REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 36 OF 2015

SAMUEL MURIMI MUTHIKE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (S. Jalang'o) at Baricho, Criminal Case No. 1798 *of 2014 delivered on 7th August, 2015)*

JUDGMENT

1. The appellant **Samuel Murimi Muthike** (to be referred to as "the appellant"), was charged with the offence of defilement of a girl aged twelve (12) years contrary to **Section 8 (1) (3)** of the **Sexual Offences Act** in Criminal Case No. 1798 of 2014 before the Senior Resident Magistrate's Court at Baricho. He was tried, convicted and sentenced to serve twenty five (25) years imprisonment.

2. He was dissatisfied with the conviction and sentence and filed this appeal raising the following grounds:

> **a. That the trial magistrate convicted him based on age assessment report produced by P.W. 4 and age factor that was not proved beyond reasonable doubt.**
>
> **b. Failed to find that the medical evidence was at variance with the complainant's evidence and did not amount to proof of penetration.**
>
> **c. Failed to properly evaluate and analyze that he was not the perpetrator of the particular offence as key witnesses were not called to testify and further lots of contradictions and inconsistencies raised doubt to the prosecution case.**
>
> **d. Erred in law in affirming conviction and sentence that is illegal and not prescribed in Section 8 (3) of the Sexual Offences Act.**
>
> **e. *Failed to give his statement of defence sufficient consideration.***

He prays that the conviction be quashed, the sentence be set aside, a retrial be ordered or such other order as the Court may deem just.

3. The appeal proceeded by way of written submissions. I have considered the grounds of appeal and the submissions by the Appellant and the State. This is a first appeal. This Court has a duty to analyse re-consider, reevaluate the evidence and reach its own independent finding. However, I must bear in mind that the trial magistrate had the opportunity to hear the witnesses, assess their demeanor and make his finding unlike this Court. This Court must give room for that. This was held in the case of **Okeno -V- R (1972) E. A. 32** where it was stated:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to exhaustive examination (Padya V R (1975) E.A. 336 and to the appellate Court's own decision on the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shamtilal M. Ruwala –V- R (1957) E.A. 570). It is not the function of a first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses……"**

4. Analysis of the Evidence before the trial Court:

P.W. 1 was V.W. a girl aged thirteen years. She was born on 26th January, 2002. On 9th December, 2014 she was sent by her grandmother

V.W to take milk to Mama Njeri. She went in company her two cousins. On the way she met the appellant Maina and Kinyua. Her cousins left her. As she talked to the appellant her grandmother came while armed with a stick and she ran away with appellant to his home. While there she had sex with appellant three times. In the morning her uncle DW went to look for her. The appellant told him he had not seen her. He locked the complainant in the house. Later the complainant's mother, her grandmother and her uncle went and opened the door and rescued her. Thereafter the complainant was escorted to Baricho Health Centre where she was treated.

5. The evidence of the complainant shows that she knew the appellant. Her evidence was not shaken during cross-examination. She maintained that she had sex with the appellant. I find no reason to doubt her testimony. She was aged 13 years and gave evidence on oath. The trial magistrate was right to believe her and to rely on her testimony

6. P.W. 2 V. W. is the grandmother of the complainant. She confirmed that on the material day she sent the complainant to take milk to Mama Njeri. She was with R and E who returned home and informed her that the complainant was left on the road with the appellant. P.W. 2 went to look for her while armed with a stick. The complainant ran away and did not return home. The following day she was rescued by DW. The matter was reported to the Police. The evidence of P.W. 2 is intact and she was not cross-examined. The Appellant said he had no question. The testimony confirms that the complainant was with the Appellant on that material day and she did not go home on that material night.

7. P.W. 3 **John Ngatia Githaiga** is a clinical officer at Baricho Health Centre. He examined the complainant V. W. who was aged twelve (12) years. He found that

- The inner wear had bloodstains.
- She gave a history of having been defiled by someone well known to her.
- The hymen was absent.
- There was presence of spermatozoa, blood and numerous purse cells.
- There was foul smelly bloody discharge.

The conclusion was that there was evidence of sexual defilement. He filled the P.3 form, exhibit 1 and treatment notes.

8. Evidence of P.W. 3 corroborates the evidence of the complainant that she was defiled. The missing hymen and presence of spermatozoa prove that there was penetration in the genital organ of the complainant a girl aged twelve years. The evidence affords the necessary corroboration by medical evidence to the testimony of the complainant as required under the law.

9. P.W. 4 **Cpl Raphael Rono** from Baricho Police Station is the investigating officer who received the report, issued the complainant with P. 3 form and also had her age assessed. He then charged the Appellant. The age assessment report shows that the complainant was below eighteen years.

10. The Appellant gave unsworn defence and stated that the Complainant told Police officers that he did not commit the offence. This defence was mere denial. The Appellant never put it to the complainant during cross-examination that she had told Police officers at Baricho that he did not commit the offence. This defence was not plausible and was an after thought. The trial magistrate was right to reject it.

11. From the evaluation of the evidence adduced before the trial magistrate, my conclusion is that it was cogent, the perpetrator was well known to the complainant. She testified that she was defiled, and her testimony was well corroborated by the medical evidence. The evidence tendered before the trial magistrate was sufficient and proved the charge of defilement to the required standards.

12. The issues which arise are:

a. Proof of age

The Appellant faults the trial Court for convicting him without proof of age of the complainant. Age of the complainant is a key ingredient in a charge of defilement as it determines the sentence to be passed on an accused person upon conviction. It therefore requires proof beyond any reasonable doubts. It may be proved with a birth certificate, age assessment report and in their absence victim's evidence, parent or guardian or qualified medical doctor. **Fappyton Mutuku Ngui -V- R (2012) eKLR** refers.

13. The evidence of age of the complainant which was adduced before the trial Court was firstly adduced by P.W. 1 the complainant. She stated that she was 13 years old and that she was born on 26th January, 2002. This shows that at the time of the offence she was twelve years old. Secondly, P.W. 3 the clinical officer in his evidence stated that the complainant was twelve years. Thirdly, the appellant requested P.W. 1 to be taken for age assessment. That was done and it was confirmed that she was below eighteen years since the last molars i.e. 28 and 18 were yet to erupt.

14. The complainant knew her age as she gave her date of birth. For a child who was in school in class six (6) it is expected that she would know her age. The trial Court saw the complainant and was satisfied with her age and he also relied on the age assessment report. The prosecution needed only to prove the age from the evidence of the complainant or her parents and corroborate it with medical evidence if in doubt. The prosecution corroborated the evidence of the complainant with medical evidence by the clinical officer who assessed her age to be twelve (12) years while the age assessment report confirmed that the complainant was below eighteen years. The prosecution did discharge the burden to prove the age of the complainant. Though the medical report did not give the exact age, the complainant gave her date of birth and the clinical officer assessed her age as twelve years. The age was not speculated, it was proved and the appellant was contented as he never challenged the age during cross-examination. The fact that P.W. 1 and 3 gave different dates, 13 and 12 respectively, does not raise doubt on the age. Having been born on 26th January, 2002 she was only a few days to clock 13 years. The age was on

borderline. In any case there is no prejudice because under **Section 8 (1) (3)** of the **Sexual Offences Act** provides that:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

15. The age assessment report was sufficient proof that the applicant was a minor below 18 years. Her evidence and that of P.W. 3 prove that she was within the age bracket envisaged under the Section which the Appellant was charged. The Appellant does allege that the complainant is not within that age bracket or that she had given him a different age. Where there is age assessment by a medical officer which was tendered in evidence, the prosecution discharged its burden to prove the age sufficiently. In the case of **Fred Omar Omondo V Republic [2014] eKLR** the Court in dealing with the issue of proof of age stated:

> **"In the case of JOSEPH KIETI SEET -VS- REPUBLIC [2014] EKLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011, the learned Mutende, J. held as follows:-**
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> **It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuoroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:**
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> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……"**

16. (b) Medical Evidence:

The Appellant faults the Court for failing to find that the ingredients of penetration had not been demonstrated to exist. The evidence by the complainant, P.W. 1 is that she had sex with the appellant in his home. She was removed from that house and taken to hospital on 10th December, 2014 according to the treatment notes exhibit 1b. The clinical officer found raw evidence of defilement as she was removed from the scene of crime to the hospital. The hymen was absent, there was foul smelling bloody discharge and to crown it all there was presence of spermatozoa blood and pus cells. The P.3 form, treatment notes and lab results were produced as exhibit 1a and b. This is no doubt overwhelming evidence of penetration and defilement and I need not belabour the point. I am of the view that the evidence of the complainant that the Appellant had sex with her is well corroborated by the medical evidence adduced by P.W. 3. The ground is without merits and must fail.

17. (C) Key witnesses were not called

The Appellant faults the Court for failing to properly evaluate and analyse the evidence which exonerated him. I am of the view that the evidence was overwhelming. There was no shred of doubt that the Appellant was the perpetrator. P.W. 1 testified that she was locked inside the house of the appellant by the Appellant himself. This was confirmed by P.W. 2 who confirmed that herself and others, after taking the keys from the Appellant rescued the complainant from the Appellant's house. The investigating officer (P.W. 4) visited the house and confirmed that it belonged to the appellant.

18. The Appellant states that R and E were called as witnesses to confirm that P.W. 1was left with the Appellant. Failure to call the two is not fatal as we have evidence of P.W. 1 and that of P.W. 2 that she was indeed in the house of the Appellant. P.W. 2 confirmed that she did not spend the night at home. It is the prerogative of the prosecution to call witnesses and further more no particular number of the witnesses are necessary to prove a fact. This is an issue which has been addressed by the Court of Appeal in the case of **Erick Onyango Ondeng -V- Republic (2014) eKLR** where it was held:

> **"In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though heir evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……..**
>
> **While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well as Section 143 of the Evidence (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of P.W.2, which the Court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened to pass by when the appellant was with P.W. 2 on a different occasion."**

19. This is a sexual offence. The proviso to **Section 124** of the **Evidence Act** allows the Court to convict on the sole evidence of a victim of the offence it is satisfied that the witness is truthful. In this case, the evidence of P.W. 1 was corroborated by P.W. 2. As such it was not necessary to call all the witnesses who may have had evidence on the fact. Where the prosecution has adduced sufficient evidence to convict an accused person failure to call some witnesses may not weaken the prosecution case. The Court of Appeal in the case of **Erick Onyango Ondeng (supra)** was saying that where there is sufficient evidence it is not necessary to call every witness who may have some information on the matter. The prosecution adduced evidence which proved the case beyond any reasonable doubts. The ground must fail.

20. (d) Contradictions and inconsistencies

The minor inconsistencies pointed out are immaterial and do not cause any prejudice. There is sound evidence that the complainant was removed from the house of Appellant. The minor inconsistencies which do not prejudice the Appellant are excusable.

21. (e) Illegal Sentence

The Appellant faults the Court for sentencing him to twenty five years imprisonment for defilement of the complainant who was 13 years old. Under **Section 8 (3) Sexual Offences Act** (**supra**) the sentence prescribed is imprisonment for a term not less than twenty years. What this means is that the minimum sentence is twenty years. That is the starting point. The trial magistrate exercises discretion when sentencing to twenty years and above. The sentence of twenty five years was lawful. An appellate Court can only interfere with the sentence of a lower court if some material factors were overlooked, the sentence was excessive or it was founded on erroneous principles. The Court of Appeal in a binding decision in the case of **Benard Kimani Gacheru -V- R (2002) eKLR** had this to say on the issue of interfering with the sentence by the appellate Court:

> **"On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court fees that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of OGOLA s/o OWUOURA VS REGINUM (1954) 21270……."**

The sentence imposed was legal. It took into consideration of the minimum sentence provided and took into consideration of all the material factors. The trial magistrate passed a lawful sentence which cannot be faulted.

22. (f) Defence not given sufficient consideration

The Appellant gave unsworn defence. The trial magistrate found that the charge was proved beyond any reasonable doubts. This means that the defence was of no consequence and would not have changed that finding.

23. Conclusion

Having considered the evidence in its entirety, I am of the view that the prosecution proved the case beyond any reasonable doubts. The evidence was intact and left no doubt that the Appellant defiled the complainant in the manner described and there was sufficient corroboration by material and medical evidence. The trial magistrate arrived at proper and inevitable conclusion based on the evidence tendered. The appeal is without merits and is dismissed. I uphold the conviction and sentence of the appellant.

Dated and delivered at Kerugoya this 9th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, appellant present. Mr. Sitati prosecution counsel for State, court assistant Naomi Murage this 9th day of February, 2018.

L. W. GITARI

JUDGE

9.02.2018