REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 49 OF 2017

(From original conviction and sentence in Criminal Case No. S.O.

2 of 2017 ofthe Chief Magistrate's Court at Kerugoya).

PETER MUTHEE MAVUNGO.....APPELLANT

VERSUS

REPUBLIC.....ACCUSED

JUDGMENT

The appellant Peter Muthee Mavungo was charged with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act before the Chief Magistrate's Court Kerugoya Cr. Case No. 2/2017. He was found guilty after a full trial and was sentenced to imprisonment for life.

He was dissatisfied with that conviction and sentence and filed this appeal which raised the following grounds:-

1. That the learned trial Magistrate erred in both law and facts by upholding and accepting the speculative evidence tendered by the prosecution.

2. That the learned trial Magistrate erred in law and facts by mis-directing herself and failing to notice that there was no sufficient and credible evidence on whose strength she could convict me.

3. That the learned trial Magistrate erred in law and facts in failing to recognize the fact that, there had been a grudge in between the complainant's mother and myself.

4. That the learned trial Magistrate erred in law and facts by relying on a shoddy investigation done by the prosecution side.

5. That the learned trial Magistrate erred in law and facts in finding that the prosecution has proved its case beyond reasonable doubts in spite of the glaring lack of evidence.

6. That the learned trial Magistrate erred in law and facts by failing to consider that the case was full of contradictions and inconsistence.

7. That, my defence was not given consideration during judgment.

Further grounds in the petition filed on 28/7/17 are that the trial Magistrate convicted him on defective charge sheet, failed to conduct a ***'voir dire'*** inquiry, that the charge was not supported by the medical evidence and that the conviction was against the weight of the evidence. It is also stated that the trial Magistrate shifted the burden of proof upon the appellant and the sentence was manifestly harsh and excessive.

The appellant prays that the appeal be allowed, conviction be quashed and the sentence be set aside.

The state opposed the appeal and filed written submissions through Geoffrey Obiri the Assistant Director of Public Prosecutions.

The facts of the case are that the complainant V. W. M was a child aged six (6) years in the year 2015. A birth certificate which was produced as exhibit -5- by the prosecution shows that she was born on 15/4/2008. The appellant according to the complainant was a friend

of his father and they were close neighbours.

Sometimes in 2015 the appellant called her to his house and told her to remove her clothes. The appellant penetrated her vagina with his penis. He then gave her Kshs 5/- and told her to buy doughnuts which she did. The appellant defiled severally until at some point she felt a lot of pain and could not walk properly and had to be taken to hospital. She told her father that the appellant who she knew as **Seee** had defiled her. She also disclosed to her mother and sister what had happened. The doctor found that she had been defiled severally. A P3 form exhibit -3- was filled by the Clinical Officer who confirmed that the complainant was defiled.

The matter was reported to the police. The appellant was arrested and charged.

The appeal proceeded by way of written submissions. This being a first appeal, this court has a duty to consider the evidence tendered before the trial Magistrate, evaluate it, analyse it and come up with its own independent finding while bearing in mind that it did not see the witness and leave room for that. This was held by the Court of Appeal in the case of ***Okeno –v- R 1972 E. A 32.*** This is because 1st appeal is essentially a retrial as the court considers the facts and law and make a finding. The appellant has a legitimate expectation that the evidence will be considered again, evaluated and analysed and finding made.

I have considered the evidence tendered before the trial court. The evidence was cogent and consistent, it was also well corroborated in material facts and by the medical evidence.

The appellant faulted the conviction the following:

1. **Defective charge sheet:**

In his submissions the appellant submits that the charge was defective. It is submitted that the complainant testified that she was defiled on three occasions. That the charge contravenes ***Article 50 (2)(b)*** which provides:-

> ***"Every person charged has the right to have the dispute that can be resolved by the application of the law decided in a fair public hearing before a court or if appropriate another Independent and impartial Tribunal or Body. Every accused has the right to a fair trial which includes the right ------- to be informed of the charge with sufficient details to answer it."***

It is submitted that there should be a separate charge for each act of defilement. That the charge sheet is an Omni Bus charge which is incurably defective. It is also submitted that an injustice was occasioned where evidence relates to -3- separate acts contained in one charge.

The charge sheet states as follows:-

> ***"Defilement in violation of Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3/2006. Peter Muthee Mauungo: On diverse dates between 2015 and diverse dates of 2016 at Kiamuruga County, intentionally and unlawfully did cause his penis to penetrate the vagina of V. W. M a girl aged 6 years."***

The charge or information must contain a statement of specific offence and sufficient information on the nature of offence charged it is provided under **Section 134 of the Criminal Procedure Code.**

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

The requirement is that the section of the law under which the accused is charged and sufficient particulars to give the accused the information on the nature of offence charged. This was stated in the case of **Ibrahim –v- R 1984 KLR 596**. The charge is proper if it has stated the specific offence and enough information to demonstrate to the accused as to the nature of the charge.

Section 137 (a) (ii) of the Criminal Procedure Code provides for the rules of framing of the charge and information. It provides:

> ***"The following provisions shall apply to all charges and information's, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -***
>
> ***(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***
>
> ***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;"***

What the court has to consider is whether the charge if found to have defects have occasioned a failure of justice. This is the test as to whether the charge sheet is defective. Not all defects will vitiate the proceedings unless such defects have been shown to occasion a miscarriage of Justice. **Section 382 of the Criminal Procedure Code** Provides:-

> ***"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."***

For the accused person to be charged with separate counts depends on the circumstances of the case. ***Section 135(1) of the C.P.C*** provides:-

> ***"Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character."***

What the prosecution must ensure is that the accused is not charged with very many counts in the same charge which may prejudice the accused and occasion a miscarriage of justice. In **Gideon Clain Karakacha v Republic [2018] eKLR**

The Court held;

> **It is now trite that it does not aid the course of justice for the Prosecution to prefer too many counts in the same charge sheet. In the case of Peter Ochieng vs Republic (1982-1988) I KAR 832, for instance, it was held as follows:**
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> ***"It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of a trial as to the counts upon which it wishes to proceed. Usually, though not invariable, no more than 12 counts should be laid in one charge sheet..." (Per Hancox, J., as he then was)"***
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> **Nevertheless, whereas it is undesirable to lay more than 12 Counts, it is not fatal. It all depends on the circumstances of each case; and in particular, whether the accused would be prejudiced thereby. In the instant matter, the same set of evidence was relied on to support all the counts. Moreover, the Appellant was given the opportunity to have the witnesses recalled for further cross-examination after the amendment; and the sentences were ordered to run concurrently. Accordingly, no prejudice befell the Appellant.**

In this case the appellant was charged with single count of defilement. The particulars were given. The complainant tendered evidence in support of the charge. The circumstances of this case must be considered where the complainant was a minor and was defiled severally. She could not give specific dates. Her evidence supported the particulars of the charge. The complainant was the same and same evidence was relied on. The appellant was not prejudiced. The Court of Appeal in the case of ***John Irungu –v- R Cr. Appeal No. 20/2016*** held that failure to refer to the section or Act upon which a charge was based did not prejudice the accused because the particulars of the offence were clearly stated. In this case the offence was stated and sufficient particulars were given in the charge sheet. The rights of the appellant were not violated nor was he prejudiced. There was no failure of justice. The ground is without merits and must fail.

2. Voire dire inquiry:

The appellant claims that after carrying out the voire dire inquiry, the trial magistrate did not state why she opted to take the complainant's evidence. That it is not clear whether the complainant gave sworn or unsworn statement. In addition, the trial magistrate did not state whether she was satisfied with the complainant understood an oath or duty to tell the truth.

Section 19 of the Oath and Statutory Declaration Act states;

> ***"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."***

In light of Section 19 of the Oath and Statutory Declaration Act above, if the court is receiving evidence of a child of tender age, it must be of the opinion that she/he is possessed of sufficient intelligence to understand the duty to speak the truth.

A voire dire examination aims to determine whether the child understands the nature of the oath in which case evidence maybe received on oath and ascertain whether, where the child does not understand the nature of oath he/she is possessed of sufficient intelligence and understands the duty to tell the truth. If the court finds that the child understand, it will receive the evidence though not given on oath.

In this case PW 1 was a child of tender years and as per page 4 of the proceedings, voire dire examination was properly conducted whereby the trial magistrate recorded the questions and answers before proceeding to note that the victim understood the nature of the proceedings and recorded her evidence.

The record of the of the trial Magistrate shows that the witness gave evidence without being sworn. Being a child of tender years the

evidence could be received without the child being sworn.

On the issue of corroboration of the complainant's evidence this being a sexual offence the court can rely on the evidence of the complainant to convict if for the reasons to be stated the court had reason to believe the complainant or is satisfied that she is telling the truth. This is the proviso to **Section 124 of the Evidence Act Cap 80 Laws of Kenya** which provides:

Corroboration required in Criminal Cases:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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."***

The prosecution proved the issue of penetration. The trial Magistrate had this to say on the identity of the perpetrator – line 17-22 at page 22 of the proceedings:

> ***"On the issue of identity, I agree with the prosecution case that the accused was positively identified since he was known to the victim and her family members as neighbours. The evidence indicated that he lured the victim and defiled her. I do find that the evidence on identity of the accused was overwhelming. The accused did not challenge the evidence of identification. Infact he admitted knowing the victim's family."***

I find that the appellant was properly identified as the person who defiled the complainant. He was known to PW-1- as Seee. He had defiled her on several occasions and given her money to buy doughnuts and cakes. The complainant vividly described how appellant defiled her and threatened her not to tell anybody what happened. The trial Magistrate believed the complainant and it was therefore safe to convict on her testimony.

3. Evidence adduced does not support the charge

The appellant has stated that evidence of PW 1 does not contain the specific dates which the 3 offences were committed. In addition, the evidence of PW 2 and PW 3 should be disregarded as they were not eye witnesses.

PW 1 while giving her testimony was able to clearly to describe in detail what the appellant did to her and she could even recall the clothes that she was wearing. She also narrated how the appellant gave her money after the incident. This evidence was corroborated by PW 4 who confirmed that she was defiled. The evidence was sufficient and supported the charge. The prosecution proved the three elements of the charge which are the victims age, penetration and the perpetrator.

4. Medical evidence.

The evidence of PW 4 stated that PW 1 had difficulty in walking and was walking with her legs apart. Her hymen had multiple bruises and there was an offensive smelling discharge from the vagina and loosed cells on the vagina wall. He confirmed that there was an act of penetration.

5. Appellant's defence not considered.

A perusal of the judgment at Page 4, the trial court clearly reviewed the defence of the appellant but in conclusion found that the prosecution had proved its case beyond reasonable doubt.

6. Harsh and excessive sentence.

Section 8(1) of the Sexual Offences Act No. 3 of 2006:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Section 8(3) of the Sexual Offences Act No. 3 of 2006:

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

The above Section 8(2) gives the mandatory sentence as life imprisonment therefore the sentence was not excessive. The appellant was a sexual predator who defiled a child of seven years repeatedly. The sentence meted out was deserved.

7. Did the prosecution prove its case beyond reasonable doubt?

Looking at the whole evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The evidence of PW 1 was collaborated by the medical evidence of PW 4.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The appeal lacks merits. I dismiss it.

Dated and delivered this 25th day of October 2018.

L. W. GITARI

JUDGE

Mr. Obiri for State.

Mr. Mwangi Holding Brief for Mr. Ngigi for Appellant.