REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 82 OF 2015

ALEX JOHN MUTETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior

Resident Magistrate's Court Criminal Case (S.O.) No. 22 of 2013 by Hon. Z. J. Nyakundi (PM) on 05/08/15)

J U D G M E N T

1. Upon arraignment in Court, **Alex John Muteti,** the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **28th August, 2013** in **Ikutha District** within **Kitui County,** intentionally and unlawfully caused his penis to penetrate the anus of **MM** a child aged **three and half years.**

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **28th August, 2013** in **Ikutha District** within **Kitui County,** intentionally touched the private parts of **MM** a child aged **three and half years** with his penis.

3. Having been taken through full trial, he was convicted and sentenced to **life imprisonment.**

4. Aggrieved, he appeals on grounds that: evidence adduced was contradictory, inconsistent and unreliable; **Section 77(2)** as read with **Section 33** of the **Evidence Act** was not complied with; evidence adduced was unsatisfactory and dismissing the defence was erroneous.

5. Facts of the case were that on the **28th** day of **August, 2013,** PW1 **SM** left her son (victim) aged **3½ years** at home going to the poshomill. She encountered the Appellant at the gate therefore left the child with him. As she continued with her work she heard the child crying. She went to find out what was happening and encountered both of them at the entrance to the house. In the premises, the Appellant hurriedly left. The child gave indications of having been defiled therefore she examined his anus only to find some whitish discharge. She caused the matter to be reported to PW2, **Francis Mwanzi Kitemange** a clan elder. The matter was reported to the police and the child was subjected to medical examination. Investigations carried out culminated into the arrest of the Appellant.

6. In his defence the Appellant who gave an unsworn statement testified that he declined to sell his two (2) bags of green grams that he had harvested on the **17th October, 2013** to PW1. He asked her to give him **Kshs. 10,000/=** but she refused. Therefore, he took her to the chief and she only gave him **Kshs. 2,000/=.** On the **2nd September, 2013** people went and assaulted him demanding to know why he had taken the lady to the Assistant Chief. He denied having defiled the child.

7. It was urged by the Appellant that PW1 contradicted herself in respect of the time of arrest. He faulted the trial Court for accepting exhibits produced contrary to **Section 77** and **33** of the **Evidence Act.** That he was convicted on unsatisfactory evidence since the Complainant was **3½ years** and was not able to testify. He argued that at the time of testing the victim was **6 years old** therefore should have been subjected to cross-examination and that his defence was not adequately considered.

8. In response, the State opposed the Appeal. It was urged that the case was proved to the required standard.

9. This being the first Appeal, I am under a duty to subject evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. In doing so I must bear in mind the fact that I neither saw nor heard any of the witnesses therefore unable to comment on their demeanor **(See Kiilu & Another vs. Republic (2005) 1 KLR 174).**

10. It is contended that evidence adduced in the circumstances was unsatisfactory. The Prosecution was required to prove:

(i) The age of the victim.

(ii) The act of penetration.

(iii) Positive identification of the perpetrator of the act.

11. PW1 the mother of the victim told the Court that he was 3½ years old. In the case of **Mwalengo Chichoro Mwajembe vs Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

> ***"… the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable ..."***

Although no document was adduced to prove the age of the victim there was evidence of the child's mother which was credible evidence. The Court also observed the child and was satisfied that he was of the apparent age stated. Therefore, the age was conclusively proved.

12. **Section 2** of the **Sexual Offences Act** defines penetration as:

> ***""penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

13. The child who was examined by PW5 **Daniel Mulwa,** a Clinical Officer he found him having sustained a laceration on the anal region. The fact of cuts and tears on the flesh in the anus was evidence of penetration into the anal region. This was evidence of the victim having been an action of penetration into the anus.

14. There was no eye witness to the act of penetration of the victim. Therefore, the case rested on circumstantial evidence. In the case of **Kipkering Arap Koske vs. Republic (1949) 135,** the Court stated thus:

> ***"a) The inculpatory facts must be incompatible with the innocence of the Accused.***
>
> ***b) The facts must be capable of no other conclusion or explanation except the guilt of the Accused. "***

These are the parameters to be considered when evidence adduced is circumstantial in nature.

15. PW1 testified to having left the victim with the Appellant at home. Her attention was attracted by the child's response to the pain he was feeling. He cried aloud and PW1 moved to find out what was happening and having got an indication of what befell the child she proceeded to inspect his anus. At that point in time the Appellant left. She called PW2 who took up the matter as a clan elder.

16. The Appellant put up a defence of having disagreed with PW2 over some green grams that he had harvested but soon after he was arrested he was subjected to medical examination. It was PW5's evidence that his penis had dry human waste at the glan. In his defence he was silent in this particular issue. This therefore confirms the fact that he came into contact with the child's anal hole. Having been alone with the child, he had the opportunity of penetrating the child. Evidence pointing at him as the perpetrator of the act establishes his guilt as opposed to innocence.

17. It is urged that the evidence adduced was contradictory. In the case of **Twehangane Alfred vs. Uganda (2003) UG CA 6** it was stated that:

> ***"With regard to contradictions in the prosecution's 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 point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

18. The alleged contradiction is in respect of the time of arrest as PW1 indicated that he was arrested the same day the act was committed while the Court record shows that he was arrested on the **30th August, 2013.** It is established from the record and from evidence of PW3 who effected the arrest that the Appellant was arrested on **30th August, 2013** therefore this was a minor contradiction that cannot lead to an acquittal. It did not go to the substance of the case.

19. The trial Court is also faulted for failure to comply with **Section 33** and **77** of the **Evidence Act.** The alluded to provisions of the law are in respect of persons who cannot be called to testify and reports by experts including medical practitioners.

Looking at **Section 77** of the **Act,** it gives the Court the discretion to allow production of a document such as a P3 (Medical Examination

Report) having presumed that it is genuine. If necessary, the Court is mandated to call the maker of the document for purposes of being cross examined. This may be in the instance where some matters in the document must be clarified. From the reading of that provision of the law, calling the maker of a document is not necessary.

20. In the instant case the P3 was adduced in evidence by the maker. PW5 clearly stated that he filled the P3 (Medical Examination Report) therefore, the question of complying with either **Section 33** or **77** of the **Evidence Act** did not arise.

21. It is contended that the victim of the offence should have testified as he was **6 years old** during the retrial.

Section 31(1)(b)(2)(a) of the **Sexual Offences Act** provides thus:

> ***"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—***
>
> ***(b) a child;***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—***
>
> ***(a) age;"***

22. The Court Prosecutor in this case made an Application to the Court which considered the age of the child and declared him a vulnerable witness. Therefore, it directed the mother of the child to testify. This is a case where the Court was satisfied that the child was not competent to testify by virtue of his age. He was not able to understand the duty of speaking anything comprehensible. Therefore, the learned Magistrate did not fall into error.

23. Having re-evaluated what transpired in the trial Court per the Record of Appeal, I find the Appeal on conviction devoid of merit. Accordingly, it is dismissed.

24. On sentence, the Appellant was sentenced to **life imprisonment.** In the case of **Jared Koita Injiri vs. Republic (2019) eKLR** the Court of Appeal states as follows:

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

25. In mitigation, the Appellant pleaded for leniency. In the circumstances, I do set aside the sentence meted out and substitute it with **thirty (30) years imprisonment** to take effect from the date of conviction and sentence by the trial Court.

26. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of July, 2019.

L. N. MUTENDE

JUDGE