REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 30 OF 2017

STEPHEN NANGAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 871 of 2013**

in the Senior Principal Magistrate's Court at Githuguri a

by Hon W. Ngumi (SPM) on 1st April 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Stephen Nangaka, was charged with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 11th day of September 2013 at [particulars withheld] in Githunguri District within Kiambu County, he intentionally and unlawfully caused his penis to penetrate the vagina of G N (hereinafter referred to as "PW 1") a child aged 7 years.

2. He had also been charged with the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No 3 of 2006.

3. The Learned Trial Magistrate, Hon W. Ngumi, Senior Principal Magistrate, convicted and sentenced him to serve life imprisonment.

4. Being dissatisfied with the said judgment, on 22nd September 2015, the Appellant filed a Chamber Summons seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on five (5) Grounds of Appeal. On 24th October 2017, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on seven (7) Amended Grounds of Appeal.

5. When the matter came up for hearing on 20th March 2018, the State submitted orally in court.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess 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".**

7. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been placed before it for determination:-

> **1. Whether or not the Appellant's constitutional rights to fair trial were infringed upon;**

2. Whether or not the charge sheet was defective; and

3. Whether or not the Prosecution proved its case beyond reasonable doubt.

8. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. RIGHT TO A FAIR IMPARTIAL TRIAL

9. Amended Ground of Appeal No (2) was dealt with under this head.

10. The Appellant submitted that he was never supplied with witness statements and in particular that PW 1 testified before he was furnished with her witness statement. He referred this court to the cases of **Simon Githaka Malombe vs Republic [2015] eKLR** and **Simon Ndichu Kahoro vs Republic [2016] e KLR** where the common thread was that an accused person must be furnished with witness statements to enable him prepare for his defence because failure to furnish him with the same was a clear breach of the provisions of Article 50 (2) (c) and (j) of the Constitution of Kenya, 2010.

11. On its part, the State denied that the Appellant's constitutional rights were violated. It submitted that the Trial Court directed that he be furnished with the said witness statements and that he never complained throughout the trial but instead he always indicated that he was ready to proceed with the hearing. It termed his submission on as an afterthought.

12. Notably, Article 50 (2) of the Constitution of Kenya provides as follows:-

"Every accused person has the right to fair trial which includes the right to have adequate time and facilities to prepare a defence."

13. A perusal of the proceedings shows that when the Appellant took plea on 23rd September 2013, the Learned Trial Magistrate did not order that he be furnished with witness statements. On 4th October 2013, he asked that he be furnished with the said witness. The said Learned Trial Magistrate ordered that he be issued with the same.

14. On 15th November 2013, part of PW 1's evidence was taken. The Appellant did not alert the said Learned Trial Magistrate that he had still not been furnished with the said witness statements. On 26th November 2013, the said Learned Trial Magistrate directed that he be issued with the said witness statements when he requested for the same.

15. On 21st February 2014, the evidence of a medical officer from [particulars withheld] Health Centre, C W C (hereinafter referred to as "PW 2"), No [particulars withheld] APC Ruba Kipruto Sang (hereinafter referred to as "PW 3") was taken. The Appellant did not also inform the Trial Court that he did not have witness statements. Indeed, on 28th February 2014, he informed the Trial Court that he was ready to proceed with the hearing. The matter proceeded to conclusion without him ever having requested for an adjournment to enable him prepare for trial.

16. It was evident that the Appellant had had adequate time to prepare for trial when he proceeded to cross-examine witnesses and in the circumstances, he could not be heard to say that his right to fair trial was infringed. The Learned Trial Magistrate had erred when he failed to order that the Appellant be furnished with Witness Statements when he took plea but which error was regularised when the Appellant demanded to be furnished with the same and the Learned Trial Magistrate made an order that he be furnished with the same.

17. In the circumstances foregoing, this court found Amended Ground of Appeal No (2) not to have been merited and the same is hereby dismissed.

II. CHARGE SHEET

18. Amended Ground of Appeal No (1) was dealt with under this head.

19. The Appellant argued that the fact that he was charged under Section 8 (4) of the Sexual Offences Act which calls for a minimum sentence of fifteen (15) years imprisonment rendered the Charge sheet defective because it showed that PW 1 was a child aged seven (7) years.

20. He placed reliance on the case of **Jason Akumu Yongo vs Republic [1983] eKLR** where it was held as follows:-

"In our opinion a charge is defective under Section 214 (1) of the criminal procedure code where:

a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses: or

b. It does not, for such reasons, accord with the evidence given at the trial: or

c. It gives a misdescription of the alleged offence in it particulars."

21. On its part, the State contended that the Charge sheet was not defective as it showed the date, time and place of the offence, name and age of PW 1.

22. A perusal of the Charge sheet revealed that the particulars that were set out by the State were all present to sustain a charge of defilement. The fact that the provisions that was indicated in the charge was Section 8 (4) of the Sexual Offences Act did not render the Charge sheet defective as the same could be cured by Section 382 of the Criminal Procedure Code. The same provides as follows:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

23. In the absence of any demonstration by the Appellant of what prejudice he suffered, this court was not persuaded to find that the Charge Sheet as drafted was defective.

24. In the circumstances foregoing, this court did not find merit in the Amended Grounds of Appeal No (1) that is being dismissed.

III. <u>PROOF OF THE PROSECUTION'S CASE</u>

25. Amended Grounds of Appeal Nos (3), (4), (5), (6) and (7) were dealt with under this head as they were all related.

26.. The Appellant argued that PW 1's case was not proven, there was no evidence of penile penetration, essential witnesses were not called and that there was evidence that she was coerced to testify against him.

27. The State pointed out that the Notification of Birth and P3 Form was proof of PW 1's age and that T W N (hereinafter referred to as "PW 4") was not coerced into testifying as she was PW 1's mother. However, there was no indication that the Prosecution adduced in evidence the Notification of Birth. What was adduced in evidence was a P3 Form dated 17th September 2013 that showed PW 1's age as seven (7) years. As the Appellant did not adduce any evidence to rebut that of the Prosecution regarding PW 1 was aged seven (7) years at the material time, this court therefore accepted the Prosecution's evidence that PW 1 was aged seven (7) years.

28. Further, although the State had contended that PW 4 was not coerced to testify against the Appellant because she was PW 1's mother, the correct submission by the Appellant was that PW 1 was coerced to testify against him.

29. Be that as it may, this court carefully analysed the evidence that was tendered by the Prosecution witnesses and noted that the case herein was premised on the evidence of a single witness, a minor. Indeed, in sexual offences, a trial court can believe the evidence of that single witness if he or she is satisfied that the victim is telling the truth.

30. This is in line with the provisions to Section 124 of the Evidence Act Cap 80 (Laws of Kenya). The same provides as follows:-

> **"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."**

31. The Learned Trial Magistrate was satisfied that PW 1 was telling the truth because she testified that the Appellant had done "bad manners" to her three (3) times before and thus she had no reason to doubt her. She observed that on the material date, he took longer than usual to cut napier grass. In her judgment, the Learned Trial Magistrate pointed out that PW 1's hymen was broken and that because there was discharge and bacteria around her vulva, then she had been defiled.

32. She concluded that there was no bleeding or bruising as it was not the first time the Appellant had defiled PW 1. She, however, questioned why the Appellant was not tested to confirm if he also had the same sexual transmitted disease as PW 1 had. She dismissed the Appellant's evidence as an afterthought.

33. In her examination-in- chief, PW 2 stated that PW 1's hymen was "never broken". On Cross- examination, she stated that the hymen had been broken which was not expected in a young child. In view of the contradiction in the proceedings regarding PW 2's examination –in-chief and her cross-examination, this court resorted to perusing the Learned Trial Magistrate's hand written notes. However, it could not decipher what the word in PW 1's examination -in- chief before "broken" was.

34. The illegibility of the Learned Trial Magistrate's notes had the potential of swinging the case either way. However, as she clearly indicated in her judgment that PW 1's hymen had been broken, this court observed that the typed proceedings may have reflected a different position and that the Learned Trial Magistrate was the only one who could decipher her own hand writing and indicated in her judgment that PW 1's hymen was broken.

35. The Learned Trial Magistrate may very well have accepted PW 1's evidence that the Appellant had defiled her three (3) times before. However, as there were no injuries, bleeding or discharge, this court was hesitant to find the Appellant liable based on PW 1's sole evidence.

36. It was also this court's considered view that although under Section 143 of the Evidence Act the Prosecution has the discretion to decide the number of witnesses to prove a particular fact, the Prosecution ought to have called the children who were playing with PW 1 to corroborate her evidence as she was a child of tender years particularly because the P3 Form had already shown that she had no injuries in the labia minora, labia majora, vagina and there was no bleeding or discharge. The P3 Form was clearly obtained way before the trial commenced necessitating the presentation of a more water tight case by the Prosecution that it had placed before court. In addition, Cynthia who PW 4 said came to where she was working to inform her that PW 1 was sleeping in the house with the Appellant ought to have been called as a witness to corroborate PW 4's evidence that it was the said Cynthia who notified her of PW 1 sleeping with the Appellant herein.

37. This court found that the Prosecution ought to have had the Appellant examined to establish the presence or absence of an infection which could have either connected or exonerated him from the offence. Appreciably, the fact that PW 1's hymen was broken was not conclusive that the Appellant was responsible for having broken it. This is because the dried whitish discharge around PW 1's clitoris was observed on 17th September 2013 which was six (6) days after the incident. It was not possible that any dried semen would still have been present many days after the incident. This only pointed to an infection.

38. Further, save for the P3 Form dated 17th September 2013, no hospital attendance notes were adduced in evidence to confirm if indeed PW 1 was taken to [particulars withheld] Health Clinic on 12th September 2013 as PW 4 had contended. Going further, PW 2 stated that PW 4 reported the incident on 13th September 2013. This was two (2) days after the incident. The gap in PW 4's evidence led this court to ask itself whether the incident happened as she and PW 1 had told the Trial Court. PW 4's assertions that the doctor told her that PW 1 had no injuries because the Appellant was gentle with her was an assumption.

39. Accordingly, having considered the evidence that was adduced by the Prosecution and the Appellant and have had due regard to their oral and written submissions, this court took a different view from that of the Learned Trial Magistrate and found that the Prosecution did not prove its case beyond reasonable doubt. Doubts were indeed created in the mind of this court.

40. It will be a sad day if the Appellant herein will go away scot free because the Prosecution presented a weak case. However, this court is fully aware that it is not the responsibility of an accused person to prove his innocence unless the burden of proof has shifted to him in line with Section 110 of the Evidence Act. At all given times, the burden of proof lies with the Prosecution to prove its assertions.

41. In the premises foregoing, this court found that Amended Ground of Appeal Nos (3) and (5) were merited. The Appellant did not prove that Amended Grounds of Appeal Nos (4) and (7) relating to PW 1's age and a grudge and accordingly, the same are hereby dismissed.

DISPOSITION

42. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 22nd September 2015 was merited and the same is hereby allowed.

43. In view of the doubts that were created in the mind of this court by the unexplained gaps and ambiguities in the Prosecution's case, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant as it was clearly unsafe to confirm the same. It is hereby directed that the Appellant be hereby released forthwith unless there be any cause or reason that he be lawful held.

44. It is so ordered.

DATED and **DELIVERED** at **KIAMBU** this **27th** day of **June** 2018

J. KAMAU

JUDGE