REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 5 OF 2017

PETER MUTWIRI KABETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior Resident Magistrate HON. L.N. MESA

at Marimanti Law Courts in the Principal Magistrate's Court

Criminal Case No. 307 of 2016 dated 13th July, 2017.)

J UD G M E N T

1. **PETER MUTWIRI KABETE**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act No.3 of 2006** vide ***Marimanti Principal Magistrate's Court No. 307 of 2016***. The particulars of the charge were that on the 31st March 2016 at [Particulars Withheld] village Mantakiri Location Tharaka South within Tharaka Nithi County intentionally defiled (name withheld) a child aged 16 years old. He also faced alternative charge of indecent act with a minor. He was however convicted of the main charge and sentenced to serve 15 years imprisonment. He has now appealed to this court both on conviction and sentence.

2. Before I consider the grounds of appeal this court will consider a summary of evidence tendered at the trial court. The complainant in that case was a girl aged 16 years old as per the both certificate tendered in evidence (P. Exhibit 5) and baptism card (P. Exhibit 4). She told this trial court thatshe was in class 6 at [Particulars Withheld] Primary School and that on 31st March 2016, she had gone home for lunch and was taking her lunch alone at their home, when the Appellant went in uninvited and locked the door before throwing her into a bed and defiled her. After the ordeal the girl put on her clothes and went back to school. Later she informed her mother on what had taken place upon which she took her to Gatunga Police Station and later to Marimanti District Hospital. The minor identified a blood stained bicker she was wearing on the material day which was later tendered as P. Exhibit 1 and blood stained pant as P. Exhibit 2 by the investigating officer (PW6- PC Isabella Muchuma).

3. The evidence of the minor was corroborated by her mother LKR who told the trial court that she was herding cattle away from her house on that material date when her daughter went and informed her that she had been defiled. She borrowed a mobile phone and informed her husband RK (PW3). She further informed the trial court that she knew Peter, the Appellant herein as the person her daughter referred to as there was no other person by that name in their village.

4. RK (PW3) told the trial court that he was the father of the minor and that after he was informed of what had happened to his daughter, he hired a boda boda and went home and took his daughter to the police station before coming back with the police to arrest the Appellant herein who according to him had ran into hiding in Kamweru. David Mberia (PW4) corroborated the same evidence.

5. Benard Chabari (PW5), the clinical officer at Tharaka District Hospital told the trial court that the victim was examined by his colleague Mr. Njeru whom they had worked with and was familiar with his handwriting. He confirmed that when the victim was examined she had not changed her clothes and that underwear was soaked with blood. He also told the trial court that upon examination the labia had blood discharge and lacerations. He tendered P3 as P exhibit 4.

6. When placed on his defence, the Appellant gave sworn defence and denied committing the offence. He told the trial court that on that material date, he was constructing a chicken coop for a neighbour and that the following day as he was engaged in another casual work, the father to the minor and other people went and arrested him. He insisted that he never saw the minor on 31st March 2016 and demanded that he should be tested to confirm if he was the culprit responsible.

7. The trial court assessed the evidence tendered and concluded that the Appellant was guilty as charged as it was satisfied with the positive identification and prove of penetration. It then convicted him and sentenced him to serve 15 years imprisonment

8. The Appellant felt aggrieved and preferred this appeal listing the following grounds namely:-

i. That the magistrate's judgment is contrary to the evidence adduced.

ii. That the learned magistrate erred by declining the DNA to be conducted on the Appellant and the exhibits.

iii. That the learned trial magistrate erred by declining to allow the Appellant the chance to call his witnesses for his defence.

iv. That the learned magistrate erred in law in failing to follow the criminal procedure by failing to allow the Appellant call his witnesses and make his closing remarks or submissions.

v. That the trial magistrate erred by closing the defence case prematurely and refusing to open it.

vi. That the learned trial magistrate erred by finding that the prosecution's case was proved to the required standard

vii. That the learned trial magistrate was biased against the Appellant.

viii. The finding of the learned trial magistrate is bad and against the law and evidence on record.

9. In his supplementary petition filed additional grounds with leave from this court. The additional grounds are:-

a) That the learned magistrate erred in placing the Appellant on his defence on both the main and alternative charges.

b) That the learned trial magistrate erred by fixing a date for Judgment before a close of the defence case.

c) That the learned magistrate erred by not declaring judgment as required by law.

d) That the learned trial magistrate erred by making a finding that the victim was mentally challenged without expert opinion.

e) That the learned trial magistrate based its judgment on hearsay evidence without any corroboration.

f) That the learned trial magistrate took partial position throughout the proceedings and made biased decisions.

10. In his written submission through Ms Ndubi Ondubi & Associates, the Appellant has faulted the trial court for a blanket ruling at the close of prosecution's case without specifying whether he had been placed on his defence on both or the main charge. He contends that by placing the Appellant on his defence without specifying whether it was on the basis of the main charge or alternative charge, rendered a mistrial and exposed the Appellant to double jeopardy.

11. He also alleges that the trail court placed him on his defence twice that is during the proceedings and in the course of its judgment. The Appellant contends that the same was not procedural. He contends that he was not given the time and chance to defend himself in the 2nd time and that in his view violated his constitutional right.

12. He also alleges that he was denied a fair trial because he was not allowed to defend himself and close his case. He alleges that the trial court fixed the date for judgment before the defence had closed its case and faults the trial magistrate for putting the cart before the horse. He also contends that the trial court declined the request to re open the defence case when the Appellant faced a serious offence and claims that the trial court in doing so contravened the provisions of **Section 211 (1)** and **213** of **Criminal Procedure Code.**

13. The Appellant has also submitted that the proceedings during trial ought to have been conducted in chambers in order to protect the dignity of the victim and the Appellant as postulated under **Article 28** of the **Constitution**. It is urging this court to invoke **Article 50(4)** and revoke the entire proceedings by declaring them a nullity.

14. The Appellant further contends that the trial court recorded that the minor was mentally challenged and that on that basis, it should have sent the girl for mental assessment by an expert. He also faults the trial court for relying on uncorroborated evidence of a child who was mentally challenged submitting that as mentally challenged, she could say anything credible. He further submits that he should have been given the benefit of doubt as a result instead of using the evidence against him.

15. The Appellant further avers that his conviction was based on speculations because according to him the evidence of the victim's parents were hearsay. He alleges that the victim did not identify the treatment notes that were tendered by the doctor and that further more there was no DNA test on the speciments found on the victim's clothing and himself to provide a link of the Appellant and the offence committed.

16. The Appellants faults the trial court for duplicating his defence without analysing it and in his view, instead it instead chose to concentrate on analysing irrelevant and remote matters like construction of a chicken structure.

17. On the other hand the Respondent has opposed this appeal. It has supported both the conviction and the sentence imposed by the trial court. It contends that the prosecution's case was proven beyond reasonable doubt as all the ingredients of the offence in its view were established and proved. It contends that penetration was proved, age of the victim established and that the Appellant was positively identified.

18. The prosecution submits that all the witnesses summoned were candid and narrated the events precisely including the garments worn by the victim on the material date.The State submits that the mother of the victim tendered evidence on the age of the victim (daughter) and the fact that she had special needs.

19. The State has further pointed out that the clinical officer examined the victim on the same day of the offence and confirmed that her labia had blood, discharge and laceration. It contends that the tests confirming presence of blood and spermatozoa had been done to establish that penetration had occurred.

20. The Respondent contends that victim was not mentally challenged but was a child with special needs and that did not mean that she was incapable of giving evidence. The Respondent has submitted that the Appellant was a neighbour who took advantage of the fact that the victim was at home alone for lunch and defiled her.

21. It submits that there was no necessity of DNA as the identification was by recognition. It contends that there are no legal requirements for DNA to be conducted in sexual offences. They rely on the decision in ***Joseph Mwangi Kariuki -vs- Republic [2008] eKLR.***

22. The Respondent has insisted that the Appellant was accorded adequate time and opportunity to defend himself through cross-examination and in his defence. It has pointed out the fact that several adjournments were granted to the Appellant and that the court declined to grant furthe adjournment after granting him seven adjournments. It has defended the trial court's decision to decline an attempt by the Appellant to arrest the delivery of judgment in order to re-open the case.

23. **Analysis and determination:**

This court had considered this appeal, the grounds and the submissions made on behalf of the Appellant. I have considered the response made by the State/Respondent. This is a first appeal and the duty of this court is to re- evaluate and re-assess the evidence tendered and come to own conclusions and determine if the finding of the trial court is sustainable or not.

24. The issues raised in this appeal are fairly simple and they are as follows:-

i. Whether the trial court erred in placing the Appellant on his defence twice and without specifics.

ii. Whether the Appellant was not accorded a fair trial?

iii. Whether the trial court's judgment was not supported by evidence.

25. **(i) Whether the trial court erred in putting the Appellant in his defence**

At a close of prosecution's case, the law **(Sections 210 & 211** of **Criminal Procedure Code)** requires the trial court to either acquit an accused person if the evidence tendered is insufficient to place him on his defence, or if the court forms the opinion, based on the evidence tendered by the prosecution that a prima facie has been established sufficient enough to require the accused answer to the charge, the accused his placed on his defence and options open to him in the defence must clearly be explained to him.

26, In this appeal, the Appellant contends that he was placed on his defends and was never told whether he was to defend himself on the main charge or alternative charge. I have checked at the proceedings and noted that it is true, the Appellant was found to have a case to answer but the trial court never specified if it was the main charge or alternative charge. However looking at both the main charge and the alternative charge, it is quite clear that the two are interrelated so much so that it is really difficult to see how the Appellant could have been prejudiced in defending himself. The Appellant was faced with one main charge and an alternative count which usually is used by the prosecution as fallback in the event that they are unable to prove the main charge.

27. This is of course different where an accused could be facing different counts relating to perhaps different dates. In that event, if the trial fails to state the count upon which he is called to defend himself an accused person can have grounds to complain that he is prejudiced or embarrassed in defending himself for want of clarity. In this instance the appellant was charged with defilement in the main count and the alternative count was committing an indecent act with a child contrary to **Section 11(1)** of **Sexual Offences Act**. The alternative charge is lesser offence because unlike defilement penetration need not be proved. The prosecution only requires in to establish that the accused had contact with genitals, buttocks or breasts of the complainant. In defilement penetration is we shall shortly see is key in establishing and proving defilement. In my considered view there is no legal requirement for the trial court to tell the accused that he should defend himself on both the main and alternative count. It may be necessary for clarity purposes but where an accused person is not prejudiced like is clear in this appeal, the omission by a trial court to tell an accused person that he is placed on his defence on either the main or alternative charge, is not fatal. It is a different ball game however at the stage of conviction. At that stage a trial court should specify clearly whether conviction is based on the main charge or the lesser alternative charge. The Appellant has not shown how he was prejudiced in his defence and I do not find this ground weighty enough to overturn his conviction.

28. I have also considered the claim by the Appellant that he was placed on his defence twice to be far-fetched. This is because the record clearly shows that at the close of prosecution's case, he was placed on his defence and indeed he defended himself. It is clear that in the judgment, perhaps in summarizing the proceedings, the learned trial magistrate inadvertently may have cut and pasted the part where he

had found the Appellant to have a case to answer. That is all. It would not have been possible surely to place the Appellant on his defence during the course of judgment because there is no such provision in the Criminal Procedure Code and the Appellant has not stated that he was required by the trial court to defend himself in the middle of the judgement delivered on 13th July 2017. That is not what happened. The record of proceedings show that the Appellant tried in vain to stop delivery of the judgment and after failing in his quest and stop delivery of judgment, the judgment was delivered upon which he prayed for leniency in mitigation. I do find that the inadvertence or minor error by trial magistrate in copying and pasting in the course of its judgment that he was placing the Appellant in his defence, to be one of those insignificant anomalies/errors curable under **Section 382** of the Criminal Procedure Code. The error or irregularity in my view did not occasion a failure of justice or prejudice to the Appellant.

29. **(ii) <u>Whether the Appellant was accorded a fair trial.</u>**

Article 50 of the Constitution clearly spells out elements of a fair which includes and not limited to presumption of innocence, right to have adequate time and facilities to defend himself, right to be represented by an advocate of his choice etc. The Appellant has stated that the learned trial magistrate was biased against him but he has not shown how he was biased. I have perused through the proceedings and I do not find any iota of bias by the trial court against the Appellant.

30. It is true that the trial court declined to grant adjournment to the appellant on 29th June 2017 but the proceedings of the lower court shows that this was after the trial court had granted 6 adjournments previously to the defence including the last adjournment made on 15th December 2016. The prosecution's case was closed on 8th June 2016 and the ruling on a case to answer was delivered on 7th June 2016 when the Appellant applied for adjournment stating that his advocate was away and was suggesting defence hearing on 25th August 2016 on which date the Appellant's counsel was absent due to indisposition. The court indulged the defence and fixed defence on 13th October 2016. On that date the Appellant's Counsel appeared and applied for a DNA samples to be taken for analysis and the court reserved the ruling to 3rd November 2016 and later to 14th November 2016. When the ruling was delivered where the defence application was declined the defence hearing was fixed for 17th November 2016 when the Appellant applied for another adjournment on the reason that he wanted to appeal the court's decision. The trial court adjourned the defence hearing to 15th December 2016 when the Appellant again applied for further adjournment to 16th January 2017 and marked the adjournment as the last one. On 16th January 2017 the matter could not proceed because the trial magistrate was on leave and the defence counsel proposed defence hearing for 23rd March 2017. The matter eventually proceeded for defence hearing. On 23rd March 2017 when the Appellant was heard but the Appellant later applied for a further adjournment and the trial court indulged and fixed defence hearing on 29th June 2017 and on that date, the Appellant applied made a further attempt to adjourn the case but the trial court this time decline to grant further adjournment. The trial court then fixed the case for judgment on 13th July 2017 when the Appellant through counsel made a further attempt in vain to re open the defence case.

31. The Appellant in this appeal now claims that he was denied a fair chance to present his defence but surely going by the above record of proceedings the contrary position obtains. The trial magistrate in my considered view gave a lot of indulgence to the defence because it took almost one year from the time the prosecution close its case to the time the trial court delivered its judgment and the delay was caused by the Appellant and his counsel. The trial magistrate was not biased because if it was, it would not have indulged the defence for those number of times. One of the elements of a fair trials under **Article 50(2) (e)** is to have a speedy or expeditious trial that is concluded without unreasonable delay. It is therefore ironical that the Appellant having contributed to the delay in concluding his trial is now turning back to say he was exposed to unfair trial. I am certainly not persuaded that his allegations are merited in that regard. The fact that a defendant or an accused person fails to take his chances granted to defend himself does not mean that he has been denied a chance to present his defence or call witnesses. This court rendered itself on the question of DNA tests applied by defence through a Misc. criminal application brought earlier before this court suffices to say DNA tests are not mandatory in sexual offences and failure to conduct DNA tests is not fatal to the prosecution's case. Neither does it amount to unfair trial. What is crucial in my view is whether the evidence tendered proves beyond reasonable doubt that theoffence was committed.

32. This court has gone through the proceedings from trial court and finds that the Appellant was given a chance to tender his defence and make his closing submissions as provided under **Section 213** of the **Criminal Procedure Code** but due to his own omissions, and that of his counsel he failed to take up his chances. He cannot turn back and blame the trial court for not being accorded the chance to call his defence witnesses or was not told of his right to call such witnesses. The record of proceeding of lower court shows that the Appellant was duly represented by counsel and as a matter of fact applied for adjournment to call his witnesses which was given but when the chances came, the Appellant simply failed to avail the witnesses and he could not have expected to have been given more chances than the five adjournments he got over a span of more than seven months. I am not persuaded that this appeal should be sustained on this ground because it lacks in merit.

33. (iii) **<u>Whether the trial court's judgment was against the weight of evidence</u>**

To clearly determine whether the evidence tendered by the prosecution's case supported the conviction or put another way whether the prosecution's case against the Appellant was proved beyond reasonable doubt, one must look at the elements or necessary ingredients of the offence for which the Appellant was convicted. The Sexual Offences Act provide the following ingredients which must be established proved beyond doubt in order to sustain a conviction;

a) Penetration whether partial or complete

b) Age of the victim (must be a minor)

c) Identification of the offender.

34. Now to breakdown the above one by one, the evidence tendered by the prosecution in my view established beyond doubt that there was penetration. The evidence of the minor was explicit. This is how she described the ordeal;

"***He entered into the house and locked the door. He threw me on the bed. He then removed my bicker and panty. He then slept on top of me. He removed his clothes and put his penis in my vagina. He threatened to kill me if I scream. He had sex with me and when he finished he left..... "***

The minor was clear in her mind that he had a bicker and a pant. The minor positively identified the blood soaked picker and pant in court. The same were tendered in evidence. The medical evidence tendered by Benard Chabari (PW5) corroborated the victim's evidence. The P3 (P Exhibit 4) noted ***" blood discharge and laceration of labia"*** on the minor when she was examined the same day the offence was committed. I also find the evidence tendered by both the mother (PW2) and the father (PW3) of the victim to be consistent and corroborative of the evidence of the minor that she was defiled. The element of penetration was established and proved beyond doubt.

35. Secondly the element of age was in my view proved. The minor was aged 16 years as per the birth certificate (P. exhibit 6) tendered in evidence. The mother of the victim was categorical on this fact and I find that the fact or element was established and proved beyond doubt. All the documents including the P3 and treatment notes are pointed out that the victim was aged 16 years old. Though that at age (16 years) the victim was a little bit old to be in class 6, I find the teachers explanation that the child was child with special needs to be a satisfactory explanation. I am not persuaded to buy the Appellant's assertion that the victim was mentally handicapped or challenged. No medical evidence was tendered to establish that fact. In fact if that issue was established the charges against the Appellant could have certainly be changed to reflect the offence defined under **Section 7** of **Sexual Offences Act** that defiling a child with mental disabilities.

I also find the Appellant's contention that the trial court should not have believed the minor owing to her mental disability not to be well grounded. In fact the contention is conflicted because on one hand the Appellant contends that the claims of mental state of the minor was not based on medical of expert opinion and a letter from her class teacher was unreliable while on the other hand he contends that the trial court should have doubted her evidence on that very account and give him the benefit of that doubt. This court finds that there was no evidence tendered to show that the victim was mentally unstable. In fact this court the evidence of the minor candid and the manner in which the evidence flowed does not suggest any mental incapacity.

36. On the last ingredient of identification, I find the evidence of the minor was again candid. This is what she told the trial court;

"***I know the accused ..... I saw him with my own eyes"***

The minor told the trial court that she had bypassed the Appellant on her way home for lunch. She saw him constructing what she thought was a toilet. The Appellant when put on his defence, he stated that he was at that material time constructing a chicken coop. That evidence in my view was key in linking the Appellant with the offence for which he was convicted. The narrative given by the minor was supported by that evidence given by the Appellant and in my view it is insignificant whether the construction was a chicken Coop or a toilet. The Appellant placed himself in his evidence at the scene of crime and I agree with the Respondent that he had the chance and opportunity to commit the crime. The Appellant is known as Peter and the mother of the victim stated that in that village he is the only person known as Peter and therefore when her daughter, the victim told her that she had been defiled by Peter, she had no doubt who the culprit was. I therefore find that the question of identification was positive notwithstanding that DNA analysis was not carried out in the speciments or exhibits tendered. The evidence tendered by the prosecution proved beyond reasonable doubt that the Appellant committed the offence. All the three ingredients were established and proved.

37. This court finds that the defence was duly considered by the trial and given its due weight. I have considered the same and find that when placed on the scales of justice, the prosecution's case carries the day because it is backed by hand evidence. The defence presented was mere denial and insistence that he should have been subjected to medical tests (DNA). The evidence tendered by the prosecution was simply overwhelming against him.

38.On sentence I find that the minimum sentence provided under **Section 8(4**) of **Sexual Offences Act** is 15 years.The Appellant has not faulted the trial court on sentence or claimed that the sentence was excessive because given the circumstances it was not. In the end I find no merit in this appeal. Thesame is disallowed. The conviction and sentence are upheld.

Dated, signed and delivered at Chuka this 23rd day of October 2019.

R.K. LIMO

JUDGE

23/10/2019

Judgment signed, dated and delivered in the open court in presence of the Appellant in person and Momanyi for Respondent.

R.K. LIMO

JUDGE

23/10/2019