



**REPUBLIC OF KENYA**

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

**Criminal Appeal No.76 Of 2013**

**Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Kyuso (B.M.Mararo) in Criminal Case No. 173 of 2012**

**DAVID MUTHANDE MULYUNGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction**

David Muthande Mulyungi, the appellant, was charged in the lower court with defilement contrary to section 8(1)(3) of the Sexual Offences. It is alleged that on diverse dates between 20<sup>th</sup> and 23<sup>rd</sup> August 2012 at (particulars withheld) in Mumoni District of Kitui County intentionally caused his penis to penetrate the vagina of R.M.M, a child aged 15 years.

He was charged with an alternative count of committing an indecent act with the same child contrary to section 2(1) of the Sexual Offences Act. The alternative count is alleged to have been committed on the same date and at the same place as in the main charge.

After taking evidence of seven prosecution witnesses and the defence, the trial magistrate found the main charge proved beyond reasonable doubt, convicted the appellant and sentenced him to serve 15 years imprisonment. It is this conviction and sentence that brings him to this court on appeal.

**Petition of appeal**

By an amended petition of appeal filed with leave of this court on 16<sup>th</sup> May 2014, the appellant has listed seven grounds of appeal which I understand to be contesting the following:

- i. That the case was not proved beyond reasonable doubt.
- ii. That the prosecution case was contradictory and inconsistent.
- iii. That the case was not investigated.
- iv. That the complainant was couched.
- v. That the doctor's evidence was manipulated by the prosecutor.
- vi. That the sentence is harsh and excessive.

**Appellant's submissions**

In support of the petition of appeal, the appellant submitted that the age of the complainant was not proved; that the complainant said she was aged 15 years while the doctor and the chief said she was 14 years of age; that nothing was produced to prove age and the doctor failed to assess the age of the complainant.

The appellant submitted further that penetration was not proved and the fact that the complainant said she spent the night at the appellant's does not mean there was penetration; that medical evidence is not conclusive that penetration took place; that the evidence is contradicting as to whether the complainant was found in the appellant's house; that the appellant was not identified as the person who was with the complainant; that the complainant testified twice, at first denying the offence took place but she later said it did thereby supporting the prosecution case and that the sentence is harsh and excessive. The appellant asked the court to allow the appeal, quash the conviction, set aside the sentence and set him free.

### **Respondent's submissions**

Mr. Mulama, the learned state counsel for the respondent opposed the appeal. He submitted that the medical evidence shows there were bruises on the complainant's genitalia due to forceful penetration; that penetration could be either partial or complete as per section 2 of the Sexual Offences Act; that the age of the complainant was proved since the complainant told the court her age; that the appellant was known to the complainant and had stayed with him for 2 days; that standing the complainant down and recalling her to testify is within the law; that the evidence by the prosecution witnesses is consistent and the trial court gave its reasons for its findings. Learned state counsel asked the court to dismiss the appeal for lack of merit.

### **Brief facts of the case**

**R.M.M**, PW1 and the complainant did not go home on 20<sup>th</sup> August 2012 from the river where she had gone to fetch water. She instead went to the home of the appellant to pick her book. She stayed in appellant's house until evening and they spent the night together. She stayed with the appellant for two days and had sex with him for the two nights.

At home, **R.M.M** was missed by her grandmother (not a witness) who informed **G.M.M**, PW2 and complainant's aunt. PW2 in turn informed **M.K**, PW3, and another aunt. The two aunts joined forces with one **K**. brother to the complainant (not a witness) to look for the complainant.

The search for **R.M.M** led the search party to the house occupied by the appellant at the home of his employer. This is where the complainant was found. The appellant was arrested and later charged while the complainant was referred to hospital for treatment.

### **Determination**

To my understanding the appellant is contesting that the evidence by the prosecution witnesses is inadequate to support a conviction and that it is contradictory and inconsistent; that the complainant was couched on her evidence; investigations were not carried out and the harsh sentence. I will consider all these issues together.

The record of the lower court shows that on 27<sup>th</sup> September 2012 the complainant testified but was stood down after the prosecutor told the court that she was not cooperative. She was recalled on 8<sup>th</sup> November 2012 and she testified. This is the reason the appellant is stating that she was couched. I have examined her evidence in both occasions and note that on 27<sup>th</sup> September 2012 she went as far as telling the court that she went to pick her book from the appellant and did not go home but stayed with him and they slept together. On 8<sup>th</sup> November 2012 she continued to tell the court that she stayed with the appellant for two days. There is nothing shown to demonstrate that the complainant was couched.

The evidence that the complainant went missing until she was found by her aunts PW2 and PW3 was

given by the two aunts. From their evidence, it seems that after they traced the complainant at the house where the appellant lived, they failed to rescue her. Evidence shows that the appellant worked for the brother of the area chief Jacob Mutuku Mbiti, PW6. The evidence of PW2 and PW3 shows that after failing to have the chief arrest the appellant, they reported the matter to the District Commissioner and in company of the Administration Police PW2 and PW3 managed to have the appellant arrested.

I have considered the issue that the evidence is contradictory and inconsistent. Both PW2 and PW3 testified that they went looking for the complainant on 22<sup>nd</sup> August 2012 and found her at the appellant's house. They told the court that the appellant chased them away. They reported to the chief but the appellant was not arrested. They went to report the matter at the District Commissioner's Office. They also testified that the complainant ran away. This evidence is confirmed by PW6 the chief who stated that he saw the complainant in the appellant's house on 23<sup>rd</sup> August 2012 but she disappeared due to the commotion raised by her aunts. This is the same date when PW2 and PW3 said they found the complainant inside the appellant's house.

Corporal Daniel Mbithi, PW5, said that when police arrived at the appellant's house, it was locked but when they threatened to break open the padlock and the appellant finally opened the door PW5 did not find the complainant inside. PW5 said the complainant was brought later.

I have considered this evidence carefully and find that it does not contradict on material facts and that it is not inconsistent. I understand the evidence to mean that the complainant was found at appellant's house and escaped; that the chief failed to arrest the appellant making PW2 and PW3 go to report to the District Commissioner's Office after which the police managed to arrest the appellant.

I find no evidence to demonstrate that the medical evidence was manipulated by the prosecution as claimed by the appellant. Kennedy Kioko, PW4, the Clinical Officer examined the complainant on 25<sup>th</sup> August 2012. He found the complainant sexually active and hymen broken previously to the date of this case. He however found tenderness (redness) in the vaginal canal indicative of forceful penetration. He concluded that there had been penetration. This is uncontroverted evidence that penetration was proved.

I have considered the issue of age of the complainant. This is not one of the grounds of appeal but the appellant has raised it in his submissions. He submitted that the age of the complainant was not proved. I have noted the evidence of the complainant that she was 15 years old against that of the Clinical Officer (PW4) that she was 14 years old. The chief too testified that the complainant was 14 years old and this is the age indicated on the P3 form. PW4 did not clarify whether he assessed the age of the complainant. None of the relatives of the complainant, PW2 and PW3, testified as to the complainant's age. The complainant told the court she was a pupil in Standard 7. None of the other witnesses confirmed this evidence.

It is crucial for the prosecution to prove age of a complainant in a sexual offence. The penalty in such a case is pegged on the age of the complainant. It has been held in various decisions that conclusive proof of age in sexual offences does not necessarily mean production of a birth certificate or other documentary proof unless in border line cases. Such proof can be by other modes (**see Fappyton Mutuku Ngui v. Republic Machakos High Court Criminal Appeal No. 296 of 2010**).

In my view someone aged 15 years is on the borderline. She could easily be 16 or 17 years of age. This may not seem like much difference but the penalties when the complainant is aged 15 years and 16 years are different. It should be noted that there is a lacuna in section 8. The section leaves a gap where the complainant is aged between 11 and 12 years and also 15 and 16 years! This seems to have escaped the legislators and unbeknown to them this is causing injustice to victims of sexual offences whose ages fall between 11 and 12 years and 15 and 16 years. It is a challenge to the drafters of the charges and the court. It is the high time Parliament looked into this issue and amended this Legislation to address the gaps and I so recommend if this has not been recommended already.

An offence under section 8(3) Sexual Offences Act carries a minimum of 20 years and that under section 8(4) of the same Act carries a minimum sentence of 15 years. To avoid miscarriage of justice and

prejudicing the appellant it was crucial to prove age of the complainant either by assessing it or additional evidence by other family member as to when she was born. Since this court has two sets of ages of the complainant and considering that she could be above 15 years of age in the absence of additional evidence confirming her exact age, this court finds that it is not safe to convict the appellant on the main charge.

The alternative charge has its own challenges. It was brought under section 2 (1) of the Sexual Offences Act. Section 2 is a definition section and there is no section 2 (1). The correct section is 11 (1) of the same Act. I find, however, that this is an error that is curable under section 382 of the Criminal Procedure Code and I proceed to so cure it.

In respect of the alternative charge and having considered the evidence of the doctor and the complainant and taking into account the evidence of PW2, PW3 and PW6 that they found the complainant in the appellant's house, I have no doubt in my mind that the case in the alternative charge has been proved beyond all reasonable doubt.

In conclusion, I find the appeal without merit. On the technicality caused by lack of proof of the complainant's age, the appeal succeeds only in terms of quashing the conviction and setting aside the sentence under section 8(1) as read with subsection (3) of the Sexual Offences Act is concerned. I hereby quash the conviction and set the sentence by the trial court aside. In its place, I enter conviction under section 11(1) of the Sexual Offences Act and sentence the appellant to 10 years imprisonment. The sentence will commence from the date the appellant started serving a jail term. It is so ordered.

**Dated, signed and delivered this 16<sup>th</sup> July 2014.**

**S.N.MUTUKU**

**JUDGE**