REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 86 OF 2013

IGNITIUS KIRITU GIKINYO……..……..……APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

(Being an appeal against sentence in Kangema Senior Resident Magistrate's Court Criminal Case No. 180 of 2009 (Hon. D.A. Orimba) on 8th July, 2009)

JUDGMENT

The appellant was charged with the offence defilement of a girl contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 7th day of May, 2009 at [Particulars Withheld] in Murang'a District within central province, the appellant intentionally and unlawfully had carnal knowledge of I N, a girl aged 4 years.

The record shows that when the charge and every element thereof were stated by the court to the appellant in a language that he understood, he answered that it was true. The facts were again read to the appellant; what is recorded as his answer to the facts is, "Re-examination-facts are correct."

Amongst the facts recorded, the appellant is said to have been found in bed with the complainant. His pant was said to have been recovered stained with semen. It was produced as an exhibit in the case. According to the prosecutor the doctor who examined the complainant confirmed that the complainant had been defiled. The P3 form that was filled was admitted in evidence as an exhibit.

In the appellant's appeal he admitted that he pleaded guilty to the charge against him but he says he was only 17 years then and incapable of understanding court procedures. He contends that the learned magistrate did not explain to him the implications of pleading guilty to the charge against him. The appellant curiously says that though he pleaded guilty he did not commit the offence.

One of the tasks this court has in proceedings such as the appeal herein is to evaluate the evidence afresh and come to its own conclusions irrespective of the decision that the trial court came to; all I need to bear in mind is that I do not have the advantage of having seen and heard the appellant at the trial and ascertain his demeanour when he pleaded guilty to the charge with which he was confronted.

One piece of evidence that has attracted my attention is the P3 form which was availed by the prosecutor as evidence to demonstrate his assertion that the complainant had been defiled. The doctors findings on the physical state of and any injuries to genitalia with particular reference to labia majora, labia minora, vagina and cervix were that there were no injuries or bruises noted on the genitalia and that the hymen was intact. According to the doctor there was no discharge seen. The physical examination was described as being fair.

The doctors report is obviously inconsistent with the offence with which the appellant was charged and the particulars in support of the charge. In short there is no evidence that the offence of defilement was committed and that it is the appellant who committed it.

The prosecutor also presented in court as evidence what he alleged to be the appellant's pants stained with his semen. There was no expert evidence to support the prosecutor's allegations.

In view of these gaps in the prosecution case, I am persuaded that there is sufficient doubt as to whether the appellant may have comprehended what he pleaded to and not just whether he appreciated the repercussions of his plea. There is doubt as to whether the plea was unequivocal. These doubts coupled with the fact that there is no evidence that the offence of defilement was committed leads me to the conclusion that the appellant's conviction was not safe. I will allow the appeal, quash the conviction and set aside the sentence. The appellant is therefore set free unless he is lawfully held.

Signed, dated and delivered in open court this 9TH day of May 2014

Ngaah Jairus

JUDGE