REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 415 OF 2013

PIUS MURIGI WAIRIMU.....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Thika Chief Magistrates Court Criminal

Case No.5061 of 2009 (Hon. Wachira) in a judgment delivered on 15th April, 2011)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8(1) 2** of the **Sexual Offences Act No. 3 of 2006**. According to the particulars of the offence, on the 1st day of November 2009 at in Murang'a South District within Central Province, the appellant unlawfully committed an act which caused penetration with LWM a child aged 16 years.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. In this particular count, it was alleged that on the 1st day of November 2009 in Murang'a South District within Central Province, the appellant unlawfully and intentionally committed indecent act to LWM by touching her private part namely, vagina.

At the trial, the state presented five witnesses while the appellant gave unsworn statement and did not call any witness. As the first appellate court, it is necessary for this court to interrogate this evidence afresh and come to its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses first hand. Again, fresh analysis of evidence is a right that the appellant is entitled to at this stage of the criminal justice process. This is what the court of appeal said in **Okeno versus Republic (1972) EA 32. At page 36** of its decision the court said**:**

> ***"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

The evidence that was led at the appellant's trial was that the complainant was a form three student at [Particulars withheld] Secondary School. On 1st November, at 4.00 pm she was on her way from a shopping centre where she had taken her brother for a haircut when she met the appellant near his home; she testified that she knew the appellant before. Apart from being their neighbour, the appellant had shared a class in school with the complainant before.

When the complainant encountered the appellant, the latter is said to have held her hand and forcefully led her to his room where he locked her and left; he came back at 7 pm but left soon thereafter without talking to the complainant. At 9 pm, so the complainant testified, the appellant came to the room pushed her to the bed and forcefully had carnal knowledge with her. This trend continued until the third day when the complainant's mother, her uncle and the police came to her rescue. Apparently, on one occasion probably on the second day of her detention at the appellant's room or house, the appellant had left his phone behind; it is on this particular occasion that the complainant used it to inform her mother of her whereabouts.

The appellant together with the complainant were found in the appellant's house where they had locked themselves; they were both taken to Kabati police station where the complaint against the appellant was reported before the complainant was taken to Thika District hospital for examination and treatment. She identified in court the treatment cards and the P3 form that was filled by the doctor who examined her.

The complainant's mother **VW (PW2)** testified that on 1st November, 2009 she sent her daughter to take her brother to a barber for a haircut; while her brother, whom she testified that he was aged six, came back home the complainant never turned up. Her efforts to trace her did not bear any fruit until such time that she called to say where she was. It was then that she sought the help of the chief who together with administration police officers, her husband and the complainant's aunt accompanied her to the appellant's house where they found him together with the complainant.

One of the police officers who arrested the appellant was **Philip Ibuya (PW3)** of Nguthuru administration police camp; he testified that on 3rd November, 2009 the area assistant chief and the complainant's mother reported at the camp that the appellant had locked the complainant in his house. He confirmed that he went to the appellant's house accompanied by his colleague and the people who had reported the matter to the camp; the complainant and the appellant were found locked in the appellant's house. The officer handed the appellant over to the police at Kabati for investigation.

Indeed the police officer who received the appellant at Kabati police station's crime office police constable **Naftary Njeru (PW5)** testified that the appellant was brought to the station by administration police officers from Nguthuru administration police camp. He recorded a statement from the complainant and her mother; he also issued a P3 form to the complainant and referred her to hospital for examination and treatment.

Dr David Karuri Maina (PW4) examined the complainant; he said that the complainant was aged 16 as at 4th November, 2009. He testified that upon examination of the complainant, there was a foul smelling discharge from her genitalia and that her hymen was broken. The doctor opined that there had been penetration.

When the appellant was called upon to defend himself, he opted to give unsworn evidence; he testified that the he was a student at Thika Technical School and that the complainant had been his classmate for seven years. According to him, the appellant came to his house out of choice. He told the court that there was a grudge between his parents and the complainant's parents and that the complainant's parents wanted to extort Kshs. 23,000/= from him. According to him, he was only framed because he did not have the money. The appellant denied having defiled the complainant.

In her judgment the learned magistrate held that there was sufficient evidence to prove that the complainant had been defiled and that she had been defiled by the appellant; she therefore convicted the appellant on the principle count of defilement contrary to **section 8(1) 2** of the **Sexual Offences Act No. 3 of 2006.** The appellant was sentenced to serve 10 years imprisonment.

The appellant appealed against the decision of the learned magistrate on the grounds that;

1. The prosecution case was riddled with inconsistencies and therefore the learned magistrate erred both in law and in fact in convicting the appellant based on such evidence;

2. The learned magistrate erred in law and in fact in convicting the appellant when the prosecution did no prove its case beyond reasonable doubt;

3. The learned magistrate erred in law erred in law and in fact in failing to consider that the appellant's rights were violated under article 49 of the Constitution;

4. The learned magistrate erred in law and in fact in rejecting the appellant's defence.

When the appeal came up for hearing the appellant informed the court that he was going to rely on his written submissions and that he had nothing further to add.

The state opposed the appeal and its counsel, Ms. Akhaabi, submitted that the evidence tendered at the trial pointed to the guilt of the appellant on the offence for which he was charged and convicted. There was evidence that both the complainant and the appellant knew each other before and therefore there was no dispute as to the identity of the appellant as the perpetrator of the crime against the complainant. There was also sufficient evidence from the doctor, which, according to the state counsel was uncontroverted; this evidence was to the effect that the complainant had been defiled. The learned counsel for the state asked the court to uphold the conviction and the sentence.

The court has considered the grounds upon which the appellant's appeal is based, and the submissions by both the appellant and the counsel for the state; these submissions will, no doubt, constantly remain in my rare view as I evaluate the evidence presented at the appellant's trial.

In analysing the evidence presented at the trial, two pertinent questions emerge; these are whether the offence of defilement as defined in **section 8(2)** as read with **section 8(1)** of the **Sexual Offences Act, No. 3of 2006** or in the alternative, whether the offence of indecent act with a child as defined in **section 11(1)** of that Act was committed.

If the answer to that question is in the affirmative, the question that logically follows is whether the appellant was behind any of these offences. The answers to these questions will constitute what was described by the court of appeal in **Okeno versus Republic** (supra) as the appellate "court's decision" or "its own conclusions".

Section 8(1) defines the offence of defilement; it states:-

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The punishment for the offence of defilement varies depending on the age of the child victim. In **section 8(2)** under which the appellant was charged, the sentence for defilement with a child of eleven years or below is imprisonment for life.

It is not clear why the appellant was charged under **section 8(2)** of the Act when the medical evidence indicated that the complainant was sixteen years old; at that age, the appellant ought to have been charged under **section 8(1)** as read with **section 8(4)**. **Section 8(4)** reads;

"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

Assuming that the appellant was properly convicted, the minimum term for which the appellant would have been sentenced to serve in prison was fifteen years imprisonment and not the ten years sentence which the learned magistrate imposed. I will return to this subject of sentence after considering whether the appellant's conviction on the offence of defilement was proved beyond reasonable doubt.

The penetration referred to in **section 8(1)** of the Act is defined in **section 2** thereof to mean "***the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

According to **Dr David Karuri Maina (PW4)** who examined the complainant, there was a foul smelling discharge from the complainant's genitalia and most importantly, as far as the charges against the appellant were concerned, the complainant's hymen was broken. In the face of this evidence, the doctor opined that there had been penetration. This information was contained in a P3 form which was admitted in evidence. Medical treatment notes indicating what the appellant had been treated of at Thika district hospital were also produced and admitted in evidence.

The doctor's evidence was neither challenged nor shaken and it left no doubt that the complainant's genital organs must have been inserted with the genital organs of another person in the language of **section 2** of the **Sexual Offences Act**. Penetration as defined in the Act was established and by extension, the offence of defilement as defined in **section 8(1) of that Act** was also proved beyond reasonable doubt.

The next question is whether, from the evidence available, it was proved beyond doubt that the appellant committed the offence. The testimony of the complainant was quite crucial in this regard; she was candid that she had been in the appellant's house from 1st November, 2009 to 3rd November, 2009 and for all that time she had sex with the appellant; indeed in her evidence, she testified that this was the first time for her to have sex.

While in the appellant's house she informed her mother who upon receiving this information she reported the matter to the chief and the administration police. Together they found the complainant and the appellant in the latter's house. The appellant did not deny that the complainant was found in his house; his case was that she came there voluntarily and was not forced as the prosecution seemed to suggest. The evidence that the appellant had sexual intercourse with the complainant for the three days she was in his house was corroborated by the doctor's evidence; it was not displaced and as the learned magistrate correctly held, it does not matter that the complainant may have voluntarily gone to the appellant's house or even consented to the sexual intercourse. As a child the complainant was incapable of making such a decision.

The appellant denied having committed the offence for which he was charged and convicted and testified that his prosecution was as a result of a grudge between his family and the complainant's parents; however there was no evidence in support of this allegation and having chosen to give an unsworn statement his evidence could not be tested through cross-examination. He again alleged that the complainant's parents had demanded the sum of Kshs. 23,000/= to withdraw the case against him; this assertion appeared to be an afterthought as this issue was never put to any of the prosecution witnesses when they testified. In my view the learned magistrate was right to reject the appellant's defence. Having analysed the evidence it can be concluded quite safely that the appellant was properly convicted and there is no merit in any of the grounds in his appeal.

As for the alleged violation of his constitutional rights under **article 49 (f)** of the **Constitution** in the sense that he was taken to court outside the constitutional limitation period, it is now settled that such violation, if any, does not entitle one to an acquittal; the aggrieved party can only sue for damages. In Criminal **Appeal No. 482 of 2007, Peter Sabem Leitu versus Republic (2013) eKLR 6 the court of appeal was of the view that**;

> ***"…even if it is found by a court, that the extra judicial detention was unlawful and that it is related to the trial, we consider an acquittal or a discharge to be disproportionate, inappropriate and draconian seeing that the public security would be compromised. If an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as invariably is the case, then the only appropriate remedy under section 84 (1) would have been an order for compensation for such breach"***

Having found the appellant to have been properly convicted, I am compelled to come back to the issue of the sentence meted out against the appellant. Although the appellant was charged under **section 8(1)** and **(2),** he ought to have been charged under **section 8(1)** and **(4)** owing to the fact that the complainant was aged sixteen. The error in the charge sheet cannot be said to have prejudiced the appellant's trial in any way and he never appeared to taken any issue with it; in any event, he was not sentenced to life imprisonment which is the mandatory sentence provided for under that section.

The learned magistrate sentenced the appellant to ten years imprisonment; that sentence is not provided for an offence of defilement under **section 8 (1) and (4)** of the **Sexual Offences Act.** The minimum sentence for an offence under this provision is fifteen years imprisonment. The record shows that a requisite notice was issued on more than one occasion warning the appellant that he risked enhancement of the sentence should his appeal fail; the appellant is recorded to have understood the warning but still insisted on proceeding with his appeal.

The result of the appellant's choice is that his appeal is dismissed and the conviction by the subordinate court upheld. The sentence of ten years is however substituted with that of fifteen years imprisonment. It is so ordered.

Signed, dated and delivered in open court this 6th day of June, 2014

Ngaah Jairus

JUDGE