REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 48 OF 2014

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3627 of 2011 of the Chief Magistrate's Court at Naivasha – S. Githinji, CM)

ERICK EGELO MOSE……..……..…...APPELLANT

-VERSUS-

REPUBLIC……..……...RESPONDENT

J U D G M E N T

1. The Appellant was tried for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of Sexual Offences Act. The particulars stated that on the 12th day of December 2011 at Naivasha Township, Naivasha Municipality within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of **C.A.** a girl aged 13 years.

2. At the conclusion of the trial the Appellant was found guilty and convicted. He was sentenced to twenty years imprisonment. The prosecution case at the trial was as follows. In December 2011, the complainant **C.A.** (**PW1**) was aged 13 years and resided at K, Naivasha with her mother, **A.O.O.** (**PW4**), a worker in a flower farm. On 12/12/2011 PW4 dispatched **PW1** to the lake to buy fish at a place called Banda. That was early in the morning at 10.00am. **PW1** purchased fish from the regular supplier **Isaac Barasa Wahu** (**PW2**) and then left to return home, several kilometres away. While walking through a bushy area, **PW1** was confronted by the Appellant who proceeded to cover her mouth and knock her to the ground. He then forcefully undressed **PW1** before having sexual intercourse with her.

3. Fortunately for her a fisherman **James Maina Wangare** (**PW3**) on his way to the lake came upon the scene. The Accused who was then lying on top of the complainant got up and ran away. **PW3** got help and took **PW1** to the police station. She was then examined at the Naivasha District Hospital where her mother joined her after being summoned by police. On the same day, **PW3** and **PW1** led police to the arrest of the Appellant. He was subsequently charged.

4. The Appellant gave unsworn defence statement. To the effect that he was a casual worker at Marula Farm, Naivasha but hailed from Suneka, Kisii. That on the material date he was off duty and spent the morning at home, later proceeding to entertain himself at several establishments. After some beers with a friend, he headed home at 6.30pm. A group of people, all of them strangers to him accosted him saying they were searching for a "Kisii suspect". They exchanged words with him and roughed him up. Police came and took him to the police station. He denied the offence.

5. Four amended grounds were filed by the Appellant as follows:-

"1. THAT the learned trial magistrate erred in both points of law and facts in convicting the Appellant in reliance of contradict and inconsistent prosecution evidence.

2. THAT he also erred in law and facts in not finding that the Appellant's fundamental rights to a fair and unbiased trial was grossly violated.

3. THAT he erred in law and facts in not finding that the identification at the locus in quo was not free form error.

4. THAT he erred in law and facts in not considering my defence as the law demands." (sic)

6. The submissions challenge the Appellant's identification and highlights alleged disparity in the name attributed to him by **PW2** and **PW3** – "Elelo" rather than "Egelo". Comparing the description of the assailant in the evidence of **PW3** and that by **PW1** and **PW2** he states that the latter witnesses unlike **PW3** did not make reference to any hat worn by the Appellant and further that no description of the assailant, allegedly known to **PW2** and **3**, was given to police.

7. As regards the circumstances of the offence, he asserts that the victim was pounced upon from behind and therefore had no opportunity to observe her attacker, especially as the scene of attack was bushy. Regarding **PW3** the Appellant discounts his evidence on two accounts. Firstly, that he did not state the direction from which he approached the scene, and secondly, that he gave the Appellant's name to **PW2** as "Elelo" and not "Egelo". He further complains that the medical evidence tendered did not support penetration, and moreover that his alibi defence was not given due consideration.

8. In opposing the appeal, Mr. Koima for the Director of Public Prosecutions reiterated the prosecution evidence and asserted that all the ingredients of the offence had been proved.

9. The duty of the first appellate court was stated in the case of **Okeno -Vs- Republic [1973] EA 32** as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see 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 findings 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. See Peters -Vs- Sunday Post [1958] EA 424."

10. Having reviewed the evidence, the grounds of appeal and the submissions by the respective parties, it is clear that the key issues in contention are whether penetration occurred and whether the Appellant was properly identified at the scene of the offence.

11. Firstly, the attack occurred in broad daylight. The complainant said she was attacked from the rear, and did not know the Appellant before. For some reason the police did not consider it necessary to conduct an identification parade. **PW1's** evidence on that score is mere dock identification. In respect of **PW2** and **3** however, the two were known to the Appellant prior to the material date. In particular **PW2** said he was familiar with the Appellant and had spotted him near his stall on the material morning. He said he saw him leave after **PW1** left his stall. **PW2** is the person to whom **PW3** reported what he had witnessed while walking to the lake. **PW3** testified that:

"I walked slowly at a bushy area, towards the lake. I was alone. I found PW1 on the ground and Accused on her. I knew PW1 ……the Accused rose and ran away when he saw me. I was about 10 metres from them. I saw his face before he turned and escaped…… I used to see

him in the area. I had seen him for about five times before the incident."

12. From this evidence, it is apparent that the witness approached the scene of the offence from a direction that enabled him to observe and recognise the face of Appellant, but also to recognise the complainant. I believe a distance of 10 metres in daylight was close enough to enable recognition, the bushes at the scene notwithstanding.

13. Secondly, the witness immediately named the suspect to **PW2** and later to police who commenced a search for the Appellant. Whether or not **PW2** gave the name of the Appellant as "Elelo" or "Egelo" matters little. Ditto their failure to give a description of the assailant to police. Because, both **PW2** and **PW3** after reporting to police led to his arrest at Kanju. It seems on arrest the clothes he wore were close to what he wore in court but had had a hat at the scene of arrest.

14. **PW2** and **3** were not particular about the clothes worn by the Appellant unlike **PW1** who spoke of him wearing a grey trouser, grey T-shirt and later a hat on arrest. This however cannot be a contradiction as the same was not raised to witnesses during cross-examination. It is perfectly normal for several people observing the same person to note different things about his attire.

15. Besides, the Appellant was not identified through his clothes but through physical recognition and name. The fact that **PW2** and **3** were able to pick him out in an estate confirms their testimony. There can be no plausible reason for two men, not related to **PW1** to conspire to frame an innocent man out of many other people.

16. Indeed the Appellant was traced some several kilometers from the lake by the said witnesses. The trial court correctly concluded that:

> **"The Accused was therefore caught red handed by PW3…… The witnesses could not have made a mistake of him. I am convinced beyond reasonable doubt that Accused…… is the real culprit."**

17. The conclusion was justified as the evidence clearly placed the Appellant at the scene of the offence where PW3 caught him in *flagrante delicto*. That puts to rest the Accused's *alibi* defence.

18. Concerning the issue of penetration, the evidence by PW1 is corroborated by **PW3** who found the Appellant lying on top of the victim on the ground. The fact that the age of breach of the hymen was not disclosed nor injuries and spermatozoa noted, does not detract from the evidence of **PW1**. Nor does it exclude sexual activity with the Appellant whether for the first time or subsequent. As the trial court observed the evidence of penetration was corroborated by **PW3** who chanced upon the offence. The complainant was certified to have been aged 13 years at the time of the offence. Hence the question of consent or lack of it does not arise.

19. Other issues raised by the Appellant as to delayed arraignment in court have no relevance to the appeal. Equally, his allusions regarding absence of evidence of use of force have no merit. Upon my own careful analysis of the evidence, I am satisfied that the Appellant was properly convicted. This appeal has no merit and is dismissed.

Delivered and signed at Naivasha, this 23rd day of February, 2017.

In the presence of:-

Mr. Mutinda for the DPP

C/C – Barasa

Appellant – present

C. MEOLI

JUDGE