



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 125 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

MBURUGU MWENDA ALIAS STONE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. G. Mundia, SRM dated 6th September 2017 at the Chief Magistrate's Court at Isiolo in Sexual Offence Case No. 4 of 2017)

JUDGMENT

1. The appellant, **MBURUGU MWENDA alias STONE**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that on 15th July 2016 at Isiolo Township within Isiolo County, he intentionally and unlawfully caused his penis to penetrate the anus of JM, a child aged, 8 years.

2. The thrust of the appellant's case as set out in his amended supplementary grounds of appeal and the written submissions is that the prosecution failed to prove the case beyond reasonable doubt. He contended that the testimony of the child was not corroborated and that the medical evidence did not link him to the offence. He also pointed out there was a possibility that this was a case of mistaken identity as he was not proved to be the perpetrator. He also complained that the trial magistrate did not consider his defence.

3. Counsel for the respondent supported the conviction and sentence and urged that all the elements of the offence had been proved beyond reasonable doubt.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic* [1972] EA 32**).

5. The facts of the case before the trial court were as follows. After a *voire dire*, PW 1, testified that he was in class 4 and on 15th July 2016 at about 1.00pm, he was told by his mother to go back to school to look for his sister. He went back, looked for her but did not find her. While he was at the school compound he met a man who introduced himself as, "Stone." He narrated what took place as follows:

He told me to take me to a place to sleep. He gave me cigarette and alcohol. He told me to take them. He had made a dwelling structure using grass. He removed his clothes. He started removing my trouser upto the knees. He dropped his trouser to his knees. "Aliingiza kitu yake kwa matako." It was painful. He had covered my head with clothes. He attempted a second time. I told him to stop since I was going to nose bleed. He then told me to suck his penis. I refused. He wanted to sodomize me the third time. I told him I wanted to go for a long call. He told me to go and relieve myself. I fled home

6. PW 1 went home and narrated what happened to his sister, PW 3 before going to sleep. PW 3 recalled that on the material day, she heard the gate being knocked at about 10.00pm. She opened and found PW 1 who told her that he had not found his younger sister and was scared of being punished. He narrated to her what had taken place and told her the man was called *Stone*. In the morning, their mother (PW 2) asked where PW 1 was and she told her what happened.

7. PW 2 recalled that on 15th July 2016 at about 1.00pm, PW 1 had come home without his younger sister. She told him to go back and get her but he did not come home that evening. She looked for him until 9.00pm when she went to sleep. In the morning she found PW 1 at home. He narrated to her what happened. She took him to the hospital where he was examined and treated and then she went to report to

Isiolo Police Station. PW 4, a clinical officer at Isiolo County Referral Hospital, testified that he examined PW 1 on 16th July 2016. He observed that the PW 1 had a pre-anal tear which was bleeding and painful and here was signs of sperm. He concluded that there was penetration.

8. PW 2 further testified that after she reported to the police station she started looking for *Stone* among the street boys in the town. PW 1 had described him as a person wearing a blue jumper, black jeans and pale boots. One of the boys called, "Survivor" confirmed that it was Stone who was apprehended at about 2.00am as he was going to buy alcohol at a bar. She went with PW 1 to identify him and PW 1 confirmed he was the one. The appellant was then taken to the police station by members of the public.

9. When put on his defence, the appellant denied that he committed the offence in his unsworn statement. He told the court that he was arrested by two people who had a grudge against him and taken to the police station.

10. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

11. I have no doubt on analysis of the testimony of PW 1 that I have set out above, that his anus was subjected to penetration. His testimony was clear and consistent and corroborated by the testimony of PW 2 and PW 3 to whom he gave the narrative of what had taken place. The fact of penetration was also corroborated by the medical evidence of PW 4 who observed a peri-anal tear on PW 1's anus and opined that this was evidence of penetration. The age of the child was also proved by production of his birth certificate which showed that he was born on 16th May 2008 this confirming he was 8 years old at the time the offence was committed. I therefore find and hold that the prosecution proved the elements of penetration and age of the child.

12. The main issue in this case is whether the appellant was the person who committed the felonious act. This is a case where the person who caused the act of penetration was a stranger to PW 1. He introduced himself as *Stone* before proceeding to sexually assault PW 1 in his hovel before releasing him. When PW 1 reported to PW 2 and PW 3, he mentioned his name as *Stone*. It is PW 2 who went to investigate the whereabouts of the person called *Stone*. She was informed of his whereabouts and shown the appellant by person not called as witness. On this evidence the trial magistrate held that, "There was no dispute to the identity of the accused since the minor stated that he was known to him and PW 2 stated that he fit the description described by her son."

13. In my view and in light of the evidence, this was a misdirection on the part of the trial magistrate. The description given by PW 1 was that he was wearing certain clothes. When he was apprehended by the crowd and taken to the police station there is no evidence that he was wearing the same clothes that would cause him to be identified. This is a case where the veracity of the appellant's identification should have been tested through an identification parade. Thus PW 1's identification of the appellant amounted to dock identification as PW 1 pointed out a person who had already been arrested by members of the public.

14. The issue of identification in difficult circumstances had been the subject of various decisions of our superior courts. For example in **James Tinaga Omwenga v Republic NKU CA Cr.App. No. 59 of 2011 [2014]eKLR**, the Court of Appeal summarized the position as follows:

[18] The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.

15. The rationale for the reluctance of the court to accept dock identification is that it is not permissible for a party to suggest answers to his own witness or to lead witness to an answer (see **Amolo v Republic [1991] 2 KLR 254**). This does not mean that the court can never rely on a dock identification. In **Muiruri & Others v Republic [2002] 1KLR 274** the court noted that the trial court may proceed to convict;

[I]f satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

16. Even if it was not possible to conduct an identification parade, the appellant's identity could have been verified by those who knew him and arrested him when PW 2 came looking for him. They could have directed the police to his hovel which PW 1 could have identified as the place he was molested. The clothes he was wearing could have been taken as exhibits in order to ensure that the issue of identification was settled. The investigating officer was content to sit in the police station and charge the appellant without conducting further inquiries.

17. Having re-appraised the evidence, I am constrained to reach the conclusion that the appellant's identification was not free from error. The conviction is not safe consequently, I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MERU this 25th day of October 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr. Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.