REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HC CR A. NO 24 OF 2015

FORMERLY MERU HC CR. A NO.32 OF 2012

STEPHEN MUGAMBI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(An Appeal from the Judgment of Hon. P.M. Kiama SRM made on 7th July, 2011

in Marimanti Principal Magistrate's Court Criminal Case No.242 of 2010)

J U D G M E N T

1. Stephen Mugambi (hereinafter "the Appellant") was on 10th June, 2010 arraigned before the Marimanti Senior Resident Magistrate's Court with the charge of defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 24th May, 2010 Tharaka Nithi District within Eastern Province, the Appellant intentionally caused his penis to penetrate the vagina of L K a child of 16 years.

2. After the trial, the Appellant was convicted of the offence and sentenced to 15 years imprisonment. He has now appealed to this court against both conviction and sentence. The grounds of appeal are that:-

a. the trial court erred in convicting the Appellant yet the prosecution did not prove its case as required and for failure to satisfy itself as to the age of the complainant;

b. that the medical evidence produced was in sufficient;

c that the trial court failed to consider the Appellant's evidence; and

d. that the complainant's evidence was contradictory and full of gaping holes and unreliable to convict the Appellant with.

3. Ms. Nelima, learned counsel for the Appellant abandoned ground 3 of the Petition of Appeal.

4. This being the first appellate court, it is incumbent that I do review examine and re-evaluate the entire evidence and come up with my own independent findings and conclusions. See **Ekeno - vs - Republic (1972) EA**. However, in so doing, I must have in mind the consideration that I did not have the advantage

of seeing the witnesses testify and gauge their demeanour.

5. The evidence before the trial court was that the complainant was a form 3 student at Marimanti Girls' School. She and the Appellant studied together at Rwakinaga Primary School. On 24th May, 2010, the complainant was sent home for fees. When she was going back to school on 24.5.2010 she met two young men on a boda boda who offered her a lift. She agreed to board the boda boda because she knew the Appellant. The Appellant then took the complainant to some house in Marimanti Market belonging to him and locked her in. He went away and returned at around 7pm with two (2) sodas. At night, the Appellant wanted to make love with the complainant but she refused. Then the Appellant went out at around 1am and locked the complainant behind.

6. At around 5am, the Appellant came back, after an exchange with the complainant, he striped her on the bed and had sex with her. He thereafter locked her in the house and run way. At around11 am the complainant heard people breaking the glass. The key came off, she gave the key to the Police Officers who opened the door for her. They took her to Marimanti hospital. On cross examination, PW1 admitted that she schooled with the Appellant in Primary School. That she did not scream during the incident because she did not know if there were people around who could offer help.

7. Pw2 was a Medical doctor who produced the P3 form. He told the court that the complainant was 16 years old, that she reported to have been locked up in a house on 24th April, 2010. The P3 form showed that on examination at part B, there was mild abrasion on the labia minora and the hymen was broken. There was discharge from the vagina and there were injuries on the external part of the vagina. He produced the P3 form as PEXH. 1.

8. PW3, the investigating officer, testified that she was in the office on 24.5.10 when the OCS called her on phone and informed her of a girl who had been locked up in a house. That it is the OCS who went to the scene and found the complainant locked in the house. The complainant then gave the police the key which opened the door. She arrested the Appellant on 9th June, 2010. On cross-examination, she confirmed that she never visited the scene and that there was nothing to show that the house from which the complainant was rescued belonged to the Appellant

9. In his defence, the Appellant told the Court that he and the complainant were lovers. They studied together in primary school upto class 8. He joined Kiunga Youth Polytechnic while the complainant joined Egenya Secondary School. She later transferred to Marimanti Girls' School. That their friendship continued until he finished his course. He stated that on the material day, the complainant called him around 7.30pm and told him that she had been refused permission to enter school because it was past time. That she wanted to spend the night in his house. That the complainant came and spent the night in his house. The following morning at around 5am, he left for his rural home. That at around 3pm, the complainant called and informed him that the police had arrested her. He did not talk to her again.

10. At the hearing of the Appeal, Ms Nelima submitted that the evidence tendered at the trial did not prove the prosecution case to the required standard; that the age of the complainant was not ascertained though crucial, that the medical evidence by PW3 was insufficient. She relied on **Ben Maina Mwangi .V . R (2006) KLR 187;** that the defence of the Appellant was not considered and that the complainant's evidence had gaping holes, was contradictory and unsafe to found a conviction.

11. On his part, Mr Ongige Learned State Counsel opposed the appeal. He submitted that the age of the complainant in the charge sheet as well as the P3 form was stated to be 16 years; that the determination of the age of the appellant after trial did not have any effect on his trial; that the evidence on record established the offence of defilement and that the evidence of the complainant was sufficient under Section 124 of the Evidence Act to find a conviction. In his view, the complainant's evidence was consistent and reliable. He urged the court to dismiss the appeal. This court has carefully reviewed the evidence on record and the submissions of learned counsel.

12. On medical evidence PW2 produced a P3 form dated 24th May, 2010. It showed that the age of the complainant was estimated at 16 years. On the general medical history, it was noted that the complainant

was:-

> **"ALLEGED TO HAVE BEEN LOCKED IN THE HOUSE OF A MAN WELL KNOWN TO HER. POLICE OFFICERS WERE SUMMONED BY THE PRINCIPLE (sic) WHO WENT AND FOUND THE GIRL LOCKED FROM OUTSIDE 24.04.2010 AT AROUND 15.00 (sic)"**

13. Further, the P3 form showed that the approximate age of the injuries was not applicable. The examining officer found that there was mild abrasions on labia minora and the hymen perforated. There was also discharge of spermatozoa from the vagina. PW2 concluded that the penetration was due to sexual encounter.

14. PW2 did not state that he is the one who examined the complainant and if so, when. He did not explain whether the date of alleged lock up of the complainant and the rescue by the police was as indicated in the P3 form as being on 24.04.2010 at 15 hrs or it was some other date. This becomes relevant when one considers that the P3 form did not indicate the approximate age of the injuries and the testimony of the complainant that on the night of 24th May, 2010 the Appellant did not have any sex with her. The question that arises is whether such medical evidence is conclusive and whether it can be relied on to find a conviction for defilement.

15. On the complaint that the Appellant's defence was not considered, the trial court did not believe his story. From the record, it is clear that the Appellant did not deny the act of sexual encounter with the complainant. His defence was basically that he and the complainant were long time lovers. They had known each other since primary school. That she requested to be given overnight stay at the Appellant's house as she had been locked out by the Principal of her school. He told the court that he asked the complainant to go to school the following morning but she declined. He left her behind and went to his rural home. The trial court did not give reasons why it did not believe the Appellant's explanation. Simply put, what the Appellant was telling the court is that "we have been lovers for a long time. We are simply age mates. We did this thing consensually." I will later on revert to this fact as far as the defence of the Appellant was concerned.

16. It should be recalled that no one testified on how the police discovered the presence of the complainant in the Appellant's house. However, PEXH 1, the P3 form indicates that it is the complainant's Principal who alerted the Police about that fact before they raided that house. Secondly, the complainant herself admitted that she is the one who gave the police the key to open the door. There was no evidence to show that the key could not open from inside. It is therefore safe to conclude that the Appellant did not lock the complainant and leave with the key as there is no way the key would have been found in the possession of the complainant on 24.5.2010, yet the Appellant was arrested two (2) weeks later.

17. For what I will say hereafter, this court's view is as follows; the Appellant and the complainant had been long time acquaintances; they were lovers; the complainant's Principal may have wrongly denied her entry to the school either on the 24th May, 2010 or the previous day and since she did not want to go back to her parents, she must have contacted the Appellant. She willingly spent the night in the house of the Appellant and thereupon had sex. She may have planned to go back to school later in the afternoon of the 24.5.2010 as she testified but for the Principal's action of alerting the police early enough. In the circumstances of this case, was the offence of defilement proved?

18. A girl child of less than 18 years cannot give consent to sexual intercourse. A man who befriends and confuses a girl of such age to agree into sexual encounter with him does so at his own peril. If it is proved that there has been any sexual intercourse with such a girl, it does not matter that the two have been childhood lovers. Whether the relationship has been there for as long as the man can remember, the moment the girl child is proved to be aged below 18 years, the man is in trouble and the harshness of the Sexual Offences Act No. 3 of 2006 will be metted upon him mercilessly. In short, there can be no defence that the two were lovers and that the girl consented to the act.

19. In the present case, the evidence on record is that the Appellant and the complainant had been friends

ever since primary school; they studied together upto class 8; the circumstances under which the complainant came to the Appellant's house seem to me to have been as explained by the Appellant, the complainant remained willingly in the Appellant's house until she was rescued. I say willingly because, the key to open the door was within her reach. It is her who gave that key to the police to open the door. Why did she not open the door with that key anytime after the Appellant left the house at 8.00am? When the Appellant's age was assessed on 4th July, 2011 barely a year after the sexual incident of 24.5.10, he was confirmed to be not of 18 years of age, but of "above 18 years." This leaves room for him to have been probably 19, 20 or even 22 years. He was then an adult. He was in the same class with the complainant, in standard 8 before the complainant went to Egenya Secondary School and later Marimanti Girls School. What evidence is on record to show that these two might not have been of the same age? I have already found out that his defence was to the effect that they may have been age mates. If that be the case, could there be said to have been defilement? I doubt.

20. What this court is addressing is Ms Nelima's submission that the age of the complainant was not ascertained. In defilement cases, the age of the victim should not be left to speculation or suppositions. It must be proved with certainty, indeed beyond reasonable doubt. The production of a birth certificate, clinic card or the testimony of the mother on the date of birth of the victim is to my mind crucial. A P3 form is not conclusive unless the Medical Officer examining the child states with certainty and clarity that he undertook an age assessment of the victim before estimating the age.

21. In the present case, this court has already noted the weaknesses of the P3 form (PExh 1). It cannot be relied on as proof of the complainant's age. The Defence of the Appellant pointed towards the fact that he knew or thought the complainant to have been of the same age with him. That is why he testified that their relationship dated back to their primary school days. Since the trial court found the Appellant to be above 18 years, a year after the date of commission of the offence, in my view, it would be very unsafe to convict the Appellant of the offence when the age of the complainant remained at large. Failure to ascertain her age in the circumstances of this case, was in my view fatal.

22. Accordingly, the conviction and sentence cannot stand. I allow the appeal, quash the conviction and set aside the sentence. The Appellant is hereby set free unless otherwise lawfully held.

DATED and delivered at Chuka this 3rd day of December, 2015

A. Mabeya,

Judge.