REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. APPEAL NO. 25 OF 2016

(From Original Conviction and Sentence in Criminal Case No. 15 of 2014

of the Chief Magistrate's Court at Kerugoya.

DAVID NDAMBERI NJIRU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant David Ndamberi Njiru was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act** before the Chief Magistrate's court at Kerugoya. It was alleged that on the 2/10/2011 at [particulars withheld] village within Kirinyaga County the appellant caused his penis to penetrate the genital organ of PMG a girl aged Eight (8) years.

2. The appellant denied the charged and after a full trial he was found guilty, convicted and sentenced to life imprisonment.

3. He was dissatisfied with both the conviction and sentence and filed this appeal which raises the following grounds:-

1. That the age of complainant was not proved by any document like birth certificate or age assessment to ascertain the exact age of the complainant.

2. That there was no eye witness who witnessed the alleged offence and the mentioned members of public were not summoned in court to testify to prove who committed the offence the appellant had been charged and convicted.

3. That important witness like the accused mother and complainant mother were not summoned to testify in court despite being mentioned as the main witness.

4. That the appellant was charged with defective charge sheet OB/NO 43/2/10/2011 as indicated on P3 form contradicting with OB/NO/61/3/10/2011 indicated on the charge sheet therefore it does not exactly show the day when the offence was committed.

5. That the name of suspect mentioned by complainant on P3 form was David Kenya and the name of accused indicated on the charge sheet is David Ndambiri Njiru. That show that the appellant was mistaken identity.

6. That no medical examination was conducted on appellant despite that the incident was reported 2 hours after occurrence.

7. That there was grudge between appellant and complainant family due to land boundary dispute.

8. That the trial Magistrate failed to consider my defence and there was no reason for rejection.

4. He prays that the appeal be allowed, conviction be quashed and sentenced be set aside.

5. The appeal was admitted on 10/4/2018 and when it came up for directions on 11/2/2019 the appellant opted to argue the appeal by way of written submissions. He filed the submissions on 26/3/2019.

6. The State opposed the appeal through submissions filed by Geoffrey Obiri Assistant Director of Public Prosecutions.

7. This matter has a long history as the appellant had been tried by the Senior Resident Magistrate Kerugoya. He had pleaded guilty and he was convicted. He lodged an appeal against the sentence which was heard and determined by Justice Limo who quashed the conviction and ordered a retrial. The appeal arises from the proceedings in the retrial.

8. The brief facts of the case are that the complainant PMG a girl who was aged Eight years was on her way home from the church on the material day, 2/10/11. On the way at around 4.00 Pm she saw the appellant standing at his gate. The appellant was related to the complainant as she used to call him grandfather.

9. The appellant who according to her appeared drunk held her by the hand and led her to his compound. Once inside the compound, he led her to his house. He then laid her on his bed and removed her inner wear which he tore. He then removed his penis and tried to push it in her vagina. The complainant felt pain and started screaming. The mother of the appellant heard the screams and told the complainant to come out of the house. She came out followed by the accused. She narrated what had happened to the mother of the appellant. She in turn told her to go home and report to her parents.

10. The complainant went home and informed her mother who inturn reported the matter to the police and took the complainant to hospital. On her way home, the complainants father spotted her and realised she was crying. He asked the complainant why she was crying and she narrated what happened. PW-2- BGN went and reported to the village Elder who in turn told him to go and report to the police. PW-2- went to the police station with the complainant and reported the matter.

11. The complainant was examined at Kerugoya Hospital and a P3 Form was filled by Hezron Macharia Maina (PW-4-) who found that she wore a torn under pant. The complainant walked with her legs apart. She had bruises on the entry point of the vaginal orifice with foul smelling discharge and the hymen appeared freshly torn. Laboratory examination revealed numerous red blood cells, pus cells and bacteria in the group of gramme negative. No spermatozoa was seen. At the time of examination, the injuries were two hours old. He concluded that the complainant had suffered sexual assault in the nature of defilement.

12. PW-5- Sergeant Wesley Langat is the one who received the report and conducted investigations. He arrested the appellant and charged him with this offence. He produced a baptism card for P.M showing that she was born on 25/6/03. The appellant gave a statutory statement when called upon to give his defence. He stated that he had nothing to do with the case. In his submissions the appellant merged the grounds and argued them together. The appellant stated as follows on the 2nd paragraph of his submissions.

> ***"It is not disputed that the complainant was defiled as alleged and recorded in the charge sheet. However, the appellants central dispute is involvement in committing alleged defilement that appellant stand charge(sic) and conviction."***

13. It is clear from this statement that the appellant does not dispute that the complainant was defiled. So the only issue for determination in this appeal is whether the appellant is the one who defiled the complainant.

14. The appellant submits that the charge was not proved beyond any reasonable doubts. That the age of the complainant was not proved beyond any reasonable doubts as the court stated that it could not rely on baptism card which was produced by the Investigating Officer. The appellant further submits that his mother who was the only eye witness was not called as a witness. That PW-2- said he reported to a village elder and that the village elder was not called.

15. The appellant further submits that the treatment notes and P3 form appear to have been filled by different person. On his identity he submits that the names used by the witnesses were not his and there was need for identification parade.

16. For the State it is submitted that the prosecution proved the three key ingredients of the charge of defilement namely:-

> **1. Identity of the perpetrator.**
>
> **2. Penetration**
>
> **3. Age of the complainant.**

He prays that the appeal be dismissed.

17. I have considered the proceedings before the trial court and the submissions. This is a 1st appeal which places a duty on this court to analyse the evidence which was tendered before the trial court, evaluate it and come up with its own independent finding. This court will however leave room for the fact that it did not have an opportunity to see the witnesses when they testified and leave room for that. This was the holding in the case of **Okeno –v- R(1972) E.A 32. Also in the case of Odhiambo –v- R Cr. Appeal No. 280/2004 (2005) 1KLR.** Court of Appeal, it was stated:-

> ***"On a 1st appeal the court is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor."***

18. I have considered the evidence and evaluated it. I find that as I have pointed out, the appellant in his submissions has clearly stated that there is no dispute that the complainant was defiled as stated in the charge sheet. On my part I have considered the evidence of the

complainant and it shows that she was candid and firm as to what happened to her and on the person who was the perpetrator. This was none other but the appellant in this case. Her testimony was corroborated by her father, PW-2- who happened to be on her way home when she saw the complainant crying and on enquiring from her she informed him that she had been defiled. The complainant and PW-2- knew the appellant as they are related. Though the appellant stated that he is not known by the name Kabuti, it is noted that the witnesses said that the Kabuti is a nickname which refers to the appellant. There is no doubt that PW 1 & 2 were referring to the appellant as the perpetrator. The trial Magistrate at Page 64 of the record from line 6-14 stated-

> ***"The accused person's defence is a denial. He says that the name he was identified with by the complainant and her father was not his name as appears in his National Identity Card. The evidence that he was not identified as the assailant is discounted by the strong evidence by the complainant that she knows him very well and there is some remote relationship between their families and thus he refers to him as grandfather. Her father corroborated her evidence that the accused person is known in the village by the name of Kabuti and Kenya. The facts that these names do not appear in his National Identity Card cannot mean that he is not otherwise known by those names."***

19. I find that the trial Magistrate cannot be faulted in this finding. It is not unusual for people to have nicknames which are normally not on their Identity Card. It is therefore immaterial that the name Kabuti was not on the appellant's Identity Card. The PW 1 & 2 knew him and the offence was committed in broad daylight. The perpetrator was known not suspected. The ground is without merits. There was no need for an identification parade as the appellant was well known to the witnesses. I find that based on the evidence of PW-1- the appellant was properly identified as the perpetrator and was put at the scene by the complainant and PW-2-.

20. The appellant has submitted that his mother who was an eye witness and the village elder to whom PW-2- reported were not called as witnesses. It is trite that no particular number of witnesses are required to prove a fact. **Section 143 of the Evidence Act** provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

21. In this case the nature of the charge was defilement. The only evidence required to proof the fact apart from the evidence of the complainant is medical evidence. The Evidence Act allows the conviction based on the evidence of a single witness who is a victim of a Sexual Offence. **Section 124 of the Evidence Act**provides:-

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

The trial Magistrate in his Judgment at Page 64 of the record line 18-21 stated:-

> ***"The complainant appears from her testimony to have been straight forward and consistent in giving her evidence. I do not find any inconsistence or contradiction in her evidence that create a doubt in my mind as to her veracity. I am satisfied that she was an honest and truthful witness."***

22. This is a finding of fact by the trial Magistrate which I also discerned from the testimony of the complainant. I cannot therefore interfere with this finding. Failure to call the mother of the accused was not fatal to the prosecution case. The evidence of the complainant and that of her father was sufficient in the circumstances of this case.

The Court of Appeal in the **case of Jacob Muthee & 8 Others –v- Republic Cr. Appeal No. 259, 255 – 257** adopted the decision in **Bukenya –v- Uganda 1972 E.A 349** and stated –

> ***"In a criminal trial the prosecution has a duty to call or make available all witnesses necessary to establish the truth ----------***
>
> ***and is not required to call a superfluous number of witnesses."***

23. In sexual offences it is not expected that a perpetrator would commit the offence in the open for there to be eye witnesses. As such where the court is satisfied that the witness is truthful like in this case, it was not necessary to call other witnesses to prove the fact. As for the Village Elder his evidence would not have added any value. He told PW-2- to go and report to the police and there is evidence that he did report to the police.

24. The testimony of the complainant that she was defiled was corroborated by the testimony of PW-4- Hezron Macharia Maina. He told the court that he examined the complainant on 2/10/2011 who complained that she was sexually assaulted by a person well known to her on 2/10/11 at around 5.00 Pm. The patient presented with a torn under pant which were soiled in nature. She was walking with her legs apart. She had multiple bruises at the entry point of the vagina orifix. Hymen was freshly torn. Cervix had no injury noted. There was foul smell, whitish discharge was noted emanating from the vagina orifix. On laboratory examination of the specimen taken, HVS revealed red blood cells, pus cells and bacteria were noted in the group of gram negative. No sperm cells were noted. The injuries he noted were fresh. PW-4- confirmed that he is the one who filled the P3 form and the treatment notes. He maintained during cross-examination that the complainant

knew the person who assaulted her very well.

25. The evidence of PW-4- confirmed that the complainant was defiled and secondly that there was penetration. Though the complainant said the appellant was trying to push his penis to enter her vagina, this does not mean there was no penetration. Under the **Sexual Offences Act,** penetration need not be complete, partial and complete insertion of the genital organ into the genital organ of another amounts to penetration. **Section 2 of the Sexual Offences Act** defines penetration thus –

> ***"means the partial or compete insertion of the genital organs of a person into the genital organs of another person."***

26. The evidence of PW-1- the complainant is corroborated on the fact of penetration. The issue raised by the appellant lacks merits. The law does not require any number of witnesses to be called for proof or corroboration of the facts stated by the complainant. The **Court of Appeal in AGM –V- Republic Court of Appeal Nyeri Cr. Appeal No. 72/2013** stated:-

> *"We have considered this ground of appeal and we reiterate that the prosecution is not duty bound to call any given number of witnesses. Section 143 of the Evidence Act (Chapter 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. In Julius Kulewa Mutunga –v- Republic Criminal Appeal No. 31/2005 (unreported) this court held that;*
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> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

27. The prosecution called witnesses who managed to prove the ingredients of the charge, that is the identity of the perpetrator, penetration and the age of the complainant. The submission that the prosecution failed to call witnesses is without basis. I find no merits on this ground.

28. The appellant has submitted that there were contradictions and inconsistences. Having perused the record of the lower court, I did not find any inconsistencies. Minor inconsistencies which do not tend to show that the witnesses are deliberately not telling the truth are ignored. Witnesses can be consistent and at the same time be telling lies and that is why the court has to approach the issue of contradictions and inconsistencies with a measure of flexibility. The Court of Appeal while dealing with this issue in the case of **Erick Onyango Ondeng –v- Republic (2014) eKLR**stated as follows:-

> ***"not every contradiction would cause the evidence of a witness to be rejected, there would need to be more to the contradictions."***

The court cited with approval the Court of Appeal of Uganda decision in **Twehangane Alfred –v- Uganda Cr. Appeal No.139/2001 (2003) UGCA** where it was stated –

> ***"As noted in the Uganda Court of Appeal in Twehangane –v- Uganda it is not every contradiction that warrants rejection of evidence – As the court put it:***
>
> ***With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they do not affect the main substance of the prosecution case"***

29. Having considered the proceedings before the trial Magistrate, I do not find any contradictions which cast doubts on the prosecution case. The minor inconsequential inconsistencies are ignored. The ground lacks merits.

Age of the complainant.

The complainant when she testified on 3/6/15, informed the court that she was Eleven years old. The offence was committed on 2/10/2011. The PW-4- testified that he examined the complainant and found that she was Eight years old at the time she was examined.

30. PW-5- produced the complainant's baptism card which was marked as exhibit -3-. It indicated that the complainant was born on 25/6/2005. The trial Magistrate rejected it, he went on to find that the evidence in the P3 form supports the facts the child was Eight years old at the time of Sexual assault.

31. I find that sufficient material was placed before the trial Magistrate to prove the age of the complainant. The complainant was intelligent enough at the time she gave evidence to know her age. At the time she testified she was not a child of tender years. The trial Magistrate believed her and was satisfied that she could tell her age. The appellant did not challenge the age of the complainant when he cross-examined her. My view is that the case mainly rested on the credibility of the complainant which the appellant did not challenge. I also revisit his opening statement of his submissions where he states he does not dispute that the complainant was defiled as recorded in the charge sheet. The charge sheet has given her age as Eight years. The submission that her age was not proved is an afterthought which must be rejected.

32. Prove of age in Sexual Offences is a critical aspect which has to be conclusively proved as it determines the nature of the offence and the consequences that flow from it. The Court of Appeal has reiterated the importance of proving the age of the victim of a Sexual Offence in the case of **Hudson Ali Wachongo –v- Republic (2016) eKLR** where it held –

"The importance of proving age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim". See also **Elias Kasemo –v- Republic C. A Malindi Cr. Appeal 504/2010.** The trial Magistrate was aware of the need to have the age of the victim proved.

In the Case of **Francis Omuroni –v- Uganda Court of Appeal Cr.Appeal No. 2/2000** the Court stated that –

"Apart from medical evidence, age may also be proved by Birth certificate, the victims parents or guardian and by observation and common sense."

33. The burden is on the prosecution to prove the age of the victim beyond any reasonable doubts. Where no other evidence is available medical evidence becomes paramount in determining the age of the victim. However, age maybe proved by production of birth certificates or notifications, victims parents or guardians. In my view even a Baptism Card can be relied on to prove the age of the victim. Over reliance on Birth certificates especially in rural areas may impede justice for minor victims of sexual offences as most people don't obtain them.

34. In this case evidence on the age of the complainant was adduced by PW-4- the Clinical Officer who testified that on 2/10/11 the OCS Kerugoya Police Station requested for examination of a patient P.M.G aged Eight years after allegedly being sexually assaulted. He examined the complainant. At Page 45 line 6 of the record he stated –

"The estimated age of the person I examined is Eight years." He produced the P3 form and treatment notes exhibit 1 & 2 showing the age. The appellant did not challenge this finding.

35. The trial Magistrate held that – **"The evidence in the P3 form supports the fact that the child was Eight years old at the time of the alleged sexual assault ------**

In Cross examination the Clinical Officer PW-4- was emphatic that the complainant was Eight years old at the time of examination ---- The child appeared before court and from her physical stature and general appearance, I am satisfied she was about Eleven years as testified in her evidence at the time of her testimony. In the Circumstances I am satisfied from that evidence that when the offence was allegedly committed on 2/10/11 the complainant was about Eight years old." See record page 61-62 from line 21 to page 62 line 9.

36. The age was proved by medical record and the trial magistrate went a notch higher and made his remarks on his observation of the complainant. **Section 8(2) of the Sexual Offences Act** provides:-

"A person who commits an offence of defilement with a child aged Eleven years or less shall upon conviction be sentence to imprisonment for life."

37. I find that the age of the complainant was proved to the required standard. The ground must fail.

38. I find that the prosecution proved the charge against the appellant beyond any reasonable doubts. Perhaps what I should consider is the sentence which was imposed on the appellant. The trial Magistrate stated as follows at Page 66, line from 22 of the record – ***"The sentence prescribed in law is a maximum of life imprisonment.***

I have considered the fact that the accused has been in custody since year 2001. He also appears to be advanced in age. Taking this matters into account and considering that life imprisonment is the maximum and only term of imprisonment prescribed by law, the court sentence the accused person to life imprisonment."

39. Simply stated, the trial Magistrate was lamenting that despite there being factors that would have been considered in sentencing the appellant, his hands were tied and he could only pass the mandatory sentence of life imprisonment. I am happy that the trial Magistrate will not have any course to complain in future as the Supreme Court of Kenya in its wisdom has held that a mandatory sentence that does not leave room for a Judicial Officer to exercise his discretion in sentencing is unconstitutional.This was so stated in the case of **Francis Kioko Muruatetu& Another –v- Republic & Others. Pet No.15 of 2015**, consolidated with Petition 16/2015.

40. The holding applies to other sentences like those under the Sexual Offence Act among others which do give discretion to the trial Magistrate in sentencing.

41. I should therefore interfere with the sentence and set aside the sentence of life imprisonment. I substitute it with a sentence of imprisonment for Twenty Five years computed from 4/10/2011 when the appellant was first placed in custody.

42. I otherwise find that the appeal lacks merits and is dismissed.

Dated at Kerugoya this 24th Day of April 2020.

L. W.GITARI

JUDGE