miscarriage of a woman namely **AO**, inserted a sharp pointed instrument into the birth canal of the said **AO**.

**2.** After a full trial, the appellant was convicted and sentenced to ten (10) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on the **24th April 2011**, together with the supplementary grounds filed on **10th August 2015.**

**3.** The appellant appeared in person at the hearing of the appeal and opted to rely on his written submissions filed herein on **10th August 2015**. His main complaint is that he was convicted by the trial court on the basis of evidence which was insufficient and contradictory in that, other that the p3 form, no treatment notes were produced to confirm alleged treatment. That, the clinical officer (pw4) observed that the complainant's condition was usual in a normal birth. That, the evidence by pw1 and pw2 was contradictory in relation to the instruments allegedly used in the attempt to procure abortion.

**4.** The appellant contended that no investigations were conducted in the case and that there was no evidence to show that the complainant gave birth prematurely. He also contended that the medical evidence was inconclusive and that the prosecution did to discharge its burden of proof.

The appellant therefore urged this court to allow the appeal and set him at liberty.

**5.** The learned prosecution counsel, **M/s. Boyon**, opposed the appeal on behalf of the state/respondent and submitted that the evidence adduced by the prosecution was sufficient. That, four (4) witnesses testified for the prosecution and in the process the complainant (pw1) narrated to the court how the appellant who was her teacher invited her to his home on several occasions and made advances at her. That, she finally succumbed to his advances resulting in them having sexual intercourse which led to her pregnancy.

**6.** Learned prosecution counsel, further submitted that the appellant gave a sum of Kshs.1000/= to the complainant to procure an abortion. An attempt was thus made to have the pregnancy terminated. Learned prosecution counsel went on to submit that the evidence against the appellant was overwhelming

and that the complainant's evidence was corroborated by that of her grandmother (pw2).

**7.** The learned prosecution counsel contended that the appellant took advantage of the complainant, defiled her, impregnated her and attempted to procure an abortion while she was at the time aged fifteen (15) years.

It was further the contention of the learned prosecution counsel that the appellant's grounds of appeal amount to mere denial and do not challenge the prosecution evidence at the trial. Therefore, this appeal lacks merit and fit for dismissal.

**8**. After due consideration of the rival submissions in the light of the grounds in support of the appeal and those in opposition, the duty of this court was to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

**9.** In that regard, the prosecution case was briefly that, the complainant **ANO (pw1**) was at the material time aged fifteen (15) years and a secondary school pupil at **[Particulars Withheld] Secondary School** where the appellant worked as a teacher. In due course he made advances at and seduced her. She initially declined the advances but later gave in.

He invited her to his home at a time when she was sent home for school fees. It was then that they engaged in sexual intercourse. Later, she missed her monthly menses and alerted him. He gave her a sum of Kshs.1000/= to procure an abortion on closure of schools.

**10.** She (complainant) kept the money and did not attempt an abortion. Upon return to school, he (appellant) called her on the **5th June 2009**, and informed her that he would take her to a place where the abortion would be carried out. They went to the place using separate routes and on meeting again, the appellant was in the company of a stranger who was to assist in the abortion. The stranger asked for money and indicated that he could not take her to his house for fear of being seen with her. He took her to a nearby brick house where he left her for about ten (10) minutes and returned with some items including a bucket of water, cotton wool, a sack and an object resembling a pair of pliers. She was directed to lie on the sack on the floor of the house with her legs apart. The stranger then inserted the pliers into her sexual organ (vagina) causing her to feel a watery gush. He withdrew the pliers from her and after twenty (20) minutes told her not to say what happened but to tell the teacher (appellant) that the job was complete.

**11**. She returned to school but because of the after effect of the "*operation*" carried out of her, she went home and slept. Her step-mother later arrived and asked why she had left school early. She indicated that she was unwell and thereafter accompanied her step mother to hospital at Kenyenya where they met her school principal **Zadock Morema Mochache,** who told her to proceed to her mother's place of work in a hotel even as he was left behind conversing with her step mother.

**12**. It was then that the complainant realized or suspected that her plot had been discovered. She met her mother who asked her whether she had gone to **Maraba** with a teacher. She answered in the affirmative and on being asked about her pregnancy she gave an explanation. Her mother called her father who was away attending a seminar in Western Province. He directed that the matter be reported to the police. She accompanied her mother to the police station after which she was directed to **Kenyanya hospital** where she was later put on treatment and ended up giving birth to a baby boy whom she later named **K**. She recorded a statement with the police and indicated that she was almost nine (9) months pregnant when the abortion was attempted.

**13**. The complainant's grandmother, **TK** (pw2), saw the complainant in the company of the appellant as they passed along a road near her house. She noted that the appellant was walking ahead of the complainant. She talked to the complainant who informed her that she (complainant) was going ahead shortly. She (pw2) noted that the complainant was pregnant and had said that she was going to see a doctor. She (pw2) then saw the appellant returning from somewhere. He briefly conversed with the complainant. Thereafter, she (pw2) followed the complainant to the "*doctor*" to see what was happening.

She did not talk to the "*doctor*" but saw him administering drugs on the complainant. She did not know his name. Later, she (pw2) and others took the complainant to hospital where she experienced labour pains and gave birth.

**14.** The report of the attempted abortion was received at Ogembo police station of **7th June 2009**, by **P.C. Jared Osogo (pw2)**. He commenced necessary investigations and issued a P3 form to the complainant for her to undergo a medical examination at Gucha District hospital. He later charged the appellant with the present offence after he was arrested. **Joseph Mokua Nyangau (Pw4**), a clinical officer at **Gucha District hospital** examined the complainant on **9th June 2009** and thereafter compiled and signed the necessary P3 form (P.ex1) indicating that she had undergone induced abortion.

**15.** The appellant's defence was a denial and a contention that his relationship with the complainant was only that of teacher and student. She was at the material time one of his form two students. He knew her by name but contended that the allegation that be impregnated her was false. He never tried to induce her to abort and it was only after his arrest that he learnt that she had given birth.

**16.** The appellant indicated that all the teachers and the school administration as well as himself were not aware that the complainant was pregnant. Her parents did not also complain that she was pregnant. He (appellant) implied that he was implicated by the complainant's father due to their political differences arising from his support of a person other than that from their clan, he (appellant) and the complainant's father being from one clan.

**17**. From all the foregoing evidence, it was apparent that the basic issue for determination by the trial court was whether there was an attempt to procure an abortion respecting the complainant and if there was, whether the appellant was the person responsible. As noted hereinabove, the appellant's defence was a total denial of responsibility without necessarily disputing the occurrence of the unlawful transaction. The complainant's sexual escapades with or without the appellant did not arise as facts in issue. Therefore, the identity of the person responsible for her pregnancy was immaterial and if it was, then the person ought to have been charged with the offence of defilement considering that the complainant was only fifteen (15) years at the time.

**18**. Be that as it may, ***Section 158*** of the penal code provides that:-

> ***"Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever is guilty of a felony and is liable to imprisonment for fourteen years."***

The evidence by the complainant (pw1) as supported by that of her grandmother (pw2) indicated that some substance or object was administered or inserted into the complainant through her sexual organ or through her buttocks for purposes of procuring a miscarriage or abortion.

**19.** The clinical officer (pw4) confirmed by medical examination that the complainant underwent induced abortion or rather attempted abortion. He however, could not tell how and by what means the attempt was made. Apparently, the prosecution through the evidence of the complainant (pw1) and that of her grandmother (pw2) could not establish with certainty how and by what means the attempt to procure miscarriage was effected.

Whereas the complainant talked of a pair of pliers being inserted into her vagina her grandmother talked of some drugs being administered into the complainant by use of a syringe through her buttocks and/or through her vagina.

**20.** Such material contradiction impacted negatively on the veracity of both the complainant and her grandmother thereby raising doubt as to whatever indeed there was any attempt by any person to procure an abortion so that it could be stated with certainty that the necessary ingredients of the offence were duly established by the prosecution against the offender.

**21**. And, even if it was accepted that the ingredients of the charge were fully established through evidence availed by the prosecution, the next material issue would be whether the appellant was the offender. In this regard, it was evident that the appellant and the complainant were seen together at or about the time the offence was allegedly committed. However, it was also evident that the appellant later left the complainant after a person referred to as a *"doctor'* appeared at the scene allegedly through the appellant's influence.

**22.** The said "*doctor*" was the person who took the complainant to a certain brick house and administered or inserted substances or objects into her sexual organ with a view to procure a miscarriage.

After he or she was finished, the "*doctor*" notified the complainant that the mission was successful but she should not inform anybody save the appellant. As it turned out the mission was never successful as the complainant ended up giving birth to a baby boy. The appellant's apparent connection with the *"doctor"* raised suspicion that he was aware of what was going on and in fact, prompted the whole illegal transaction.

**23.** However, mere suspicious was not adequate evidence of his involvement in the offence either as a principal offender and/or aider and abettor especially given that the prosecution did not avail evidence to establish that there was a common criminal intention between him and the "*doctor*" to commit the offence (**see, Dracaku s/o Afia & Another v.s. Rep. [1963] EA 363] see also, Section 21** of penal code].

Apparently, the "doctor" was not arrested and charged yet he was the principle offender and was known to the complainant's mother going by what was stated by the complainant's grandmother. (pw2).

**24.** For all the foregoing reasons it could not be stated that the charge was proved by the prosecution against the appellant beyond any reasonable doubt even though he was highly suspected on the basis of the fact that there could have been a linkage between him and the "*doctor*" or that he was the person responsible for the complainant's pregnancy and therefore decided to terminate it through co-operation from the complainant. Suspicion, no matter how strong, cannot be a basis for conviction in a criminal charge. It may form part of circumstantial evidence against the suspect but cannot be considered on its own to found a conviction.

**26.** Herein, it was apparent that the appellant was convicted by the trial court on the basis of suspicion that he was responsible for the complainant's pregnancy and that he provided the "*doctor"* who attempted to procure an abortion on her. The conviction, in the opinion of this court was neither safe nor sound and must and is hereby quashed with the result that this appeal succeeds on both conviction and sentence which is hereby set aside.

The appellant be forthwith set a liberty unless otherwise lawfully held.

**J.R. KARANJAH**

**JUDGE**

[Delivered and signed this **3rd** day of **December 2015**].

In the presence of **M/s. Boyon** for state and appellant in person.