REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO.10 OF 2020

MARTIN MUGIIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Principal Magistrate's Court at Marimanti SOA Case No.16 of 2018 delivered by Hon. S.M Nyaga on 25th October 2019)

J U D G M E N T

This appeal arises from the decision in the ***Principal Magistrate's Court at Marimanti Criminal Case No. S.O A 16/2018*** where the appellant was charged with defilement contrary to **Section 8(1) (3) of the Sexual Offences Act**. It was alleged that on 14th August 2018 in Tharaka North Sub-County within Tharaka Nithi County the appellant caused his penis to penetrate the vagina of MK a child aged 13 years. In the alternative the appellant was charged with committing an indecent act with a child contrary to ***Section 11(1) of the Sexual Offences Act*** in that on 14th August 2018 at the same place, the appellant intentionally touched the vagina of MK a child aged 13 years with his hands and penis.

1. The appellant pleaded not guilty to the charge and a full trial was conducted. The appellant was convicted on the charge of defilement. As far as the record of appeal goes which is upto page 48 years, the sentence imposed is not captured. However a perusal of the original record of the lower court which has been forwarded to this court shows he was sentenced to serve twenty years imprisonment as per the committal warrant. The appellant was dissatisfied with the conviction and filed this appeal based on the following eight (8) grounds:-

1. That the learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

2. That the learned trial magistrate erred in law and fact by failing to note that the charges of defilement was not proved.

3. That the trial magistrate erred in matters of law and fact by failing to note that the medical report does not connect the appellant with this case.

4. That the learned trial magistrate erred in matters of law and fact by failing to note that the case was frame-up.

5. That the trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.

6. That the learned trial magistrate erred in both law and fact by rejecting the appellant defence without giving cogent reasons.

7. That since I cannot recall all that transpired during the trial, I now beg the honourable court to furnish me with the court proceedings and judgment to draft grounds that are more cogent during the hearing of this appeal.

8. That I pray to be present during the hearing of this appeal.

It is his prayer that the appeal be allowed, the sentence be set aside and he be set at liberty.

2. The appeal was admitted on 30th July 2020 and directions were given that the appeal be disposed off by way of written submissions. The

appellant filed and served the respondent with his submissions.

3. The respondent did not file its submissions but submits that they have conceded the appeal. The prosecution counsel Ms Maari submits that the minor had recanted her statement saying that her mother was behind the statement. The minor further stated that nothing like that, (referring to allegation of defilement) had happened. She further submits that medical evidence did not corroborate the allegation of defilement.

4. In his submissions, the appellant submits that the trial magistrate was biased and also erred in law and fact by convicting him on far fetched evidence not ***"conversed"*** (sic) during trial. The appellant further urges the court to find that the conviction was based on suspicion which cannot form a basis of conviction and resulted in an injustice of the highest degree.

5. I have considered the grounds of appeal, the submissions and the proceedings and Judgment of the trial magistrate. This is a first appeal and the law is now well settled by various decision of this court and the Court of Appeal that the Court has a duty to analyze the evidence and come up with its own independent finding. This is a duty which calls on the 1st appellate court to do a revisit of the evidence, analyze and evaluate it. The 1st appellate court is required to do what is akin to a re-trial which of necessity will require it to make its decision. In the case of ***Okeno -v- Republic (1972) E.A 32*** the Court held that the 1st appellate court is required to re-evaluate the evidence and come to an independent conclusion as to whether to uphold the conviction while bearing in mind that it never saw nor heard the witnesses testifying and leave room for that. This is a duty which this court is supposed to be fulfilling. The Court of Appeal in the case of ***MarkoI Oruri Mose -v- Republic (2013) eKLR*** it was stated that-

> **" It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court a fresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."**

6. I have a duty to analyze the evidence not withstanding the fact that the State has conceded the appeal. If the law imposes a duty on this court, it has to perform that duty irrespective of whether the State has conceded to the appeal.

7. I will proceed to analyze the evidence. PW1 testified that she was left at home which was also used as a shop at Kathangacini Market. The appellant was in the house and was sleeping on the bench used as a seat. The appellant slept on the bench. According to her, the appellant did not do anything bad to her. According to her it is her mother who suspected that they were having sex. PW1 testified that her mother recorded a statement. She was taken to hospital by police but the doctor explained to her that the results were negative.

8. When PW1 was cross-examined, she was referred to her statement where it was indicated that the appellant had sex with her by force. Her response was that she had no sex. Upon cross-examination by the prosecutor, PW1 stated that her mother was behind the statement.

9. The PW1 was the key witness. She was fifteen (15) years at the time she gave evidence and although a *voire dire* examination was done it was not necessary for a child of that age. The important fact to note is that she understood the meaning of Oath and she was sworn. Her evidence did not implicate the appellant of the offence charged as she categorically denied that she had sex with the appellant. In an offence of this nature, the evidence of the complainant is crucial as an accused person can be convicted on her evidence alone. The denial by the complainant that she did not have sexual intercourse with the appellant cast doubt as to whether the appellant committed the offence. This is further reinforced by the fact that the medical evidence did not corroborate the allegation of defilement. According to David Nyaga (PW7) the clinical officer attached to Marimanti Level 4 hospital who examined the complainant, she had no bleeding, her cervix was normal, the hymen was broken though it was not indicated if it was freshly broken. She had some discharge, and pus cells were seen. The medical evidence does not tend to support the allegation of defilement because although the hymen was broken, there was no evidence of bleeding and this casts doubts as to whether it was broken on the material day. The presence of an infection did not support defilement as it was not necessarily as a result of sex.

10. The evidence tendered by PW2 – the complainant's mother during cross-examination was that she suspected that the appellant and the complainant were having sex. Suspicion no matter how strong cannot form a basis of conviction.

In the final analysis the suspicion was ruled out by the doctor who stated that the finding was negative on allegation of defilement.

11. PW3- who is the complainant's father did not witness the incident. He was called by his wife (PW2) who informed him that she had found the appellant and PW2- who had locked themselves inside the room. He arrested the appellant. In cross-examination he said police were called because he had locked himself inside the house with a young girl.

12. PW4 was called by PW2 and she found the appellant under the bed. Though she said there was an inner pant around, she was not specific as to where she found it. Her evidence does not add any probative value.

13. PW6 the investigating officer did not narrated the action she took but her evidence is bare on the result of her investigations as she did not tell the court whether the allegation of defilement was confirmed.

14. The evidence tendered by the prosecution was insufficient and was based on suspicion. It is trite that suspicion however strong cannot form a basis of conviction. In the case of **Sawe -v-Republic (2003) KLR 364** the Court of Appeal stated:

> **" Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

The **Court of Appeal in the case of Mary Wanjiku Gichira -v- Republic Criminal Appeal No.17/1998 (UR)** stated-

> **"Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

15. The standard of proof in criminal cases is that of beyond any reasonable doubts. It matters not how grievous or serious the offence is, where doubts abound, they must go to the benefit of the accused. The cardinal principle in criminal trials which is also backed the Constitution with regards to fair trial is that an accused person is presumed innocent until proven guilty. In the case of **Woolmington -v- DPP (1935) A.C 462 at 481**, the law on legal burden of proof in criminal matters was addressed where the court stated as follows:-

> **"Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt……..if at the end of and on the whole of the case there is reasonable doubt created the evidence either by the prosecution or the prisoner as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

This is further discussed in **Halsbury's Laws of England 4th Edition volume 17 parts 13 & 14** which states:-

> **" The legal burden is the borne of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard he will lose."**

The state has a duty to establish the guilt of the accused to the required standard no matter the charge faced with sufficient evidence. That standard is well settled, it is beyond any reasonable doubts.

16. The decision of the trial magistrate cannot be supported as it was based on extraneous evidence which was not before the trial magistrate. He faults the complainant for telling lies in court. The fact of telling lies in itself casts doubts on the evidence. I am minded that the complainant was a minor who requires protection under the law from predators bent on ruining their lives but this not withstanding conviction must be based on evidence and not on conjectures. Suspicion cannot for a basis of conviction trust be based on evidence and not on conjectures. I agree with the contention by the respondent that the conviction cannot be supported. Suspicion cannot form a basis of conviction. I find that the appeal has merits. I allow it as prayed. I order that:-

a. The conviction and sentence is set aside.

b. The appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JANUARY, 2021

L.W. GITARI

JUDGE

28/1/21

Judgment has been read out through skype in open court.

L.W. GITARI

JUDGE

28/1/2021