REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 8 OF 2016

NZIOKA KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. I.M. Kahuya

SRM delivered on 11th February 2016 in Criminal Case No. 1358 of 2014

at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted of, and sentenced to serve five (5) years imprisonment on 18th December 2012, for the offence of defilement of an imbecile contrary to section 146 of the Penal Code. The particulars of the offence were that on 19th August 2014 at [particulars withheld] village in Machakos County he intentionally and unlawfully caused his penis to penetrate the vagina of M W M aged 38 years, who to his knowledge was an imbecile. The Appellant was also charged with an alternative offence of committing an indecent Act with an adult contrary to section 11(A) of the Sexual Offences Act.

The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in his Petition of Appeal dated 22nd February 2016 filed in Court on the same date by his legal counsel, L.N. Ngolya & Company Advocates. The grounds raised by the Appellant are as follows:

1. The Learned trial Magistrate erred in Law and fact by convicting the Appellant when the prosecution had not proved their case against him beyond reasonable doubt.

2. The Learned trial Magistrate erred both in Law and fact by failing to resolve the patent doubts in the prosecution case in favour of the Appellant. The trial Court itself even doubted the prosecution's evidence but failed to arrive at a verdict favourable to the Appellant.

3. The Learned trial Magistrate erred both in Law and fact by failing to scrutinize and evaluate the prosecution's evidence thereby arriving at an erroneous decision.

4. The Learned trial Magistrate erred both in Law and fact by convicting the Appellant on the basis of the identification evidence of a single witness who is a child and which identification was not

free from possibility of error.

5. The Learned trial Magistrate erred both in Law and fact by failing to ascribe any reason as why she disbelieved the Appellant's Defence when the said Defence raised an alibi the latter of which was never displaced by the prosecution's evidence .

6. The Learned trial Magistrate erred in Law by not acquitting the Appellant even when she made reference to Section 215 of the Criminal Procedure Code which calls for an acquittal of an accused.

The Appellant prays that this Appeal be allowed, the conviction quashed and sentence set aside.

The Appellant's learned counsel filed submissions dated 9th January 2017 wherein it was urged that the trial Court erred in law and fact by convicting the Appellant when the prosecution had not proved its case beyond reasonable doubt. The Appellant analysed the evidence of PW1 which he contended was contradictory and not credible, as she did not witness the alleged sexual act by the Appellant, and gave differing accounts as to the circumstances in which she witnesses the alleged defilement.

Further, that learned trial Court erred in law and fact by relying on uncorroborated evidence of a minor to convict the Appellant. And did not warn herself of the danger of convicting on evidence of a single identifying witness. The evidence of the other witnesses - PW2 to PW6, was also analysed and found to be insufficient to warrant a conviction of the Appellant.

Ms. Rita Rono, the learned prosecution counsel, filed written submissions dated 15th February 2017 in opposition to the appeal. It was urged therein relying on the evidence of PW1 and PW6 that the charges against the Appellant were proved beyond reasonable doubts. Further, that PW1 clearly saw the Accused wearing his trousers and the victim was lying down on the grass showing that there was carnal knowledge or attempted carnal knowledge of the victim by the Appellant to the victim, however, that what cannot be ascertained is whether there was penetration

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). The main issue raised by the Appellant's grounds of appeal and submissions is whether the Appellant's conviction for the offence of defilement of an imbecile was based on sufficient and consistent evidence.

Section 146 of the Penal Code provides for the offence of defilement of idiots and imbeciles as follows:

> **"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years. "**

The ingredients of the offence therefore are firstly that the victim is an idiot or imbecile, secondly, that the accused had knowledge of this fact at the time of commission of the offence, and thirdly that the accused had or attempted to have carnal knowledge with the victim while so knowing. Carnal knowledge is defined in the **Blacks Law Dictionary, Ninth Edition** at page 241 as "sexual intercourse, especially with an underage female" while an imbecile is defined at page 816 as "a person inflicted with severe mental retardation" The burden was on the prosecution to prove every element of the offence beyond any reasonable doubt as held in **Muiruri vs Republic (1983) KLR 205**

The prosecution called six (6) prosecution witness to prove its case against the Appellant. PW1 (E W K) who was a minor aged 14 years at the time, testified as to witnessing the alleged act committed by the Appellant, and was the only eyewitness who testified. J M M (PW2) who was the victim's mother, and William Ndolo (PW3)a community policing officer, testified as to the reports they received of the alleged defilement and the actions they took after the reports of taking the victim to hospital and arresting the

Appellant respectively.

PW4 was Dr. Mutunga, a psychiatrist at Machakos Level 5 Hospital, who conducted a mental assessment of the victim, while PW5 was PC Akumu, who testified that he visited the scene of the crime and charged the Appellant with the offence. The last witness was Dr. John Mutunga from Machakos Level 5 hospital who produced the P3 form containing the results of a medical examination he conducted on the victim.

As regards proof of the elements of the offence, PW4 produced a medical report on the mental assessment of the victim as exhibit 4, in which he stated that on the date of examination the victim was in a wheel chair, her speech was incomprehensible and she kept on making unintelligible sounds. He found the victim to have a condition known as mental retardation PW1, PW2 and PW3 also testified that the victim was mentally retarded and could not speak. Therefore this element of the offence was established by the Prosecution.

None of the prosecution witnesses however testified as to the Appellant being aware of the victim's mental condition. PW1 testified in this regard that she saw the Appellant carry the victim who was her aunt to the kitchen and that when she called out to the Appellant as to why he was carrying the victim, he replied that the victim had wanted to be move elsewhere. Whereupon PW1 stated that it was not true as her aunt did not speak. PW1 on cross-examination further testified she had never seen the Appellant visit them or the victim. This testimony in my view on the contrary points to the Appellant not being aware of the victim's condition.

Lastly and more importantly the testimony of PW1 did not establish that the Appellant had sexual intercourse or attempted to have sexual intercourse with the victim. Her testimony in this regard was as follows:

> **"At that point the accused left and my ant remained in the kitchen, I went away to the farm to dig out sweet potatoes. While there I was able to see my aunts legs raised up. So I moved closer and I saw the Accused person pulling up his trouser, while my aunt leg was on the floor. The accused person was covered with ash, So he fled upon seeing me. At that point I informed my neighbours who had apparently seen the accused person flee from my aunt's home."**

Upon cross examination PW1 further testified as follows:

> **"When I spotted the accused person with M (the victim) I approached him and asked him where he was taking her. So the Accused person left her by the kitchen door. Then I returned to my place/home which is 50 metres away. There were farms in between with 2 mango trees. M was inside the kitchen when I saw her legs raised up. I didn't rush to find out why. I did not see the Accused's private parts neither M's. I did not scream neither did M. I at that point called W G my neighbour and told him that someone was holding M. We rushed back and found M pulling up her shorts. Suddenly the Accused person jumped over the fence**"

It is evident that there are material inconsistencies in the testimony of PW1 as to the number of persons who were present when the Appellant was alleged to have been found with the victim, the Appellant's and victim's state at the time, and as to the time PW1 informed the neighbours as to the alleged act by the Appellant. In addition PW1 did not testify as to witnessing any sexual act or attempt as to a sexual act between the Appellant and the victim.

I find that PW1'S testimony affected her credibility as a witness, and her evidence as to the alleged defilement therefore required to be corroborated under section 124 of the Evidence Act. However, none of the neighbors who saw the Appellant at the scene of the offence or fleeing from the scene as alleged were called to testify.

Section 124 of the Evidence Act in this regard provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, 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."

Finally, PW6 recorded in the P3 form that he filled on 25th September 2014 that there were no injuries to the victims genitalia, and he testified that her hymen was ruptured and there was non-traumatic vaginal penetration. The fact as to whether it was the Appellant who committed this act of penetration was however not established beyond reasonable doubt as shown in the foregoing.

I accordingly allow the Appellant's appeal for the foregoing reasons, and quash his conviction for the offence of defilement of an imbecile contrary to section 146 of the Penal Code. I also set aside the sentence of five years' imprisonment imposed on the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 11th DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE