REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIM. APPEAL NO. 142 OF 2016

PETER GITAU MACHUGU......................................APPELLANT

VERSUS

REPUBLIC...PROSECUTOR

JUDGMENT

A. INTRODUCTION

1. Peter Gitau Machugu ("Appellant") was presented before the Chief Magistrate's Court in Thika in Criminal Case No. 310 of 2012 charged with a single count of defiling TNW, a child aged thirteen (13) years contrary to section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had defiled the minor on 29/10/2011 at [particulars withheld] within Kiambu County by intentionally causing his penis to penetrate the vagina of TNW.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 29/10/2011 at [particulars withheld] within Kiambu County, he intentionally touched the vagina and breasts of TNW, a child aged thirteen (13) years with his hands and penis.

3. The Appellant pleaded not guilty to both the main and the alternative charge and the case was set for hearing. After a fully-fledged trial, the Learned Trial Magistrate convicted the Appellant in the main charge and sentenced him to twenty (20) years imprisonment as the law dictates.

4. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court.

5. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of

the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic* [1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

C. <u>THE EVIDENCE PRESENTED IN THE TRIAL COURT</u>

7. The evidence, as it emerged from the trial was as follows.On the material day, TWN, by then a 13-year old girl, was at their home which was rented from the Accused Person's mother. It was at night and she was asleep with her two sisters. She is the oldest in a family of three girls. TWN testified that as it was approaching midnight, TWN's mother came and picked her up and asked her to go sleep at the house of the Accused Person together with her (the mother). The Accused Person lived next to his mother which, in turn, was not too far from where TWN, her sisters and their mother lived.

8. According to TWN, when she and her mother approached the Appellant's house, he started coughing in apparent code he had devised with her mother to signal that it was safe for them to go in. And so they went. TWN testified that the three of them slept in one bed at the Appellant's house. TWN further testified that the Appellant had sex with her mother. When he was done, TWN's mother fell asleep and the Appellant turned to TWN. TWN promptly announced that she was not the mother – just in case the Appellant had, in his drunken state mistaken her for her mother – but her reminder was met with stubborn insistence by the Appellant to have sex with her. He proceeded to remove her panties an inserted his penis in her vagina and had sex with her. Thereafter, they slept till the following morning when they went home.

9. In the morning, TWN testified that the Appellant gave TWN's mother some Kshs. 1,000 and asked her to buy clothes for TWN. The Appellant allegedly told TWN that that is how babies are made.

10. When they returned home, TWN says he told her mother what had happened but her mother warned her never to tell anyone about it. She then proceeded to wash the blood stained panties and clothes that TWN had on that night.

11. TWN testified that this was not the only time her mother offered TWN for sex with the Appellant. Apparently, he used to repay TWN's mother by offering her free alcohol which was often brought in a jerry can.

12. At some point, TWN decided that enough was enough. On one occasion when her mother had locked the door to their house from the outside, she opened the window and helped her two sisters escape to their grandmother who lived nearby.

On that day, TWN's mother attacked TWN with a panga injuring her badly on her arm. TWN screamed and neighbours came to her rescue. What was in immediate contention was whether she would continue with her education and whether she should collect her school uniform which TWN claimed her mother had taken to Appellant's house to thwart any plans for her to go to school.

13. TWN testified that when the neighbours came, TWN went and collected her school uniform from the Appellant's house and then members of the public asked her mother to take TWN to hospital. Responding to the pressure, TWN's mother obtained a letter from the Chief and proceeded to Makongeni Police Station. She was not treated in part because TWN's mother, being complicit, was reluctant to follow through.

14. According to TWN's grandmother who testified as PW2, the area Chief asked her to intervene. She did take TWN to hospital where she narrated her ordeal. The matter was also reported to the Children's Officer who took TWN into a rescue centre. TWN's grandmother corroborated the part of the story where TWN "freed" her sisters who ran away to their grandmother. PW2 testified that after TWN's mother became reluctant to follow through with the case, she took over while TWN's mother took off and has not been seen since.

15. At the Thika Level 5 Hospital where TWN was examined, Dr. Alawira noted that TWN had a swelling and tenderness on the right distal forearm which was consistent with being attacked with a sharp weapon. TWN's hymen was broken and she had a tear in her vagina. There was no presence of spermatozoa at the time of examination. The Doctor's conclusion was that TWN had been defiled.

16. Corporal Mbula is the Investigating Officer in the case and testified as the last Prosecution Witness. She narrated how TWN's mother came to the station on the first day accompanied by two other women to report the defilement. Afterwards, the mother ran away and has not been seen since then. The grandmother has been following up on the case.

17. At the end of the Prosecution case the Learned Trial Magistrate considered there was sufficient material on record to put the Appellant on his defence. The Appellant gave a sworn statement and called two witnesses – his own mother and his wife.

18. The Appellant's defence during trial centred on three themes. First, he argued that he did not live in Gatuanyaga as alleged but in Kiamwenje with his wife and children. His testimony was that he only used to visit his mother once in a while in [particulars withheld]. When he did so, the Appellant narrated, he would sleep in the kitchen next to his mother's main house.

That kitchen, the Appellant testified, had no bed so it cannot possibly be true that he defiled TWN in a bed in that room.

19. Second, the Appellant, with support coming from his wife, Mercy Njeri Gitau, testified that he is an alcoholic who has lost the physical ability to have sex due to extremely low libido and erectile dysfunction fueled by over indulgence in alcohol. His wife testified that the last time they had sex was when the wife conceived their twin daughters in 1999.

Therefore, the Appellant argued, it cannot possibly be true that he had sex with TWN.

20. Lastly, the Appellant testified that the whole suit was a frame-up by TWN's grandmother because she had a grudge against the Appellant's mother. This, both the Appellant and his mother testified, was because TWN's grandmother was involved in a case before the Chief over a cow which TWN's grandmother had lost to the Appellant's mother. The defilement charges was, therefore, TWN's grandmother's way to draw revenge.

21. The Appellant's mother testified that the Appellant only visits occasionally but does not live with her. She also testified that there was no bed in the room where the defilement allegedly took place.

22. Faced with this evidence, the Learned Magistrate concluded that the Prosecution had proved its case beyond reasonable doubt.

D. <u>ANALYSIS AND DETERMINATION</u>

23. There is enough evidence to support the conclusions reached by the Learned Trial Magistrate. The Prosecution evidence was, on the whole, consistent. As an appellate Court, I am required to give deference to the view of the Learned Trial Magistrate on the credibility of the witnesses. Here, the Learned Trial Magistrate who had the opportunity to observe and listen to the testimony of the witnesses concluded that TWN and her grandmother were credible witnesses and similarly concluded that the Appellant was not. I find no cogent reason to depart from that finding.

24. In his analysis the Learned Trial Magistrate considered the evidence before him and concluded all the three elements of the charged offence of defilement were present. These are:

a. Age of the victim;

b. Proof of penetration; and

c. Positive identification of the Accused as the assailant who unlawfully caused the penetration.

25. In his judgment the Learned Trial Magistrate found sufficient evidence from both the oral evidence of TWN, her grandmother and the doctor as well as the Treatment Notes and P3 Form produced as Exhibits in the case to conclude that TWN was thirteen years old at the time of the offence. I find no reason to fault this finding by the Learned Trial Magistrate.

26. On the issue of penetration, the Learned Trial Magistrate concluded that the medical evidence was conclusive that there was penetration of TWN's genitalia. The *viva voce* evidence of TWN was also directed to this point. TWN testified straightforwardly how the Appellant removed her panties as they were sleeping and then proceeded to have sex with her immediately after he had sex with TWN's mother.

27. Finally, the Learned Trial Magistrate tackled the core question: was there evidence that it was the Appellant who caused the penetration? On this one, the Learned Trial Magistrate re-hashed the evidence briefly reproduced above and concluded that the evidence was unmistakable that the Appellant caused the penetration. He believed the testimony of the Prosecution witnesses. In particular, the Learned Magistrate was impressed by the evidence of TWN as truthful. Conversely, he disbelieved the story by the Appellant:

28. On my part, I find no reason whatsoever to impugn these findings by the Learned Trial Magistrate. On the contrary, I find support for them from the evidence presented at trial. The Prosecution witnesses gave straightforward and credible testimonies. Their evidence was consistent and mutually corroborative. They remained unchallenged after the opportunity to cross-examine.

29. On appeal, the Appellant's advocate attacked his conviction on four points:

a. First, Mr. Kinuthia argued that the conviction should be annulled because there was non-compliance with Section 200(3) of the CPC. This is because, Mr. Kinuthia argued, Hon. Martha Mutuku originally heard the case. Midway during the trial, Hon. Abdulkadir Lorot took over after the Appellant had been put on his defence. Mr. Kinuthia argued that Hon. Lorot did not inform the Appellant of his rights under Section 200(3) of the CPC. He cited a number of cases in support of his argument including ***Eric Omondio v R eKLR [2007]; Bob Ayub v R (Crim. Appeal No. 106 of 2009); Wainaina Karanja v R (Crim. App. No. 61 of 1993).***n 214(1) of the CPC was not complied with because there was a variance between the charge sheet and the evidence given by the Complainant the charge sheet talks of the offence having happened in 2011 while TWN at page 10 of the proceedings testified that it happened in 2014.

b. Third, Mr. Kinuthia argued that the burden of proof was shifted to the Defence. This is because the evidence said that the mother of TWN was present during the commission of the offence yet she was not called to testify. Mr. Kinuthia argued that TWN's mother was a crucial witness and the failure to call her as a witness was fatal.

c. Finally, Mr. Kinuthia argued that the defence was not taken into account. He argued that the Appellant had argued that he had no libido and his wife testified as much. Yet, Mr. Kinuthia argued that this was not taken into account in arriving at a decision.

30. I will deal with each of the grounds briefly below.

31. Was Section 200(3) of the CPC complied with? That Section is couched as follows:

(3) Where a succeeding magistrate commences the hearing of proceedingsand part of the evidence has been recorded by his predecessor, the accusedperson may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

32. Our case law has held that it is incumbent upon a succeeding Judicial Officer to inform the Accused Person of the right to recall any witnesses. Here, the Learned Honourable Lorot took over from the

Honourable Martha Mutuku after the latter had placed the Appellant on his defence. At the first hearing on 14/07/2015 when Honourable Lorot was presiding, Mr. Kinuthia rose and addressed the Court as follows:

I am present for the Accused. The matter is for defence hearing…..We are ready and in terms of Section 200 CPC, we shall proceed with defence hearing. We are ready with the Accused and two other witnesses.

33. Now on appeal Mr. Kinuthia says that the right under Section 200(3) belongs to the Accused Person and not his lawyer and that it was incumbent upon the Honourable Trial Magistrate to specifically inform the Appellant of his rights under that sub-section.

34. While I agree that the right under Section 200(3) belongs to the Accused Person, I am not persuaded that the Accused Person was not aware of his rights in this particular context.

An advocate typically represents his client during the trial and makes certain decisions on matters of strategy and tactics. When an advocate specifically addresses the Presiding Magistrate on a matter of rights that the Accused Person has and authoritatively informs the Trial Magistrate on behalf of the Accused Person that they have considered the rights and options offered by the law and that the Defence has elected a particular course of action, it would be absurd to insist that the Trial Magistrate is required even in the face of such definitive pronouncement by the Defence Counsel, to still insist that the Accused Person has to personally respond on the elections he has made. In my view, therefore, the complaint by Mr. Kinuthia pivoted on Section 200(3) of the CPC fails.

35. Next, Mr. Kinuthia complained that the evidence adduced by TWN was at variance with the information in the charge sheet: the latter spoke of 2014 while the latter had 2011 as the date of the offence. This complaint is equally unavailing for the Appellant. It is true that the year "2014" appears in the typed proceedings and attributed to the testimony of TWN. However, it is also true that at the beginning of her testimony (see page 9 of the Typed Proceedings), TWN was quite clear that she was talking about 2011. All the other witnesses were uniformly consistent in placing the year of the offence as 2011. Indeed, in 2014, the trial was already going on. In the face of this, it is easy to conclude that the year "2014" that appears on page 10 of the Typed Proceedings is a scrivener's or typographical error – one which, in the face of the other consistent evidence, cannot be a clutch to nullify the conviction.

36. Third, Mr. Kinuthia argued that the burden of proof was shifted to the Defence because the TWN's mother was not called as a witness. Mr. Kinuthia argued that TWN's mother was a crucial witness and the conviction cannot stand without her testimony.

37. By this argument, the Appellant sought to bring himself within the holding in ***Bukenya & Others Vs Uganda (1972) EA 549*** where the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

38. However, in this case, it cannot be said that the mother of TWN was in any sense essential witnesses or even useful witnesses to advance the Prosecution case given the fact that she was evidently complicit in the defilement of her daughter. As the Court of Appeal stated in ***Keter V Republic [2007] 1 EA 135***, *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

39. Here, TWN's mother, on realizing that she would also likely face criminal charges for offering her underage daughter to the Appellant for sex for money, she disappeared and has never been found. However, while she was present during the sexual assault, the evidence of TWN is enough to establish the elements of the crime. TWN's evidence cannot be termed "essential" and the fact she did not testify is not fatal to the conviction.

40. Lastly, Mr. Kinuthia states that the Defence of lack of sex drive was not taken into account in reaching determination in the matter. This is what the Learned Trial Magistrate said about the Defence:

The Accused stated that the he cannot have sex. He called his wife as witness to this alleged deficiency. Unfortunately, no medical records were introduced in this behalf (sic). In fact, he stated that he was informed that unless he quits drinking, he will have a problem of sexual virility. The wife is certainly not the measure of his capacity to do or not do, I am inclined to agree with the submission by the state that having lived in Muranga, and the Accused in [particulars withheld], she was not the best judge of his sexual potency. There is also no evidence that he sought medical help at all on this matter and cannot rely on the opinion made to ask him to stop drinking, 12 years back as proof that he is truly disable in matters sexual.

The child gave her testimony, She explained how she was captive to poor parenting and a man who paid her own mother to have sex with her. She had nowhere to run to. Surely, such a script cannot be expected from a child who exuded details of traumatic experience and withstood the veracity (sic) of strong cross-examination. From the testimony on record, the child must have been on the stand for a period of longer than half an hour and was put through the riguours of cross-examination [by a lawyer]. Her account is believable, and more importantly, is corroborated by the medical evidence and that of her grandmother.

41. Apart from the inferences from the Learned Trial Magistrate that it was incumbent upon the Appellant to “prove” that he was impotent, the rest of the Learned Trial Magistrate’s analysis is spot on. I begin by pointing out that the Appellant had no duty to prove he was impotent. In a criminal trial the role of the defence to point to or to produce evidence from which it could be inferred that there is at least a reasonable possibility that the defence was possibly true. It is, at all times, the Prosecution’s role to negative the defence by eliminating any reasonable possibility that the Defence is reasonably possibly true. (See ***S v Shackell (4) SA 1 (SCA)***).

42. However, here, even after using the very high threshold required in criminal trials, the Learned Trial Magistrate was correct in believing TWN and disbelieving the Appellant and concluding that his theory of defence was so improbable that it cannot reasonably possibly be true.

43. As for sentence, the Appellant was imprisoned for twenty years. This is the minimum allowable by the law upon conviction for an offence contrary to section 8(1)(3) of the Sexual Offences Act. Therefore, no appeal against sentence is possible here.

E. DISPOSITION AND ORDERS

44. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of twenty years’ imprisonment is affirmed.

45. Orders accordingly

Dated and delivered at Kiambu this 21st Day of June, 2017.

JOEL NGUGI

JUDGE