



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 12 OF 2014
(FORMERLY KISII HCCR APPEAL NO. 55 OF 2013)

BETWEEN

GITHONO JAMES MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 455 of 2012 at Principle Magistrate's Court at Kehancha, Hon. A. P. Ndege, PM dated on 1st July 2013)

JUDGMENT

1. The appellant **GITHONO JAMES MAINA** was charged with defilement contrary to **section 8(1)** as read with **8(3)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on 22nd September 2012 at [Particulars Withheld] in Kuria West District within Migori County [he] intentionally and unlawfully caused his penis to penetrate the vagina of LBM a child aged 16 years. He was tried and convicted and sentenced to 15 years imprisonment.

2. The case for the prosecution was that PW 1, the complainant, was a 16 year old secondary school student in Form 2. She testified how she had sexual intercourse with the appellant. PW 1's mother, PW 2, testified that on 22nd September 2012, she gave her daughter permission to study at her friends place. Unfortunately, she did not come home that night and on the following day her son told her that he had seen PW 1 with the appellant. She reported the matter to the police at about 4 pm. PW 4, the investigating officer, in the company of other officers, escorted her to the appellant's home where they found the appellant and PW 1. They were both taken to the police station.

3. PW 5, a clinical officer at Isebania Hospital, examined PW 1 on 23rd September 2012. He found that her hymen was torn and that she undergoing menstruation. He sent a blood specimen to the laboratory for examination. PW 6, the medical laboratory technologist who examined the specimen, testified that the blood sample contained spermatozoa. Based on the test, PW 5 and PW 6 concluded that PW 1 had had sexual intercourse.

4. The appellant was placed on his defence and gave sworn evidence. He denied committing the offence. He testified he was 17 years and that on 23rd September 2012 he had returned from visiting his uncle in Nyeri and was sleeping when he was woken up by police officers. They told

him to accompany them to the police station and that on the way he met PW1, PW2 and PW4.

5. The learned magistrate held that the prosecution had proved the elements of the offence of defilement and convicted the appellant. The appellant now appeals against the conviction and sentence on the following grounds set out in the petition of appeal dated 15th July 2012;

- 1) *?The learned magistrate erred in law when he convicted the accused upon evidence that had been recanted by the complainant.*
- 2) *The learned magistrate erred in law and fact when he failed to hold and find that the contradiction in the prosecution evidence were in favour of the accused person.*
- 3) *The learned magistrate erred in law and in fact when he used insufficient medical evidence to establish that the appellant had defiled the complainant.*
- 4) *The learned magistrate erred in law and in fact when he failed to consider that the complainant was 18 years old at the time of the alleged offence.*
- 5) *That the learned magistrate erred when he failed to alert the accused person of his defence in S. 8(5) of the Sexual Offences Act, 2006*
- 6) *That the learned magistrate erred when he failed to clear the court during the hearing of the complainant's evidence thereby causing prejudice to the appellant.*

6. Mr Kisia, counsel for the appellant, submitted that penetration was not proved as the magistrate relied on testimony that had been recanted by PW 1 and it was unclear and contradictory. He contended that the testimony of PW5 and PW6 could not be relied upon as the examination was done 48 hours after the alleged defilement. He further submitted that the learned magistrate failed to consider that the complainant was 18 years and as such he ought to have informed the appellant of his right to the defence under **section 8(5)** of the **Sexual Offences Act**. This provision states that it is a defence to a charge of defilement if it is proved that the complainant deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence and the accused reasonably believed that the child was over the age of 18 years.

7. Ms Owenga, counsel for the State, opposed the appeal on the ground that the prosecution proved that the complainant was a child. Counsel submitted the trial magistrate observed PW 1's demeanour and found her to be truthful and was entitled to rely on her evidence. She further said that the alleged contradictions in the evidence came later after the evidence had been tendered and were of no consequence. She urged the court to uphold the conviction as the elements of the offence had been proved.

8. As the first appellate court, this Court is guided by the principles set out in **Okeno v Republic [1972] EA 32** as follows;

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and 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 the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should 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.

9. I have considered the entire evidence and it is clear that PW 1 knew the appellant. Both PW 1 and the appellant were found in the appellant's house and were arrested by PW 3. The

evidence of penetration is to be found in the testimony of PW 1. This evidence is corroborated by the medical evidence of PW 5 and PW 6 which showed that there was spermatozoa in the blood samples extracted from PW 1's vagina and that the hymen was torn. Although the examination was done after 48 hours, the tests disclosed the existence of spermatozoa in the blood. There was no evidence that PW 1 had sexual intercourse with any other person after her arrest.

10. During the trial, PW 1 and PW 2 were recalled for cross-examination. PW 1 recanted her earlier testimony. She stated that she did not have sexual intercourse with the appellant and that she was 18 years old. Although PW 1 recanted her earlier testimony. The fact of sexual intercourse was proved by the medical evidence and the evidence of PW 2 and PW 3 put her at the appellant's home where she was found. In any case there was no reason for her to lie when she gave her earlier testimony. The appellant's defence cannot stand in light of the prosecution evidence. Apart from the testimony of the PW 1 which the learned magistrate believed, PW 2 and PW 3 found the PW 1 at the appellant's home. I therefore hold that there was sexual intercourse between the appellant and the accused.

11. The appellant pointed to the fact that there were contradictions in the prosecution evidence. For example, while PW 1 testified that she had sexual intercourse on 22nd September 2013 and PW 2 place the date as 24th September 2013. There was also a contradiction in the evidence of PW 2 and PW 3 regarding how the appellant and PW 1 were found. PW 1 and PW 2 stated that they were found in the separate rooms while PW 3 stated that they were found in the same room under the bed. The learned magistrate concluded that these contradictions were not material to the charge of defilement. The learned magistrate relied on the case of **R v Pius Nyamweya Momanyi Kisii HCCRA No. 265 of 2009 (UR)** where the court held as follows;

[N]ot every contradiction in a case must of necessity raise doubt in the mind of the trial court as to the culpability or otherwise of an accused person. The contradiction if minor cannot affect the final finding of a trial court. It is trite law that minor discrepancies and or contradiction should not affect a conviction.

12. I agree with this conclusion as the essential elements of the charge of the defilement were proved and the contradictions in the evidence were not material to the central charge of defilement.

13. The age of the complainant is an essential element of the offence of defilement. According to the charge, it was alleged that the complainant was aged 16 years old. The birth certificate tendered in evidence shows that she was born on 10th October 1994. A simple calculation of the age of the complainant shows that as at the time of defilement she was 17 years 11 months old. A few days shy of her 18th birthday.

14. The tenor of the accused' defence is that he did not have sexual intercourse with the complainant as alleged. In the circumstances the defence under **section 8(5)** of the **Sexual Offence Act** was not available to him as it was inconsistent with the facts before the court and there was no evidence upon which the court evaluate such a defence in view of the denial of the act of sexual intercourse.

15. I therefore find and hold that prosecution proved the offence of defilement and the appellant was properly convicted.

16. The other issue of concern in this appeal is that the age of the appellant and how the court dealt with it. PW 5 testified that when accused was examined he was determined to be a made adult. He produced a plain piece of paper, which was not signed by anyone, purporting to show some calculations concluding that the appellant had 32 teeth. PW 5 did not identify the medical practitioner who conducted the examination. The learned magistrate improperly admitted this document as it was not a medical report prepared by a qualified practitioner. In the absence of the maker, it could not even be admitted under **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** as the maker was not identified. The appellant raised the issue of his age when he stated

in his defence that he was 17 years of age.

17. As a result of the appellant's contention, the learned magistrate ordered the appellant to be examined. Two reports were prepared pursuant to orders of the court. The first one, prepared by the Kehancha Medical Superintendent of Health, stated that the appellant was approximately 18 years old and was therefore an adult. It is worth noting the doctor examined the appellant's teeth and confirmed that he had 29 teeth. A further report prepared by the Senior Assistant Director of Medical Services dated 9th May 2013 concluded that the appellant was approximately 19 to 20 years. The report did not refer to any dental assessment. This evidence was inconclusive as to the age of the appellant when the offence was committed.

18. The basis used to arrive at the age of the appellant was different in both cases and in light of this evidence the learned magistrate made no effort to resolve the issue by, for example, summoning the doctors to testify. The appellant could have been below or above the age of 18 years and any doubt as to the age could only be resolved in the appellant's favour. It was important for the learned magistrate to ascertain the fact of the age of the appellant before the trial as any person below the age of 18 years is a child and is entitled to all the protections and rights of a child under the **Children Act**. The age of the appellant also affects the sentence under **section 8** of the **Sexual Offences Act**.

19. This issue I have raised is not an idle one. In the case of **Dennis Abuya v R KSM CA CR APP. No. 164 OF 2009 [2010] eKLR**, the Court of Appeal dealt with a case where the evidence regarding the age of the appellant at the time of the offence was committed was inconclusive. The Court stated as follows:

Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was allegedly committed. Section 8(7) of the Sexual Offences Act which states, "Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act." The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act. [Emphasis mine]

20. As the appellant could have been below the age of 18 years he ought to have been sentenced in accordance with the options available under **section 191** of the **Children Act**. I have considered whether this matter should be referred back to the subordinate court for sentencing. Under **section 6** of the **Borstal Institutions Act (Chapter 92 of the Laws of Kenya)**, the maximum period under which a person may serve in a Borstal Institution is 3 years. In this case the appellant has been in custody for a period of over two years. Given that that he should not have been in prison in the first place and the consequent violation of his rights as a child, it would be unfair to commit him for further sentencing. I therefore reduce the sentence to time served.

21. The conviction is affirmed. The appeal succeeds to the extent that I reduce the sentence to time served. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 13th day of October 2014

D.S. MAJANJA

JUDGE

Mr Kisia instructed by Kerario Marwa and Company Advocates for the appellant.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.