REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 44 OF 2017

JARED MOTARO OGARO.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. J. Mwaniki – SPM dated and delivered on the 24th day of July 2017 in the Original Keroka Senior Principal Magistrate's Court Criminal Case No. 287 of 2015}

JUDGEMENT

The appellant was sentenced to life imprisonment for defiling a child aged 11 years contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act.

The particulars of the charge were that on 14th February 2015 at [particulars withheld] Sub-location in Masaba South District he intentionally and unlawfully caused his penis to penetrate the anus of DMC a child aged 11 years. He was aggrieved by the conviction and the sentenced imposed and so he preferred this appeal.

The appeal was filed through the Firm of Ochoki & Company Advocates. The appeal is premised on grounds that: -

> **"1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offence charged when the prosecution had not established guilt beyond the required standard of proof.**
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> **2. The learned trial magistrate erred in law and fact in analysing and/or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
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> **3. The learned trial magistrate erred in law and fact in finding and/or holding that the Appellant never attempted to exonerate himself while the opposite is true and without assigning any credible and/or plausible reason and/or basis for such finding, consequently, the Learned Trial Magistrate failed to approach the judgement of the Appellant with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the Respondent's witnesses.**
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> **4. The learned trial magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's submissions and thus arrived at a conclusion contrary to law and weight of evidence on record.**
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> **5. The learned trial magistrate erred in law and fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondent's evidence was riddled with massive contradictions that could not sustain a conviction.**
>
> **6. The sentence of the learned trial magistrate is illegal."**

It is urged that the appeal be allowed, the conviction be quashed, the sentence be set aside and the appellant be set at liberty.

The appeal proceeded by way of written submissions. Counsel for the appellant submitted that there were glaring inconsistencies and contradictions in the prosecution case. Counsel submitted that whereas the complainant (Pw1) alleged that he was molested on 14th February 2015 and kept the matter to himself only reporting it to his mother (Pw2) when he began feeling unwell later, his mother contradicted him by saying that he reported the matter to her on 15th February 2015 at 8am. Counsel submitted that this was further contradicted by the Assistant

Chief (Pw3) who stated that the matter was reported to him on 14th February 2015 at 11am. Counsel submitted that by the time the Assistant Chief alleged he received the report, the offence had not occurred since it occurred at 7pm on 14th February 2015 and according to the complainant he did not tell anyone about it until the next day. Counsel also took issue with the evidence of the investigating officer (Pw4) that the alleged incident occurred on 14th July 2015. He submitted that this contradicted the evidence of the complainant, his mother as well as the Assistant Chief. Counsel submitted that the investigating officer contradicted the complainant's and his mother's evidence that he was examined at Ibacho Hospital. Counsel urged this court to note that the matter was reported 26 days after it had allegedly occurred. He described the inconsistencies as glaring and submitted that the same went to the core of the prosecution's case. He urged this court to be persuaded by the judgement of **Makau J in Ochieng Aketch Vs. Republic [2015] eKLR** where he stated: -

> ***"Having evaluated and analysed the evidence of Pw1, Pw2 and Pw3, I find the evidence to have glaring inconsistencies and contradictions, I have very carefully perused the trial Court's judgement and note that the trial Magistrate did not adequately consider or evaluate and analyse the prosecution's case and had the Court done that it would have noted the inconsistencies and contradictions. It is my view and finding that the prosecution's evidence which is riddled with glaring inconsistencies and contradictions goes to the root of the charge should not be relied upon. I therefore find that the trial Court in finding and noting that the evidence by the prosecution was truthful did find so with no basis for such findings."***

Counsel further submitted that the trial magistrate should not have convicted in the absence of medical evidence. He observed that both the complainant, his mother and the Assistant Chief alleged the complainant had contracted syphilis after the sexual assault. He submitted that in the circumstances the Doctor should have been called as a witness. He stated that the omission to call him contravened **Section 144 (1) and 150 of the Criminal Procedure Code**. Relying on the cases of **NMM Vs. Republic [2018] eKLR** and **Irungu Chege Vs. Republic [2006] eKLR**, he submitted that the prosecution did not prove its case beyond reasonable doubt; that whereas the prosecution is not bound to call any set number of witnesses, the circumstances of this case warranted the calling of the Doctor in order for the charge against the appellant to hold any water.

Counsel also cited the inconsistency in the age of the complainant. He submitted that the charge sheet stated that the complainant was 11 years old whereas in his testimony the complainant said he was 12 years old and his mother seemed to suggest he was 14 years old. Counsel submitted that the trial magistrate had not discharged his duty to ascertain the age of the complainant before sentencing the appellant. Counsel placed reliance on the decision of Mwilu J, as she then was, in **Hilary Nyongesa Vs. Republic - Eldoret Criminal Appeal No. 123 of 2009** where she stated: -

> ***"Age is such a critical aspect in sexual offences that it has to be conclusively proved……..And this becomes important because punishment (sentence under the Sexual Offences Act) is determined by the age of the victim."***

Counsel for the appellant further submitted that this case may have been instigated by grudges between the appellant and the family of the complainant. He submitted that those grudges came out during cross examination. He reiterated that the evidence of the prosecution witnesses did not meet the legal threshold to help secure a conviction and urged this court to allow the appeal.

Apparently the prosecution did not file its submissions although it was indicated the appeal was opposed.

I have considered the submissions by Counsel for the appellant and also more importantly re-evaluated the evidence in the court below so as to arrive at my own conclusion. I have made provision for the fact that I did not hear or see the witnesses - **see Okeno V. Republic [1972] EA 32.**

I am in agreement that the appellant deserved the benefit of doubt. The evidence of the prosecution witnesses was indeed contradictory and even though the complainant sounded confident and composed, his evidence was watered down by these contradictions. The complainant told the court that he was molested on the night of 14th February 2015 at 8pm. This was allegedly after the appellant found him on the road, where he had gone because his father was drunk, and invited him to his house. The complainant stated that he was threatened by the appellant and for that reason he did not disclose what had happened to his mother. He stated that the next day he met the appellant who beat him for allegedly stealing his radio. If I got him properly what he reported to his mother the next day was the assault. The sexual assault was reported much later and only after he started felling unwell. However, the impression given by his mother was that the complainant told her about the defilement the next day at 8am and that after reporting the matter to their Assistant Chief she took the complainant to Ibacho Hospital where he was examined and found to have syphilis. It was also her evidence that they reported the incident to Ramasha Police Station where they obtained a P3 Form.

According to the complainant's mother, the complainant was also treated at Kenyerere Hospital. The P3 Form allegedly obtained at Ramasha Police Station and the notes of the treatment administered at Kenyerere were exhibited in court although they were not tendered in evidence. As for the Assistant Chief, he was certain that he received a report of the sodomy on the same day the incident occurred. It was also his evidence that both the complainant and the appellant who he arrested on the same day were taken to hospital for examination. This was sharply contradicted by the investigating officer (Pw4) whose testimony was that the report was made to him on 9th March 2015 and that was the day the Assistant Chief took the complainant and the appellant to the police station. He was emphatic that he issued a P3 Form but that the complainant was never examined as it had taken time. Whereas Section 124 of the Evidence Act gives the court power to convict solely on the evidence of a victim of a sexual offence, it is my finding that the contradictions in the evidence of the prosecution witnesses ought to be reconciled in favour of the appellant. This is especially because admittedly there were disputes between the families of the complainant and the appellant which were not fully interrogated to rule out a fabrication.

On his part, the complainant admitted there was a dispute between his mother and the appellant's mother regarding some farm produce she had not paid for. The complainant's mother also admitted that there was a push and pull between the parties regarding some radios. The dispute between the two families was confirmed by the appellant's mother (Dw3) and it is my finding that the trial court ought to have interrogated the allegations further. The omission to adduce medical evidence may not have been fatal given the provisions of Section 124 of the Evidence Act but such evidence would have gone a long way in confirming that the appellant was the one who infected the complainant

with syphilis.

As for the age of the complainant, his mother produced a clinic card which showed he was born on 2nd February 2002. That was conclusive evidence of his age and he was therefore 13 years old when the offence was committed. This was not a case where his apparent age could hold as there was evidence of that age. Having been 13 years when the offence was committed the trial magistrate should have sentenced the appellant under Section 8 (3) of the Sexual Offences Act which provides for a minimum of twenty years' imprisonment but not Section 8 (2) which provides for a minimum of life imprisonment.

The appeal has merit. It is allowed and the conviction and sentence are set aside. The accused shall be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nyamira this 31st day of January 2019.

E. N. MAINA

JUDGE