REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 12 OF 2016

JOSEPH MELIKINO KATUTA………….............APPELLANT

VERSUS

REPUBLIC…………………………………......RESPONDENT

(**From original conviction and sentence in Criminal Case Number 389of 2010 in the Senior Principal Magistrate's Court at Voi delivered by Hon C. N. Ndegwa(RM) on 4th April 2011)**

RULING

INTRODUCTION

1. The Appellant herein, Joseph Melikino Katuta, was tried and convicted by Hon C.N. Ndegwa, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8 (3)of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years' imprisonment.

2. The particulars of the main charge were that :-

> **"On the 13th day of October 2010 at around 4.30 pm at [particulars withheld] in Taita Taveta County, you intentionally and unlawfully caused your penis to penetrate the vagina of R M J, a child aged 12 years."**

3. He had also been charged with the alternative charge of indecent assault of a girl contrary to Section 11(1) of the Sexual Offences Act. The particulars of this alternative charge were as follows:-

> **"On the 13th day of October 2010 at around 4.30 pm in [particulars withheld]in Taita Taveta County, you unlawfully and indecently assaulted R M J by touching her private parts namely V."**

4. Being dissatisfied with the said judgment, on 1st March 2016, the Appellant filed a Notice of Motion application seeking to be allowed to file an appeal out of time, which application was allowed and the Petition of Appeal lodged on 8th March 2016 deemed to have been duly filed and served.

5. The Grounds of Appeal were as follows:-

> **1. THAT the learned trial magistrate erred in law and in fact by finding his conviction and sentence and sentenced to 20 years imprisonment without seeing that it was unsafe for the age of the complainant was not proved beyond reasonable doubt hence the same was unsafe**(sic)**.**

2. THAT the learned trial magistrate erred in law and fact by finding his conviction and sentence without seeing that Section 19 of oath statutory and declaration act was not considered hence the sentence of 20 years imposed upon him was unsafe(sic)**.**

3. THAT the learned trial magistrate erred in both law and fact by finding his conviction and sentence without considering that the prosecution did not prove their case to the standard required by law(sic).

4. THAT the learned trial magistrate erred in law and fact by not considering his reasonable defence statement.

6. He filed his Written Submissions and Amended Grounds of Appeal on 29th September 2016. He listed the following Ground of Appeal:-

1. THAT without prejudice and to the foregoing the pundit trial magistrate erred in law and facts by failing to consider no formal Birth Certificate or a copy of the age assessment report was prepared, processed and produced as an exhibit in court to prove the age of the exact age of the complainant (PW 1) for purposes of sentencing.

7. On 29th November 2016, he filed his Reply to the State's Written Submissions dated and filed on 9th November 2016. He reiterated the following Ground of Appeal:-

1. THAT the learned trial magistrate erred both in law and facts by failing to consider no formal documentary evidence like a copy of a birth certificate or a copy of the age assessment report was prepared, processed or produced as an exhibit in court to prove the exact age of the Complainant (PW 1) for purposes of sentencing.

8. When the matter came up on 19th December 2016, both the Appellant and counsel for the State asked the court to rely on their respective Written Submissions in their entirety. This Judgement is therefore based on the said Written Submissions that were not highlighted.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate 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 demeanour".**

10. After perusing the pleadings and the Written Submissions by both the Appellant and State, this court concluded that the only issue that was really before it for determination was:-

Whether or not the Prosecution had proved its case beyond reasonable doubt?

I. PROOF OF THE PROSECUTION'S CASE

11. All the Grounds of Appeal were related and were therefore dealt with together under this head.

12. The Appellant stated that the law provides that a person who asserts a fact must prove the same. In this regard, he placed reliance on the provisions of Sections 109 and 110 of the Evidence Act Cap 80 (Laws of Kenya), the case of **Muiruri Njoroge vs Republic Cr Appeal No 115 of 1982**and the definition of an assertion given in the Chambers 21st Century Dictionary Revised Edition in which an

assertion has been defined as a strong statement or claim and that would need to be proven by evidence.

13. He contended that the ageof the Complainant, R M J (hereinafter referred to as "PW 1") was not proven because no Birth Certificate or Age Assessment Report was adduced in evidence. It was his submission that the Learned Trial Magistrate relied on mere estimations from PW 1's parents that PW 1 was aged twelve (12) years at the material time.

14. He averred that this was fatal to the Prosecution's case as the sentencing policy under the Sexual Offences Act Cap 62A (Laws of Kenya) was dependent on the proved age of a victim and that the following ingredients of an offence under Section 8 of the Sexual Offences Act had to be proved:-

Age of the victim; and Penetration

15. It was his further contention that the Clinical Officer, Toto Nyawa (hereinafter referred to as "PW 5") had confirmed that there were no lacerations, ulcers or evidence of trauma of the genital parts which was evident of the fact that there had been no penetration as had been alleged by PW 1.

16. It was therefore his submission that the Prosecution had not proved its case beyond reasonable court as was held in the case of **Bater vs Bater (1950) 2 ALL ER 458** at page 459 Letter B and urged this court to acquit him of the charges.

17. On its part, the State submitted thattheLearned Trial Magistrate conducted the*voire dire* examination properly and that he satisfied himself that PW 1 and E J (hereinafter referred to as "PW 2") knew their duty to tell the truth and were thus intelligent enough to adduce sworn evidence. It stated that this was in line with Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) that provides as follows:-

> **"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."**

18. It also stated that it was not necessary for PW 1's Birth Certificate to have been adducedin evidence as the Appellant had contended as her age had been indicated in the P3 Form and was evident from the oral testimony of witnesses. It referred this court to the case of **Stephen Nguli Mulili vs Republic [2014] eKLR** where it was held that a victim's age could be proven by oral evidence of witnesses.

19. It argued that the fact that there were no lacerations on PW 1's private parts did not mean that the Appellant had not committed the act of defilement because a high vaginal swab that was taken on 13th October 2010 when she was taken to hospital showed that there was presence of spermatozoa and that her hymen was broken, proof that there had been actual penetration.

20. It was its further submission that both PW 1 and PW 2 placed the Appellant at the scene of the incidentas they had easily identified him as the offender since the said incident occurred during the day. It was emphatic that his failure to provide an alibi meant that the Prosecution had proved its case beyond reasonable doubt. It added that in any event, the Appellant did admit in his defence of having defiled PW 1.

21. It therefore urged this court to uphold the sentence of twenty (20) years that was meted upon the Appellant by the Learned Trial Magistrate as that was the minimum sentence that he could have given under Section 8(3) of the Sexual Offences Act. The said Sectionprovides that:-

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

22. A careful perusal of proceedings of the Trial Court showed that both PW 1 and PW 2 adduced sworn evidence after the Learned Trial Magistrate conducted a proper *voire dire* examination. He established that they knew their duty of telling the truth and that they were intelligent enough to adduce evidence on oath. The Learned Trial Magistrate cannot be faulted for having made the said observation as he had the advantage of seeing the demeanour of both witnesses.

23. It was therefore not correct as the Appellant had contended that the Learned Trial Magistrate did not comply with the provisions of Section 19 of the Oaths and Statutory Declarations Act. This court found his submissions in this respect to have been misplaced.

24. Turning to the evidence that was adduced in the Trial Court, this court was satisfied that the Appellant did in fact defile PW 1 herein. Both PW 1 and PW 2 identified him as the offender because the said incident occurred during the day as they were coming from school. PW 1's mother, E M J (hereinafter referred to as "PW 3") and PW 4 confirmed having examined PW 1 shortly after the incident and found sperms in her private parts, a fact that was confirmed by PW 5 when she did a high vaginal swab on her.

25. During his defence, the Appellant admitted to having had sexual intercourse with PW 1. In his unsworn statement, he stated as follows:-

> **"I am Melikino Katuta. I live at [particulars withheld]. I am a loader. I understand the charges I am facing. On 13-10-2010 I had gone to fetch water when I met R M J and I had sex with her. That is all."**

26. Although the Appellant adduced unsworn evidence which had little or no probative value, this court nonetheless noted that he admitted to having had sexual intercourse with PW 1. It therefore followed that all his submissions that the Prosecution did not prove its case beyond reasonable doubt fell by the way side. No value would then be added to analysing his submissions on this issue as it would merely amount to an academic exercise.

27. As regardsPW 1's age, this court noted that she told the Trial Court that she was aged twelve (12) years of age at the time of the incident. This was corroborated by the oral evidence of PW 3. The P3 Form also showed her age as having been twelve (12) years. It was evident from the proceedings that the Appellant never disputed that she was aged twelve (12) years.

28. Although he submitted that he was a layman and that is why he did not contest her age, a fact that this court duly noted and appreciated, it was not blind to the fact that there are rules of evidence that must be adhered by all and sundry. Indeed, there is a maxim that states that ignorance is not an excuse.

29. Having failed to controvert and/or rebut the Prosecution's evidence of PW 1's age by providing oral or documentary evidence to the contrary, it would be difficult to take this evidence at this appellate stage as the issue was never raised during trial. However, had he raised the issue and the Prosecution failed to prove the same, then this court would have agreed with him. This court therefor found itself more persuaded by the State's submissions that PW 1was indeed aged twelve (12) years at the material time of the incident.

30. It was the considered opinion of this court that the Prosecution proved all the ingredients of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act. It was able to demonstrate that PW 1 was aged below eighteen (18) years and that there was penetration by the Appellant herein. In any event, it was clear in the mind of this court that no benefit of doubt could accrue in favour of the Appellant herein as he admitted to the offence he had been charged with during his defence.

II. <u>SENTENCE</u>

31. Having considered the pleadings, the Written Submissions and the case law that was relied by both parties, there was no doubt in the mind of this court that the Prosecution presented a water tight case and that the Learned Trial Magistrate acted correctly when he convicted the Appellant herein of the offence of defilement of PW 1 and sentenced him to twenty (20) years imprisonment. That is what is provided in Section 8(3) of the Sexual Offences Act, a fact that was rightly pointed out by the State.

32. Having said so, this court was very concerned about the mental capacities of the Appellant herein when he appeared before it. Throughout the proceedings, this court found it difficult to communicate with him as he appeared to be slow mentally and intellectually, a fact it noted and recorded in its proceedings. In other words, the Appellant appeared to have been mentally challenged.

33. This observation did not, however, appear in the proceedings of the Trial Court making it difficult for this court to say for a fact if the Appellant started suffering from poor grasp of time and space after he was incarcerated or he was born with the condition that prevailed during the hearing of his appeal.

34. This court's uneasiness about the Appellant's mental capacities was not made any easier because it noted that throughout the proceedings in the Trial Court, the Appellant did not Cross-examine any of the Prosecution witnesses. The part of Cross-examination was indicated as "Nil." Against the backdrop of its observations about the Appellant's condition, the question that came in the mind of this court was whether indeed, the Appellant understood the proceedings in the Trial Court.

35. This court was of the view that psychiatric evaluation of the Appellant herein was necessary before it can pronounce itself in this matter. Appreciably, the mental state of a person is central to him bearing criminal liability of an offence that he is charged with. Both *mens rea* and *actus rea* must be present at the same time before malice aforethought can be said to have been established.

36. There is no doubt that the element of the *actusrea* on the part of the Appellant waspresent in the circumstances of this case. However, this court could not ascertain if *mens rea* had been established during the trial.

DISPOSITION

37. In the premises foregoing, this court's final decision as to whether or not it ought to quash the conviction and/or set aside the sentence that was meted upon the Appellant by the Trial Court or whether it should affirm the conviction and sentence has been put on hold pending the Psychiatric evaluation of the Appellant.

38. This court hereby directs that the Appellant be and is hereby escorted to Coast General Hospital for Psychiatric evaluation.

39. The Medical Officer is hereby directed to prepare a detailed Psychiatric Report that will inform this court whether or not the condition the Appellant had was recent or if he was born with the same and the degree of understanding his actions and the consequences thereof.

40. This matter be mentioned on 30th March 2017 to confirm if the Psychiatric Evaluation Report will have been prepared and filed in court with a view to giving further orders and/or directions.

41. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23RD**day of**FEBRUARY**2017

J. KAMAU

JUDGE

In the presence of:-

Joseph Melikino….Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk