REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.18 OF 2016

LOREE NAPERIT...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in criminal case No.934 of 2015 of the Principal Magistrate's Court at Marsabit by Hon. B.M Ombewa– Senior Resident Magistrate)

JUDGMENT

The appellant, **LOREE NAPERIT,** was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The particulars of the offence were that on 27th September 2015 at **[particulars withheld]** village in Marsabit County, he knowingly and intentionally caused his penis to penetrate the vagina of **E.N,** a child aged 15 years. alternatively, he unlawfully and intentionally touched the complainant's vagina with hi penis.

He was sentenced to serve fifteen years imprisonment. He has appealed against both conviction and sentence.

The appellant was in person. He raised the following grounds of appeal:

1. That the learned trial magistrate erred in law and in fact by not noting that the Turkana interpreter was not fluent in the language.

2.That he was denied witnesses' statements.

3. That he was denied a chance to mitigate.

4.That the learned trial magistrate erred in law and in fact by convicting him yet he was not medically examined.

5. That the learned trial magistrate erred in law and in fact by convicting him on the basis of inadmissible evidence.

6.That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

On 27th September 2015 at about 10 a.m, the complainant in company of her cousin were walking to Loiyangalani. The appellant made sexual advances to her but she declined. when he held her, she wrestled herself out of his hold and started to run away. she however fell down and he caught up with her. He laid her on a rock and defiled her. Meanwhile her cousin had gone to seek help from some fishermen. when the fishermen approached the appellant, he threatened them with a knife. They left him to go. He was later arrested and charged.

The appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

At the time of plea and subsequent hearing, the appellant was provided with a Turkana interpreter and at no time did he complain that he was not able to follow the interpretation. He had a duty to inform the court of any shortcomings. Since he never did so, the court had no way of knowing that there existed such shortcomings. He is therefore estopped from raising the complaint at this juncture.

On the 28th December 2015 after a plea of not guilty was entered, the learned trial magistrate made an order suo moto that the appellant be supplied with a copy of the charge sheet and copies of witnesses' statements. when the hearing of the case commenced on 17th February 2016, the appellant indicated to the court that he was ready to proceed. He never complained that he had not been supplied with the copies of statements as ordered. On the subsequent hearing dates he also never raised this issue. There was no way the learned trial magistrate would have known that he had not been supplied with the copies of statements without him raising the issue. He is therefore estopped from raising this issue now.

After his conviction the appellant told the court in mitigation:

> ***I have nobody to assist me. I come from far.***

He cannot be heard to complain that he was denied a chance to mitigate**.**

The issue of medical examination of an accused person in sexual offences has been settled. Though examination may be done and in some instances may offer material evidence either in exonerating the accused or in supporting the allegation against him, it is not a mandatory requirement. In **GEOFFREY KIONJI vs. REPUBLIC CR. APPEAL No. 270 of 2010,** the Court of Appeal said:

> ***Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The***
>
> ***court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.***

The fact that the appellant was not subjected to medical examination cannot influence the outcome of this appeal.

Section 25A (1) of the Evidence Act provides as follows:

> ***A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.***

The learned trial magistrate erred in relying on inadmissible evidence of **Dr. Dub Halake Dida** (P.W 5). The purported confession was not made to a prescribed person. Even if the doctor could have been a prescribed person, there was also the issue of language of communication and the procedure of taking the confession. This evidence of confession is therefore expunged from the record.

For an offence of defilement to be proved, three ingredients must be proved beyond reasonable doubts. In the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** the court enumerated them in the following terms:

> ***The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant***. *(emphasis mine)*

> *When Dr. Halake examined the complainant, there were no positive findings. It would appear that when she was previously treated at Loiyangalani hospital nothing positive was observed . If it there was any positive finding, the same could have been recorded and Dr. Halake could have remarked about it at the time of examination. This therefore meant that the ingredient of penetration was not proved. The conviction on the substantive charge was therefore not safe. I accordingly quash the conviction thereof and set aside the sentence.*

> *My perusal of the record show that there was ample evidence to convict the appellant for the offence on the alternative charge. The evidence of the complainant and that of PW2 supported the charge. I accordingly convict him for the offence in the alternative charge. Section 11(1) of the Sexual Offences Act provides as follows:*

> ***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

> *I therefore sentence him to ten years imprisonment to run from the date he was sentenced by the lower court. To that extent his appeal succeed.*

DATED at **Marsabit** this **19th day** of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE