KARIUKI NJOKA……...……..……..……..…… APPLELLANT

VERSUS

REPUBLIC…… RESPONDENT

(Being an appeal from the Conviction and Sentence by S.M. MOKUA Senior Resident Magistrate, Siakago in Criminal Case No. 1121 of 2008 on 1st December 2006)

J U D G M E N T

Kariuki Njoka the Appellant was charged with the offence of Defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The particulars in the charge sheet were as follows:-

KARIUKI NJOKA: ***On the 27th day of October 2008 at […] Village within Mbeere District of the Eastern Province defiled P.K. a child aged 15 years.***

The matter was fully heard and the appellant was convicted and sentenced to 20 years imprisonment. He was aggrieved by the Judgment and appealed against the whole Judgment raising the following grounds:-

1. ***That the learned trial magistrate erred in both point of law and facts by failing to consider that the complainer looked very grown up before the court in terms of body and structure.***

2. ***That the learned trial magistrate erred in both point of law and fact by failing to consider that we were in friendship with the complainer.***

3. ***That the learned trial magistrate erred in both point of law and fact by failing to consider that no disease was found in m body.***

4. ***That the learned trial magistrate erred in both point of law and fact by rejecting my defense without sufficient reasons.***

And when the matter came before me for hearing, the Appellant presented written submissions. He decided to condense all the grounds and submitted that the case was not proved in the absence of one Njeru who allegedly brought PW1 to him. Secondly he says there was no medical evidence showing he had committed the offence. PW1 did not recognize him. Finally he says the P3 was produced contrary to Section 69 of the Evidence Act.

The State through Ms. Matiru learned state counsel opposed the appeal saying the victim was disabled and aged 15 years. And that the Appellant had not denied the act saying the victim appeared an adult.

This Court as a 1st Appellate Court ahs the duty of re-evaluating and re-considering the evidence tendered afresh and to arrive at its own independent conclusion. I stand guided by the case of

1. OKENO VS REPUBLIC [1972] EA 32 AND

2. SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192

PW1 a student at […] Polytechnic testified that on 15/10/2008 at 2 p.m. she was at school when one Njeru approached her and asked her for her hand in marriage. She asked him to go and see her parents. At 5 p.m. she went to see Njeru at […] Shopping centre. They met and Njeru took her to […] at his place. He slept with her. The next day Njeru handed her over to the Appellant. The Appellant was not known to her. He too had sexual intercourse with her. He left her in the house. At 5 p.m. the Polytechnic Manager and police officers came for her. She was taken to […] Police station and the Mbeere District Hospital. The said girl said she was aged 15years.

PW2 confirmed the disappearance of PW1 from the polytechnic and her being found at the Appellant's place. PW3 is the mother to PW1. She said her daughter was crippled and was aged 15 years when the incident occurred. PW4 a clinical officer confirmed that PW1 was physically handicapped. Her right hand was paralyzed. He also confirmed that he examined PW1 on 29/10/2008 and found that she had been defiled. He produced the P3 form. The girl was found to have gonorrhea.

PW5 participated in tracing the whereabouts of the complainant. The Appellant in his unsworn defence stated that he had met PW1 at […] Market. She was not in uniform. She told him she wanted to get married. He did not find out how old she was. So he decided to marry her and took her to his place and he intended to send his parents to her home. He found her to be mature. He went to look for someone to send to her home. When he returned he never found her. Later he was alleged to have married a school girl.

From the evidence adduced there is no dispute that one Njeru lured PW1 out of school and after sleeping with her the Appellant did the same. It is not clear why the said Njeru had not been placed behind bars. PW1 was even found to have contacted gonorrhea. The Investigating Officer never deemed it fit to have Njeru and the Appellant immediately examined to establish if they too had it. The Appellant was only examined on 17/11/2008 since the date of incident on 27/10/2008.

It is not however disputed that the Appellant had sexual intercourse with PW1. He does not deny it. In his defence he says he saw the girl as being mature. PW1 narrated the conversation she had with Mr. Njeru. After classes she left the Polytechnic and actually went to the market to look for Njeru. She slept there at Njeru's place.

PW6 a police officer states that after Njeru was through with PW1 he abandoned her at the market and that is how the Appellant found her. The Appellant also says he found her at the market looking for somebody to marry her.

The kind of discussions that PW1 had with Njeru and the Appellant, were too advanced for a 15 year old. Under Section 8(5)(b) of the Sexual Offences Act, it is a defence to such a charge when the accused says he reasonably believed that the child was over the age of 18 years.

The Appellant raised this defence. It therefore became imperative for the Prosecution to adduce evidence to displace that defence. NO documentary evidence e.g. Birth Certificate; Baptismal card or age assessment report was produced before the learned trial Magistrate. Without that kind of evidence and in the face of the defence raised by the Appellant and the conduct of PW1 prior to the incident, I do find that the learned trial Magistrate erred when at page 18 lines 7-9 of the record he states;

"Further more the complainant was said to have gone to the accused's place from […] Village Polytechnic. This was a clear indication that indeed the complainant was under 18 years".

This is a loaded statement which is not supported by any evidence at all. Section 8(3) of the Sexual Offences Act provides:-

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

The sentence in Section 8(3) of the Sexual Offences Act is based on the victim's age. Secondly, the defence of the Appellant challenged age of PW1. The prosecution had a duty to satisfy the Court that indeed PW1 was of the age she claimed to be. And for the reasons given above I do find that the Appeal has merit. I do hereby allow it.

I quash the conviction and set aside the sentence. The Appellant shall be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DELIVERED, SIGNED AND DATED AT EMBU THIS 10TH DAY OF JULY 2012.

H.I. ONG'UDI

JUDGE
In the presence of:-

Ms. Macharia for the State

Appellant present in person

Njue CC